



November 9, 2018

Chair Felicia Marcus and Board Members  
c/o Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814



*Sent via electronic mail to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)*

**RE: Comment Letter – Cleanup and Abatement Funding Program Guidelines**

Dear Chair Marcus and Members of the Board:

California Coastkeeper Alliance (CCKA) is a network of California Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state for the benefit of Californians and California ecosystems. We appreciate the opportunity to comment on the Draft Cleanup and Abatement (CAA) Funding Program Guidelines (Guidelines). To strengthen the success and effectiveness of the program, we recommend the following changes to the Guidelines:

- (1) Establish a subaccount within the CAA to provide funding for citizen monitoring programs.
- (2) Establish dedicated regional subaccounts within the CAA to help direct monies back into individual regions to fund SEPs and other water quality projects that may otherwise go unfunded.

**I. THE STATE WATER BOARD SHOULD DEVELOP A SUBACCOUNT WITHIN THE CLEANUP AND ABATEMENT ACCOUNT TO PROVIDE FUNDING FOR CITIZEN MONITORING.**

The State Water Board should create and divert funds to a subaccount within the CAA to provide funding for citizen monitoring. The CAA was created by Water Code Sections 13440 - 13443 to provide public agencies with grants for the cleanup or abatement of pollution when no viable responsible parties are available to undertake the work. There are, however, currently no formal means to measure the overall performance of the CAA. Statewide water quality monitoring is a critical tool for measuring the success of statewide cleanup efforts and quantifying the return on investment into the CAA. Due to limited resources at the Regional Water Boards, water quality monitoring is often accomplished by citizen groups, which require consistent funding to support equipment, training, and time for data collection and entry.

Setting aside a small portion of accounts receivable into the CAA (e.g., 5 percent) and directing that funding toward citizen monitoring efforts would help ensure the delivery of valuable, cost-efficient data into Water Board databases, such as the California Environmental Data Exchange Network (CEDEN). In turn, this will enhance the state's ambient water quality monitoring programs and allow the Water Boards to more effectively prioritize and enforce against sources of water pollution. The responsibility of disbursing funds from this designated subaccount should fall to the state's water quality monitoring programs (e.g., Surface Water Ambient Monitoring Program (SWAMP) and the Groundwater Ambient Monitoring and Assessment Program (GAMA)).

The State Water Board should create and divert funds to a subaccount within the CAA to provide funding for citizen monitoring programs to measure the overall success of cleanup and abatement projects statewide and effectively identify, prioritize, and enforce against sources of water pollution. We recommend the State Water Board incorporate the following language into the Guidelines:

**Recommended Language** (new language indicated in red):  
(Draft CAA Guidelines, pp. 4- 6)

## **A.2. PROGRAM PRIORITIES AND FUNDING AVAILABILITY**

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### **A.2.1. Program Priorities**

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#### **A.2.1.1. Tier 2 – Secondary Urgency**

- a) Projects that address a less urgent need to clean up a waste or abate the effects of waste on waters of the State where no viable RP has been identified, or where the viable RP is unwilling or unable to adequately respond.
- b) **Projects that provide water quality monitoring through citizen science programs, to be paid from a designated sub-account comprised of 0.05% of the accounts receivable from the CAA.**

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### **A.2.2. Funding Availability**

#### **A.2.2.1. Verification of Fund Availability**

State Water Board staff will estimate fund availability based on the current and projected uncommitted CAA balance, projecting over a minimum of five years. This evaluation will be performed at least annually. **State Water Board staff will estimate and track fund availability to maintain a subaccount comprised of 0.05% of the CAA accounts receivable for the purpose of funding water quality monitoring through citizen science programs.**

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## **A.3. ELIGIBILITY REQUIREMENTS**

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A.3.1. Eligible Grant Applicants Pursuant to section 13442 of the Water Code, the following entities are eligible to apply for funding to clean up a waste or abate the effects of waste on waters of the State, provided the entity has the authority to undertake the cleanup or abatement activity for which it seeks funding:

- A public agency.<sup>2</sup>
- A tribal government that is on the California Tribal Consultation List maintained by the Native American Heritage Commission and is a disadvantaged community (DAC), that agrees to waive tribal sovereign immunity for the explicit purpose of regulation by the State Water Board pursuant to Division 7 of the Water Code, as well as for enforcement of the funding agreement.
- A not-for-profit organization serving a DAC,<sup>3</sup> with authority to clean up or abate the effects of a waste.
- **A not-for-profit organization providing water quality monitoring.**
- A community water system serving a DAC.

