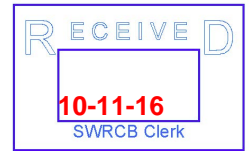




O'Laughlin & Paris LLP

Attorneys at Law



October 6, 2016

***Via Email and U.S. Mail***

**Email:** [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Re: SJTA Comments on 2016 Water Quality Enforcement Policy

Dear Ms. Townsend:

The San Joaquin Tributaries Authority (“SJTA”) appreciates the opportunity to provide comments on the proposed 2016 Water Quality Enforcement Policy (“Policy”). The SJTA commends the State Water Resources Control Board (“SWRCB” or “Board”) for on its efforts to improve the water quality enforcement process through improved transparency, consistency and fairness. The following comments are provided with the aim of furthering the Board’s efforts, and for the purpose of obtaining additional clarity with respect to certain issues.

Comments on the Incorporation of the Human Right to Water in the Prioritization Process

The Policy sets forth a two-step process for prioritizing discretionary enforcement actions: step one involves ranking the violation, or series of violations, and step two involves prioritizing cases for individual entities. (Policy, at 5-7.) In addition to this two-step process, the Policy also states that “Water Boards shall . . . prioritize and pursue enforcement in furtherance of State Water Board Resolution 2016-0010, adopting the Human Right to Water as a core value.” (Policy, at 4.) However, the Policy does not explain how the Human Right to Water as a core value should be incorporated into the two-step prioritization process, and further explanation is necessary.

2617 K Street, Suite 100  
Sacramento, California 95816  
(916) 993-3962  
(916) 993-3688-fax

117 Meyers Street, Suite 110  
Chico, California 95928  
(530) 899-9755  
(530) 899-1367-fax

Mailing Address:  
Post Office Box 9259  
Chico, California 95927

For instance, the Policy indicates that the first step in enforcement prioritization is to determine the significance of each violation, or series of violations, by analyzing the severity of impacts to beneficial uses, the level of disregard for regulatory program requirements, and deviation from applicable water quality control plan standards or permit or order conditions. (Policy, at 5.) The Human Right to Water as a core value is not mentioned in this list of considerations for determining the significance of a violation, nor is there any indication as to how it should be incorporated into this analysis. The Policy also does not incorporate the Human Right to Water in the Class I and Class II ranking system. (Policy, at 5-6.) The second step in the prioritization process, i.e., case prioritization for individual entities, also fails to indicate whether, or how, the Human Right to Water as a core value should be considered. (Policy, at 6-7.)

Thus, while the Policy generally states that Water Boards should prioritize and pursue enforcement in furtherance of the Human Right to Water as a core value, it does not provide any guidance to the Water Boards as to how this should be accomplished. In the absence of a more substantive explanation as to how the Human Right to Water should be considered and weighed during the prioritization process, the Water Boards could reach drastically different conclusions regarding prioritization, leading to inconsistent enforcement. Moreover, without further direction from the Policy, the generalized command to prioritize enforcement based on the Human Right to Water could be improperly exploited as an overriding justification for prioritizing any particular enforcement action above all others. If the Water Boards are to prioritize and pursue enforcement in accordance with State Water Board Resolution 2016-0010, adopting the Human Right to Water as a core value, then the Policy must provide more specific direction to how this core value should be considered, lest it be improperly invoked as a type of catch-all justification for subverting the Policy's prioritization process.

#### Comments on Monetary Assessments in Administrative Civil Liability (ACL) Actions

The Policy proposes any assessment of an ACL should “[b]ear a reasonable relationship to the gravity of the violation and the harm *or potential for harm* to beneficial uses or regulatory program resulting from the violation.” (Policy, at 9 [amendments in italics].) The Policy also states that, “[b]ecause actual harm is not always quantifiable due to untimely reporting, inadequate monitoring, and/or other practical limitations, potential harm can be used under this factor.” (Policy, at 11.) For the reasons set forth below, the 5-point scale for assessing “Actual Harm or Potential Harm to Beneficial Uses” requires further clarification.

According to the Policy, “Minor” harm (a score of 1) is defined as “no actual harm and low threat of harm to beneficial uses.” (Policy, at 12.) A “score of minor is typified by a lack of observed impacts” but “potential short term impact to beneficial uses with no appreciable harm.” (Policy, at 12.) The phrases “low threat of harm” and “potential short term impact” require further clarification. When these phrases are read together with the definition for “below moderate” harm (a score of 2), it is evident that they lack the specificity necessary for real-world application.

For instance, “below moderate” harm is “typified by observed or reasonably expected potential impacts . . .” (Policy, at 12.) The distinction between “minor” and “below moderate” with respect to *actual* harm is clear: a designation of minor harm is appropriate where impacts are *not* observed, whereas a designation of below moderate is appropriate where impacts *are* observed. However, the distinction between “minor” and “below moderate” with respect to *potential harm* demonstrates the absence of any clear or justifiable basis for imposing a “minor” harm designation. A designation of “below moderate” harm is typified by “*reasonably expected* potential impacts,” but a designation of “minor” harm does not require any finding of reasonableness with respect to potential impacts. (Policy, at 12 [emphasis supplied].) Moreover, a designation of “below moderate” is deemed to be appropriate where potential harm to beneficial uses is “*measurable* in the short term,” but the designation of “minor” harm does not require any finding of measurable potential impact. (Policy, at 12.) In short, the Policy effectively allows for a finding of “minor” harm based upon unreasonable expectations of potential impacts, and immeasurable potential impacts. The Policy should not allow for a finding of harm based upon such a speculative standard.

The distinction between “below moderate” and “moderate” is also unclear. Both designations are characterized by “observed or reasonably expected potential impacts.” (Policy, at 12.) However, a designation of “below moderate” harm is appropriate where “harm or potential harm to beneficial uses is measurable in the short term, but not appreciable,” whereas a designation of “moderate” is appropriate where “harm or potential harm to beneficial uses is moderate and likely to attenuate without appreciable medium or long term acute or chronic effects.” (Policy, at 12.) These definitions are problematic for several reasons. First, the word “moderate” is used to define the type of harm deserving of the “moderate” designation, and thus provides little guidance. Second, the Policy seemingly attempts to distinguish between “measurable” harm/potential harm and “appreciable” harm/potential harm, as indicated in the definition for “below moderate” harm. However, neither term is defined in the Policy, and the common definitions of measurable and appreciable are too similar for any meaningful distinction to be discerned without further guidance from the Policy itself.

Not only is the terminology difficult to distinguish, the Policy should not allow for a finding of harm based upon such a speculative standard. Monetary penalties should be based on harm; potential harm is difficult to define and quantify, as is reflected by the proposed Policy language.

#### Enforceability of Water Quality Control Plans

The Policy states that enforcement prioritization is based, in part, upon the extent to which the alleged violator has deviated from “applicable water quality control plan standards or permit or order conditions.” (Policy, at 5.) There is no further clarification in the Policy as to how water quality control plans will be enforced. As the Board is aware, some water quality control plans are implemented through water rights proceedings. The Policy fails to articulate how a water quality enforcement action

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will overlap, if at all, with a water right enforcement action in such a scenario. The SJTA requests the Board clarify this point; to the extent enforcement prioritization does not apply to enforcement of water quality control plans that are implemented through water right actions, the Policy should so state.

Very truly yours,

**O'LAUGHLIN & PARIS LLP**



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Timothy J. Wasiewski

TJW/llw

cc: Ms. CJ Croys-Schooley (*via U.S. Mail and email*)  
San Joaquin Tributaries Authority (*via email only*)