COAST ACTION GROUP
126 Steiner Ct.
Santa Rosa, CA 95404

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Affiliate of Redwood Coast Watersheds Alliance

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Sent via electronic mail to: commentletters@waterboards.ca.gov &
cj.croyts-schooley@waterboards.ca.gov

RE: Comment Letter – Water Quality Enforcement Policy

Dear Chair Marcus and Board Members:

GENERAL

Coast Action Group recognizes and appreciates the serious consideration and effort that has been put into the development of the current iteration of the proposed Enforcement Policy Language. CAG also recognizes that Regional and State Board resources for enforcement are limited – and – that the proposed language is designed to address the resource limitations while applying equity to the administration this policy. And - that accounting for such limitations and the application of equity requires prioritization of issues in the application of this policy. In consideration of these issues the policy is directed at, both, encouraging cooperation from dischargers and discouraging actions that would diminish Water Quality Standards (beneficial uses).

All parties: State and Regional Water Board(s), dischargers, other responsible agencies, and the public must recognize that clean water (and related beneficial uses) is a precious resource. When Water Quality Standards are not being met, or are threatened, remedy or recovery is difficult and expensive to attain (if attainment of same is feasible or possible). Thus, it is imperative that enforcement policy (policy and administration of the policy) is capable of discouraging bad actions and/or, in the case of serious violation, applying penalties and administrative actions necessary to assure attainment of Water Quality Standards.

The waters of the State of California are currently burdened with a significant portion of its water resources that are compromised (impaired). Application of Enforcement Policy is a key component in actions necessary for the protection and recovery of our waters.

POLICY ISSUES

We agree that it is important for, both, the Regional Board and State Board staff to work together in a coordinated effort for attainment of goals (enforcement of State Water Code) and in the development of enforcement actions on specific cases.

The policy language on assessment of liability has changed. We support these changes – as long as liability determinations will assure compliance and applies a reasonable remedy.

The ability to pay language (and discussion) should be framed in terms of equity – where equity considers: likelihood of compliance, degree of seriousness of violation, cooperativeness of the discharger, time period of compliance attainment, and resource costs to the public and agency. All of these factors must be considered in light of equity. It is true smaller, or disadvantaged, communities have somewhat limited resources. However, that does not mean they are not culpable or responsible. If commensurate penalty assessment and ability to pay is an issue, payment over time can be considered in settlement of the issue. (this would apply to small businesses, agricultural operations, and smaller or disadvantaged communities).

An evaluation of actual harm and/or potential harm must be a major factor in consideration of prioritization of enforcement actions and the application of any penalty(s). Additional factors of consideration – degree of threat, level of toxicity, and a grading scale - as applied (as policy language) appear to have a tendency to be discretionary. Discretionary action and application of policy may tend to be a major factor in the enforcement process. (there is no way around that fact). Thus, appropriate and beneficial outcomes must also consider the current status of the waters affected – high quality or impaired, cooperative attitude of the violating discharger, anti-degradation policy, and the likelihood or assurance of remedy or recovery of the resource.

Additionally, the consideration of "potential" harm (threat of damage from pollutant discharge) puts dischargers on notice that corrective action must occur before there is opportunity for actual discharge of pollutants – which is a much more damaging and costly outcome. The objective is to discourage inappropriate resource management before damage occurs and if there is a damaging discharge remedy (restoration) will occur (promptly). The threat of penalty is there to discourage bad behavior and eliminate issue before there is a problem and encourage protective practices. Thus, penalties must be commensurate with the level of harm, or potential harm, and not just a cost of doing business.

Dischargers have pushed back against increased levels of applicable penalties. Polluted waters and loss of beneficial uses (e.g. loss of drinking water source, fishery and other aquatic life, etc.) is very costly – at many levels. Expenses for the recovery (if recovery is possible) of polluted or impaired waters can be extraordinary. Additionally, the temporal frame for remedy or recovery can be extraordinary (taking many decades). It is often the case that the cost (money and loss of beneficial uses) burden of maintaining Water Quality Standards and/or recovering Water Quality

Standards is shifted from the polluter the public in the application of State run clean-up programs subsidized by taxes and bond money along with the ongoing loss of beneficial uses.

Again, we reiterate, penalty assessment(s) may consider the noted factors in the proposed policy (with discretionary and objective criteria). Commensurate and equitable penalties must meet standards: assurance of resource recovery, deterrence/resource protection, and be equitable in terms of lost resources (beneficial uses) and the cost of prosecution of an enforcement action. If "equity" is a consideration, as stated in the policy, all costs and effects must be part of that consideration.

We must also reiterate the importance of recognizing that enforcement actions on "potential" discharges as integral to the effectiveness of attainment of water code mandates and the mission of the State and Regional Boards. Potential discharges of pollutants will eventually become actual discharges. Thus, actions (and policy) that discourage, controls, or eliminates potential discharges are essential for an effective water quality control program. The proposed language appropriately considers this. The application of these considerations will determine program effectiveness. It is appropriate that lesser penalties be applied to violations with potential to deliver pollutants – if the discharger is cooperative and controls the pollutant source after an initial warning.

The policy consideration of the factor of the discharger's history and conduct is appropriate. Discharges that are culpably responsible for violations and/or that have demonstrated serious negative histories should be subject to (and understand that they will be held to) serious compliance standards and the possibility of extensive penalties. Insufficient penalties should not be allowed to be a cost of doing business – or – a cost that is passed on to the public. Likewise, accidental incidents and cooperative discharges should be acknowledged by working with them to resolve issues.

