



October 18, 2016

Felicia Marcus, Chair
Members of the State Water Resources Control Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Subject: **Comments on Proposed Changes to Water Quality Enforcement Policy**

Dear Chair Marcus and Members of the Board:

The Water Department staff of the City of Santa Rosa (City) appreciates the opportunity to comment on the proposed amendments to the State Water Board's Water Quality Enforcement Policy (Policy). City staff supports the comment letters concurrently submitted by the California Association of Sanitation Agencies (CASA) and the California Stormwater Quality Association (CASQA), and incorporates those comments herein by reference, with specific emphasis on the items noted below.

The City operates collection, treatment, storage, discharge, and reclamation facilities, employing state of the art advanced, tertiary-treatment facilities, and producing high quality recycled water that is beneficially reused in cutting edge water reclamation projects encouraged by the California Legislature. Specifically, the City of Santa Rosa owns and operates the Santa Rosa Subregional Water Reclamation System, a publicly-owned treatment works, which currently collects, treats, and recycles (and infrequently discharges) an average dry weather flow of 15 million gallons per day of industrial, commercial, and municipal wastewater from a population of approximately 225,000 in the Cities of Santa Rosa, Cotati, Rohnert Park, Sebastopol, and the unincorporated South Park County Sanitation District.

The City also owns and operates a municipal separate storm drain system and implements a storm water management program to prevent and reduce storm water pollution and protect local creeks and the Russian River from water quality impairments.

The City strives to achieve consistent compliance with the State's important water quality requirements. Notwithstanding that effort, the City seeks to ensure that the State's Policy prescribes a method for enforcement that will best achieve fair, consistent, and reasonable results, for both the protection of the natural environment and the City's ratepayers.

Of particular concern to the City are the following comments made in the aforementioned trade association group's comment letters, highlighting some additional emphasis by the City regarding several topics:

- **Preserving Appropriate Flexibility.** The City strongly believes that while the Policy should prescribe a process by which discretionary enforcement actions can be implemented in a consistent manner, preserving flexibility to accommodate a wide variety of circumstances is key to ensuring that the Policy is implemented fairly and reasonably.
- **Focus on Compliance Assistance In Lieu to Simply Increasing Penalties.** Despite the stated goals of the proposed Policy amendments, the City is concerned that many of the proposed changes to the Policy could, taken as a whole, significantly increase enforcement liability for public agencies and others in the regulated community who are expending tremendous resources towards compliance. The City would suggest that the State's efforts should be more focused upon compliance assistance, especially in disadvantaged communities, in lieu of simply increasing the potential overall penalties.
- **Definition of "High Volume Discharge" Requires Refinement.** The City concurs in the request that: (1) a more specific \$2.00 per gallon figure be applied to high volume discharges, rather than the currently enunciated sliding scale of \$2.00 - \$10.00 per gallon; (2) the Policy reaffirm the original intent of this section, which was to apply the \$2.00 per gallon figure to, at a minimum, all sewage and storm water releases, and specifically requests that recycled water releases be included in the types of discharges to which "high volume discharge" provisions apply; and (3) the Policy lower the initial volume threshold from 100,000 gallons to 50,000 gallons if high volume discharges will continue to be defined volumetrically.
- **The Policy Should Separately Address Economic Benefit Recovery For Municipalities.** For public agencies handling the collection, treatment, disposal and/or recycling of wastewater, like the City, the cost of large scale capital projects that may be necessary to achieve and/or maintain compliance can be significant, and in many cases, in the tens of millions of dollars. The Policy should promote flexibility, where possible, in evaluating economic benefit in the municipal context, so that the enforcement process does not lead to disproportionate and devastating consequences to local agencies, which cannot simply shut down or stop providing public health and safety services. Unlike private businesses, any economic benefit-based penalties must be passed along to ratepayers, who may be unable to shoulder both the cost of compliance activities along with economic benefit recoupment. For this reason, the City requests that the Policy include an exception or safety valve for circumstances involving municipal agencies facing significant compliance costs, or, at a minimum, an alternative set of criteria for determining economic benefit applicable to municipal dischargers.
- **Changes to Conduct Factors Do Not Incentivize Compliance.** The Policy's "Degree of Culpability" and "History of Violations" factors should not be modified from the existing Policy. Removing credit for an entity's positive compliance history reduces the flexibility of staff undertaking enforcement actions to account for the hard work and dedication of those responsible for ensuring its pursuit. The proposed changes to the "History of Violations" factor are especially distressing, as there are few large-scale

municipal facilities that operate without some sporadic (and sometimes expected) exceedance. (See Policy at page 23). As proposed, it appears that this factor will only be used to increase liability, given that a minimum multiplier of 1.1 will almost always be the starting point in an enforcement action. (See Policy at page 23). This change punishes the regulated community in the present for what may be completely disparate compliance circumstances in the past, reduces the flexibility of enforcement staff to look at a discharger's individual compliance history, fails to recognize the slight variability well-operated municipal treatment plants can experience from time to time, and has an unduly harsh effect on dischargers who may have experienced many years without a violation, but may have minor past exceedances on occasion. Should the State Water Board pursue the proposed changes, the City requests, at a minimum, that a clear "cap" of 1.5 be prescribed for this multiplier if enforcement staff seek to elevate above a 1.1 (consistent with the existing Policy).

