



October 18, 2016

Jeanine Townsend, Clerk of the Board
State Water Resources Control Board
commentletters@waterboards.ca.gov

**RE: COMMENTS ON PROPOSED AMENDMENTS TO THE STATE WATER
RESOURCES CONTROL BOARD'S WATER QUALITY ENFORCEMENT POLICY**

Dear Ms. Townsend,

Placer County appreciates the opportunity to comment on the proposed amendments to the State Water Board's Water Quality Enforcement Policy. We appreciate the State's intent to provide more transparency, consistency, and fairness in its approach to enforcement. As part of the regulated community, we welcome those changes and respectfully offer the following suggestions:

Enforcement Coordinator

One of the most significant proposed change is the requirement that "Each Regional Water Board shall appoint and Enforcement Officer to assist with prioritizing cases and implementing this Policy." Enforcement staffs in each Region are to meet at least quarterly, "to pre-screen and analyze potential cases for discretionary enforcement." These enforcement prioritization meetings are to include, "the Enforcement Coordinator, one or more attorney liaisons from the State Water Board Office of Enforcement, enforcement staff, and the lead prosecutor or the lead prosecutor's designee." This added section goes on to state that, "some or all of the dialogue and/or documents referred to at the meetings may be attorney client privileged and/or work product protected." The County feels that the addition of a Regional Enforcement Officer could be a positive step. However:

1. If the work of Enforcement Coordinators is not publically available, this may not increase transparency in the process, and may, in fact, be adding another level of internal "non-transparency" to the process.
2. The roles and duties of the Regional Enforcement Coordinators should be better defined.
3. Most importantly, we recommend the role of the Regional Enforcement Coordinators include the ability to meet with dischargers, if requested, at appropriate times, to discuss possible enforcement actions, reasons for the actions, and facts leading to the actions. The most appropriate point for this meeting may be when enforcement actions are proposed to move from informal enforcement actions to formal enforcement actions, as defined in Appendix A.

Adding a notification and review step prior to formal enforcement actions will afford the Discharger the opportunity to state their case to the Enforcement Coordinator, which will help provide a more transparent, fair, and potentially less subjective process than the alternative

where the Enforcement Coordinators are responsible for prioritizing enforcement actions based solely on the input of RWQCB staff. This opportunity may lead to changed prioritization for enforcement, or even the avoidance of formal enforcement actions, and may also lead to legal challenges based on what is perceived as unfair enforcement.

Discretionary Enforcement Actions - Establishing Case Priorities

4. Existing language for establishing case prioritization includes nine items to be considered, including history of violations and other factors. In the proposed amendments, two additional considerations are added: (1) whether an entity has gained a financial advantage through avoided cost of compliance, and (2) whether an action taken by the Board is likely to encourage other similar regulated parties to, "voluntarily identify, and avoid or correct similar violations." The second of these seems to indicate that, if a Board thinks an enforcement action on one party will have a positive compliance effect on other regulated parties, the enforcement action can be given a higher priority. We do not feel it is appropriate to increase the enforcement prioritization on one party to effect better compliance on the part of others. This language should be removed, as using enforcement actions to "set an example" to others in order to achieve greater compliance as a whole does not reflect the message of increased "fairness" being proposed.
5. The proposed amendments state the Administrative Civil Liability (ACL) enforcement actions against one discharger do not need to be compared to other actions previously taken by the Board. We recommend the opposite be required to provide more fairness and consistency, which are among the stated goals of these amendments. While it is recognized that each case will be unique, a comparison to other ACL enforcement actions for similar situations is warranted. An ACL assessment found to be significantly different than those levied in other similar cases, could lead to increased legal challenges, and courts typically look at similar cases in order to levy judgments.

Appendix A - Enforcement Actions

6. This appendix describes the enforcement steps available to Water Boards, including both "informal and formal enforcement actions." The proposed amendments include a section titled "Progressive Enforcement" which states that enforcement staff should, "(1) assist cooperative dischargers in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance." It further states, "For some violations, an informal response such as a phone call, email, or staff enforcement letter is a sufficient first step to notify the discharger that the violation has been identified, and to encourage a swift and complete return to compliance."

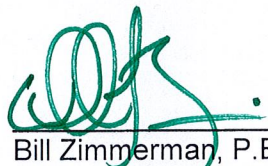
Dischargers have been experiencing, in some Regions, a lack of these informal first steps prior to issuance of a Notice of Violation (NOV). It is hoped that the amended Enforcement Policy leads to a return to more informal interaction between enforcement staff and dischargers, through the role of the new Enforcement Coordinator, prior to issuance of NOV's. As mentioned earlier, such a process could lead to changed prioritization for

enforcement, or even the avoidance of formal enforcement actions, by communicating early in the process. The Policy also defines an NOV as an “informal notification” in the same category as a phone call or email. An NOV should be considered a formal notification that begins the enforcement action process.

7. The proposed amendments regarding NOVs remove the requirement that an NOV be mailed to the discharger by certified mail. The proposed amendment says only that the NOV is to be provided to the discharger(s), but no longer defines the means for doing so. This process should be better defined.

Again, the County appreciates the opportunity to provide feedback on the proposed amendments and commend Water Board staff for their efforts. We agree that more fairness and transparency is needed and hope that our recommendations will help you achieve those goals.

Sincerely,



Bill Zimmerman, P.E.
Deputy Director

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