Equity is an issue (partially discussed above) acknowledged in the policy. However, certain facets of this issue are not fully realized in the policy (all costs to the resource/loss of beneficial uses and recovery costs). The policy application of "Equity" does consider issues of: competitive advantage, ability to pay, deferred expenses gained by not employing BMPs, etc.. However, the total cost consideration of applicable penalties, resource loss, recovery costs, and Board case management costs need more work. All costs attributable to actions needed to recover Water Quality Standards, including loss of beneficial uses (to the public), and related enforcement activity (including investigation and prosecution of a violation) must be considered in terms of Equity.

The justification of the terms of any settlement and/or penalty should be supported by an accounting of costs and findings – with this information be available for public review.

In the case where the discharger (business entity or small municipality) claims inability to pay an appropriately assessed penalty – payment over time should be considered – if the violation is reasonably and timely corrected. The flexibility of payment over time can allow smaller entities to spread the burden of the penalty while also reducing the need for meticulous research and audit into the murky area of finances and net worth needed to produce in depth financial evidence. A claim of inability to pay should not allow limitation of application of equity consideration.

Consideration of Economic Benefit (gained by not controlling a pollutant source – benefit by avoiding costs) is appropriate and integral to consideration of Equity.

Mandatory Minimum Penalties related to NPDES violations:

Small community wastewater treatment plant violations can be just as devastating to water resources as larger treatment plant violations or industrial violations (where the larger entities may have a larger economic base). Assessment of the appropriate penalty and imposition of the penalty may be a burden on the community. This burden can be mitigated by allowing payment of the penalty to be deferred - over time. The preferred outcome in these cases is similar to other enforcement cases – prevention, enforcement of recovery, and penalty. Failure to assess a reasonable/equitable penalty and remedy may encourage further failure to comply. Consideration of exceptional incidence is appropriate.

Appendix A – Enforcement Actions:

The concept of progressive enforcement is acceptable – if the desired outcomes of protection and/or recovery of beneficial uses is insured. Progressive enforcement fits with the need to manage limited resources and appears to be a logical approach for securing cooperation in goal attainment. If a violation is small, it may only take a phone call to get it fixed. However, if a violation is large and compromises beneficial uses, or when Water Quality Standards are not being met (waterbody impaired status exists), or when the discharger has a history of not being cooperative - in these cases formal enforcement actions should be prompt.

In cases where informal contacts are made seeking compliance - specific performance actions and deadlines should be made clear to the discharger and a record should be kept on these contacts and specific compliance details.

Application of Enforcement Policy to Agricultural Operations and other Non-point Source violations:

The State and Regional Boards have specific Non-point Point Policy (Sediment Policy and Policy related to toxic and other pollutants – including Basin Plan Water Quality Objectives) that must be enforced. Non-point source pollution is responsible for impairment of a significant portion of the State's waters (State List of Water Quality Limited Segments). Evidence supporting the list of impaired waters indicates that responsibility for the pollutant inputs leading to impairment is from Agricultural operations, timber operations (another form of agriculture) to a great extent, and from other non-point sources to a lesser extent. (See Coastal Zone Management Act – Re-authorization – and State of California's agreement to remedy these non-point issues. Also see the court findings in Pronoslino vs. Marcus, upheld by Pronsolino vs. Nastri – where it is clearly stated that the Clean Water Act does not work unless all responsible parties participate).

Management of non-point source issues by discharges by applying BMPs and/or complying with WDRs and Waivers - along with monitoring and taking action to control non-point sources (including potential sources) by a discharges – can limit or reduce introduction of pollutants into

waters of the State. However, pollution from non-point sources does, and is significant and is occurring.

Limiting or curtailing enforcement on non-point sources, including agricultural operations (as requested by Ag), would be a disaster. Many of the impaired listed waters would never be recovered and many high quality waters of the State would be impearled.

Agricultural interests have presented an argument that their per gallon pollution is less than the per gallon pollution of other dischargers violations. Thus, they claim any penalty assessment on agricultural non-point source generated pollution, on a per gallon of estimated volume basis of assessment, should be less than penalties assessed to other dischargers violations. Their argument is based on their claim that the load of pollutant, per gallon, from agricultural non-point sources would be less than the per gallon load from other non-point sources, and the per gallon load from wastewater and/or industrial sources. We suggest that all pollution delivered to waters is lesser than the quantity of the surface or ground water – and – thus, the pollutant is mixed with the ground and/or surface water and is, thus, causing contamination. The pollutant may be – sediment, nutrients, temperature, pesticides and toxins, or metals. Most of these pollutants can be part of an agricultural, wastewater, or industrial discharge. All of these pollutants and issues of concern need to be treated fairly and equitably in the application of Regional and State Board Enforcement Policy. However, the specious argument that Ag deserves a break relative to other discharges and dischargers is not credible. In part, the criteria for assessment and prosecution of an enforcement action is - is the discharge diminishing a beneficial use or otherwise contributing to impaired status? All assessment of penalty criteria must be applied equally (as part of the assessment process) and equitably – with any penalty assessed to be commensurate with damage and costs.

Other General Concerns

In the process of creating water quality control programs – which includes the issuance of permits, development of TMDLs, and also includes policy development; the State and Regional Boards should require all permits and policies to contain discussion and findings that he specific activity meets water code (and other State Code – including CEQA when appropriate) and the requirements and actions specified are enforceable and that the State or Regional Board is capable and committed to reviewing and enforcing violations.

For any permitting process, promulgation of permits and Water Quality Control Plans, and related enforcement of actions necessary to protect and recover Water Quality Standards; the Regional and State Boards must be committed to adhere to policy and permit conditions, and maintain sufficient trained staff to effectively employ these processes. That means energy must be directed at development and retention of the necessary human resource to do this job.

Submitted for Coast Action Group by Alan Levine. Director