- **“Potential Harm” Is Too Vaguely Referenced.** The City is concerned that the vague, undefined notion of “potential harm” as used in the proposed Policy is going to prove problematic in many cases, as that term is theoretical and subject to multiple, and potentially unreasonable, interpretations. The term “potential harm” as used in the proposed Policy should, at a minimum, be grounded in potential harm that could actually occur under the relevant factual setting, and must be supported by peer-reviewed literature, or other supportable scientific basis. Further, if evidence of actual harm (or lack thereof) is available and presented to the Water Boards, the Policy should state that such evidence should be utilized in favor of more speculative “potential” harm.
- **Dischargers Should Be Able to Compare Similarly Situated Enforcement Actions.** We strongly believe that two similarly situated dischargers facing similar violations should be treated equitably in the enforcement arena, otherwise the Water Boards' decisions could be considered arbitrary and capricious. In the spirit of statewide fairness and consistency, Water Boards should be encouraged, and dischargers must be allowed, to compare like circumstances. Thus, the City supports the revisions suggested by CASA, as follows: “The Regional Water Boards are not required to make specific findings comparing a proposed penalty to other actions that it or another Water Board has taken or why the proposed amounts differ. However, the Water Boards should consider penalties for similar violations under similar circumstances, particularly those within the same Region, when proposing penalties and taking enforcement action.”
- **POTWs Should be Able to Address “Ability to Pay.”** The proposed Policy strikes out portions of the “ability to pay” analysis applicable to public agencies. (See, e.g., Policy, p. 26, which includes the strike out of the following language: “...would result in widespread hardship to the service population or undue hardship to the discharger.”). However, the Water Code prescribes in all enforcement settings that the discharger's “ability to pay” is an important factor that must be considered prior to issuing a proposed penalty. It is an especially important factor for public agencies, whose ratepayers must absorb the consequence of the State's enforcement decisions. The only remaining discussion of this topic exists on page 4 of the proposed Policy, under the heading of

“Disadvantaged Communities.” While the City appreciates the State Water Board’s recognition of the difficulties faced by “disadvantaged communities,” the City wants to ensure that the undefined term, as used in this section, is not unduly restrictive of a public entity’s opportunity to make an “ability to pay” argument.

For this reason, the City joins in CASA’s request that the State Water Board define the term “disadvantaged community” to mean a publicly owned treatment works with financial restrictions where enforcement results in undue burden on its service population based on (a) median income of the residents, (b) rates of unemployment, or (c) low population density in the service area. It should also be made clear that not all three factors (median income, unemployment, low population density) are necessary to qualify as a disadvantaged community, these are simply factors to be considered. We also request that the State Water Board clarify that a “disadvantaged community,” as used in the Policy, is not the same as a “publicly owned treatment works serving a small community” as defined in Water Code section 13385(k)(2), so as to avoid the overly narrow definition that limits applicability of that designation to those POTWs whose population is 10,000 or less persons. Finally, we request that the proposed Policy specifically note in the “Ability to Pay” section on pages 25 and 26 that staff can consider a Disadvantaged Community and/or a Small Community’s (as discussed on pages 4-5 of the proposed Policy) “ability to pay,” and to cross reference page 4 of the Policy in the “Ability to Pay” section.

- **Multiple Permit Violations Resulting From the Same Act Should be Addressed with a Single Based Liability Amount.** The City supports the existing Policy, which prescribes that a single act that violates multiple requirements in the same permit, plan, or order may be addressed with a single base liability amount, and rejects the proposal to remove this approach. (See Policy, at page 24). Thus, the City requests that the existing subsection (e) on page 24 be retained, and that the newly proposed subsection (e) be moved to new subsection (f). This change will avoid an unduly harsh enforcement response in the event of a single act violating duplicative and/or connected requirements, which supports reasonable and fair assessment of penalties.
- **Concern Regarding How Additions to the “Other Factors” Consideration Will Be Implemented Fairly and Transparently.** Transparent and consistent enforcement requires that dischargers know in advance what enforcement liabilities they could be subject to in the event of a violation and subsequent enforcement action. However, subdivision (b) in Step 8 (“Other Factors As Justice May Require”) on page 29 of the proposed Policy states that adjustments to calculated penalties might be warranted if “[a] consideration of environmental justice issues indicates that the amount would have a disproportionate impact on a particular disadvantaged group, or would be insufficient to provide substantial justice to a disadvantaged group.” (See Policy, p. 29) How a proposed penalty would be “insufficient to provide substantial justice to a disadvantaged group,” when penalties are paid to the State of California, is vague and unclear. Further, the City is concerned that this factor may modify a proposed penalty in an arbitrary manner, to benefit a particular interest group, which runs counter to all the stated goals of

the Policy. The City requests the State Water Board eliminate this provision in its entirety, or, in the alternative, better define what this means, how it might be used, and how it specifically could impact a penalty under the Policy.

- **“Class I” Violations Category Should Be Modified.** The City concurs with the concerns expressed by CASA and CASQA regarding the newly proposed circumstances that would result in a “Class I” characterization, and supports the changes requested.
- **Legal Argument Should be Removed from the Text of the proposed Policy.** Footnote 4 on page 31 of the proposed Policy sets forth a general legal opinion and conclusion regarding the applicability of statutes of limitations and/or the equitable defense of laches in administrative proceedings. Whether these defenses apply in any specific enforcement circumstance should be addressed during that enforcement action, based on the applicable law and precedent at that time. It is not appropriate to include such conclusory legal statements within the context of a generalized policy, which could hamper a party’s ability to appropriately raise such defenses in a site-specific enforcement setting. As such, the City concurs in the recommended removal of footnote 4.

The City hopes that its comments are useful to the State Water Board during its consideration of the proposed Enforcement Policy revisions.

Thank you for your consideration of the City’s concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "Linda Reed" followed by a flourish.

Linda Reed
Interim Director of Water