

SCS ENGINEERS

October 18, 2016

Public Comment
Water Quality Enforcement Policy
Deadline: 10/18/16 12:00 noon

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



SUBJECT: Comments on Proposed Rulemaking – Amendments to the State Water Resources Control Board’s Water Quality Enforcement Policy

Dear Ms. Townsend:

Thank you for the opportunity to comment on the proposed rulemaking for amendments to the Water Quality Enforcement Policy. SCS Engineers provides environmental services to a variety of commercial and municipal clients that are potentially subject to Regional Water Quality Control Board (RWQCB) enforcement actions, in all Water Board regions of the State. Comments from our clients reflect a growing concern with current enforcement actions that are quite subjective and variable both within, and between, RWQCB regions. The regulated community welcomes any attempts to improve upon the current enforcement approach by making the enforcement policies more consistent, transparent and fair. To this end, please accept the following comments on the proposed rulemaking.

1. The proposed addition of a Regional Enforcement Coordinator could be a very positive step in the enforcement process, providing for a single point in each region at which enforcement actions are reviewed for fairness and consistency. However, 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 “opaqueness” to the process. As described in the proposed rulemaking, the role of the Regional Enforcement Coordinator is not well defined other than to be part of periodic meetings, no less than quarterly, and that the results of those meetings may be protected from public release under “attorney client privileged and/or work product protected.” This does not appear to provide the level of transparency intended as part of these proposed amendments. Therefore, it is suggested that the role and duties of the Regional Enforcement Coordinators be better defined, including a means for the public and regulated parties to access results of the Enforcement Coordinator’s decisions regarding enforcement prioritization, while recognizing that some details will need to be protected for legal reasons. Perhaps, as is the case with most governmental bodies in California, these meetings can be divided into a closed-session portion due to legal issues, and an open meeting portion for which results can be released to the public and/or dischargers.



2. As described in the proposed amendments, the role of the new Enforcement Coordinators appears to be largely an internal function to the Regional Board enforcement process. If this is the case, an opportunity for more transparent, consistent and fair enforcement actions may be missed. It is suggested that 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. By adding a notification and review step prior to formal enforcement actions, this affords 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 of the Enforcement Coordinators being responsible for prioritizing enforcement actions based solely on the input of RWQCB staff. This opportunity to meet with dischargers may lead to changed prioritization for enforcement, or even the avoidance of formal enforcement actions, and may also lead to less adjudication issues based on what is perceived as unfair, inconsistent enforcement.
3. It is suggested that the language related to the Regions prioritizing enforcement actions against one discharger to “likely encourage similarly situated members of the regulated public to voluntarily identify, and avoid or correct similar violations” (Section II, B. 11.) be removed. This sounds like one discharger can receive a higher prioritization for enforcement actions just to “set an example” to others in order to achieve greater compliance as a whole. This certainly does not reflect the stated intent of fairness and consistency being proposed in the amendment language. It is our opinion that enforcement should be consistent based on the facts of each individual case, and not on a subjective, perceived ability to effect compliance changes on other parties through enhanced enforcement actions on one party alone.
4. The proposed amendments state the Administrative Civil Liabilities (ACL) enforcement actions against one discharger do not need to be compared to other actions taken by the Board (Section VI. A. first paragraph). It is suggested that the opposite be required so as 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 in some aspects, 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 certainly lead to increased challenges in adjudication, where the courts typically look at similar cases in order to levy judgements. Since Enforcement Coordinators are to be established for each region, it seems that a logical part of their duties would be to evaluate all proposed enforcement actions in terms of consistency with enforcement actions at other sites, including levying ACLs and the amount of proposed ACLs.

5. Finally, it is recognized that part of the proposed amendments is to establish revised formulas for establishing ACLs, based on certain site conditions, including “potential harm.” Although the formulas may be better defined in the proposed amendments, it will still take significant subjective judgement on the part of RWQCB staff to assign values to the formulas, including what may be perhaps the most subjective factor of all – perceived potential harm. It is suggested that, in order to help correct potential errors, reduce subjectivity, and provide fair and equitable enforcement actions, Dischargers should have the ability to review the proposed ACL actions, and rational for the actions, with the Enforcement Coordinator. Perhaps the most important function that an Enforcement Coordinator will perform will be the ability to mitigate outliers of subjectivity on the part of RWQCB staff, so that enforcement actions are as fair and consistent as possible. Allowing Dischargers to interact with the Enforcement Coordinators, at one or more points in the enforcement process, will help achieve the fairness, consistency and transparency desired in adoption of these proposed amendments.

Thank you again for the opportunity to submit comments on the proposed amendments to the Water Board’s Enforcement Policy.

Sincerely,



SCS ENGINEERS
E. Wayne Pearce, PG

Transmitted via email to commentletters@waterboards.ca.gov

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