### **A.3.2. Eligible Project Types**

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Eligible Tier 2 projects include but are not necessarily limited to planning and design including pilot projects, or implementation of the following:

- Cleanup of Oil/Diesel/Petroleum Spill, Mining Waste Leachate Drainage, or other Discharges.
- Removal of Contaminated Sediment, Illegally Dumped Material, or other Debris.
- Remediation of Contaminated Groundwater.
- Watershed Restoration, including Habitat Restoration, Erosion Control, Algae Abatement, etc.
- **Water quality monitoring.**

**II. THE STATE WATER BOARD SHOULD ALLOW FINES FROM WATER QUALITY VIOLATIONS TO REMAIN IN THE REGION AND BE DIRECTED TOWARDS ENVIRONMENTAL PROJECTS OR ACTIVITIES WITHIN THE AREAS IMPACTED BY THE WATER QUALITY VIOLATIONS.**

Water Board enforcement penalties should not only be assessed for the purpose of bringing violating Permittees into compliance. Bringing a discharger into compliance with the law fails to address the damage that pollution caused, or may have caused, to water quality, human health, essential habitat, or recreation. Ultimately, bringing a discharger into compliance simply places that discharger in the same position it already should have been and fails to remediate the environmental harm caused by the violation. The Waterkeepers have witnessed this remedy on several occasions – a penalty for a water quality violation that is applied to an undefined project to bring the Permittee into compliance but omits a penalty to remediate the environmental harm caused by the violation. In addition to bringing dischargers into compliance with their individual permits and the Clean Water Act, Waterkeepers often bring enforcement actions that result not only in compliance with permit requirements, but an assessment for a Supplemental Environmental Project (SEP) sufficient to offset the harm caused by the pollution to the local receiving water. The State Water Board should require all enforcement cases include penalty fines that go back into the local community to offset the harm caused by the pollution to the local receiving water.

Current penalties assessed at the regional level include the option for a discharger to contribute to a local SEP, which has the potential to remediate local pollution and improve water quality in an immediate region or community. Under this current enforcement penalty framework, however, dischargers who are assessed penalties and contribute to a local SEP remain liable until the SEP is completed. This deters dischargers from opting to pay penalties that will have a direct impact on the impacted community, and results in dischargers often choosing to pay a civil penalty to the statewide cleanup and abatement fund, rather than contribute to a local SEP.

The State Water Board should both allow and encourage enforcement penalties for water quality violations stay within the region of the violation. The practice of directing the entirety of penalties into the CAA diverts money away from the area subject to the pollution and deposits these monies to assist other areas throughout the state. While this practice may be beneficial to the state, it is not beneficial to those donor regions. Retaining a portion – even a set percentage – of funds contributed to the CAA could benefit those Regional Board jurisdictions prioritizing enforcement and compliance actions, and benefit the community harmed by the pollution. Establishing dedicated region-specific subaccounts within the CAA can help direct monies back into individual regions to fund SEPs and other water quality projects that may go unfunded due to the practice of dischargers contributing to the CAA, rather than local SEPs to avoid prolonged liability.

The State Water Board should direct enforcement penalties of water quality violations into a SEP-like account for each region for environmental projects that offset the harm caused by the original violation. A SEP is an environmentally beneficial project or activity that is not required by law, but that a defendant agrees to undertake as part of a settlement of an enforcement action.<sup>1</sup> The purpose behind SEPs is to encourage environmental and public health benefits that may not have otherwise occurred in the settlement of an enforcement action.<sup>2</sup> An action simply requiring a defendant to comply with environmental regulations does not address the harm caused by that defendant to the environment or the people endangered by that pollution. As stated by the U.S. Environmental Protection Agency (EPA), SEPs “can be a powerful tool to secure significant environmental and public health benefits beyond those achieved by compliance, and to help address the needs of communities impacted by violations of environmental laws.”<sup>3</sup>

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<sup>1</sup> U.S. ENVTL. PROT. AGENCY, EPA SUPPLEMENTAL ENVIRONMENTAL PROJECTS POLICY - 2015 UPDATE, 1 (March 10, 2015).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

The State Water Board should revise the Guidelines to ensure enforcement penalties for water quality violations stay within the region of the violation. We offer the following recommended edits to the Guidelines:

**Recommended Language** (*new language indicated in red*):  
(Draft CAA Guidelines, p. 1)

## INTRODUCTION

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The CAA is established by Water Code sections 13440 to 13443. The CAA is funded by various monies including those: appropriated by the Legislature; collected as part of criminal penalties or civil proceedings brought pursuant to Division 7 of the Water Code; collected or recovered by the State Water Resources Control Board (State Water Board) or a Regional Water Quality Control Board (Regional Water Board) under Chapter 6.7 of Division 20 of the Health and Safety Code; and repaid by loan recipients, including principal, interest, and fees. (Wat. Code, § 13441.) **It is the policy of the State Water Board that enforcement penalties for water quality violations be distributed through the CAA to the impacted region, ecosystem, or immediate geographic area of the violation.**

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(Draft CAA Guidelines, p. 4)

### A.2.2. Funding Availability

#### A.2.2.1. Verification of Fund Availability

State Water Board staff will estimate fund availability based on the current and projected uncommitted CAA balance, projecting over a minimum of five years. This evaluation will be performed at least annually. **State Water Board staff will estimate and track fund availability to maintain a sub-account comprised of 0.05% of the CAA accounts receivable for the purpose of funding water quality monitoring through citizen science programs.\* State Water Board staff will maintain region-specific subaccounts to direct monies from enforcement violations to environmental projects that offset the harm caused by water quality violations within that region. Subaccounts shall be evaluated annually.**

*\* Rationale for this language is discussed in Section I. of this Comment Letter.*

The State Water Board should refer to the EPA's SEP Projects Policy (SEP Policy) as instructive when considering potential SEP-like projects under the CAA to remedy the harm caused by water quality violations. The SEP Policy seeks to establish guidelines and categories of SEPs, ranging from environmental restoration projects to pollution reduction to emergency planning and preparedness to catchall types of SEPs. Chief among the SEP Policy's requirements is that the proposed SEP have sufficient nexus between the violation and the proposed project(s), that the project(s) advance at least one objective of the environmental statute that provides the basis of the enforcement action, and that the project(s) relate to the underlying violation at issue in the enforcement action. The SEP Policy considers SEP projects related to the underlying violations if they were designed to either reduce adverse impacts to public health or the environment to which the violation at issue contributes or the overall risk to public health or the environment potentially impacted by the violation at issue.

The State Water Board should require funding from enforcement penalties be applied in the same region, within the same ecosystem, or in the immediate geographic area. The SEP Policy suggests that an environmental project from a water quality violation with a nexus to the violation is "easier to establish" if the primary impact of the project is within the same ecosystem or within the immediate geographic area.<sup>4</sup> The environmental projects does not need to address the same pollutant or the same medium, so long as the proposed project relates to the underlying violations. Further, the State Water Board should require an environmental project to be significant

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<sup>4</sup> *Id.*

enough to offset the adverse impacts caused by activities at the Permittees facility and within the watershed until the plans proposed under the settlement agreement are fully implemented.

The State Water Board should revise the Guidelines to ensure the Office of Enforcement and the Regional Boards secure environmental projects with a strong nexus between the Clean Water Act violations of a Permittee's facility, and to direct financial resources toward specific watershed improvement projects. We further recommend the following changes to the Guidelines so that the State Water Board directs enforcement penalties of water quality violations to stay within the region and be put to a SEP-like account for environmental projects that offset the harm caused by the original violation:

**Recommended Language** (*new language indicated in red*):

(Draft CAA Guidelines, p. 4)

**A.2.2.2. Funding Prioritization**

Tier 1 funding requests are accepted on a continuous basis. Subject to the availability of funding, the State Water Board will give priority to requests where there is the greatest threat to public health and safety, regardless of when the request for funding is received. In determining priorities for funding projects, the State Water Board will also consider **the availability of monies from penalties assessed for water quality violations collected within a specific region, the nexus between the proposed environmental project and financial resources available in a regional subaccount,** and the applicant's access to or ability to qualify for alternative funding sources.

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Thank you for considering CCKA's proposed changes to the Guidelines. In sum, providing a small, dedicated amount of CAA funding for citizen monitoring will help ensure Permittees and environmental projects are achieving their intended purpose of meeting water quality standards. Further, allowing water quality enforcement penalties to remain in the region that the water quality violation took place will remediate the harm done to the environment and help heal our waterways. We look forward to working with the State Water Board to incorporate our proposed changes into the Final Guidelines.

Sincerely,



Sean Bothwell  
Executive Director  
California Coastkeeper Alliance