



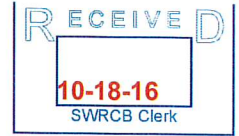
Department of Public Works
Environmental & Construction • Flood Control
Operations • Solid Waste Management
Surveyor • Transportation

Gerry Newcombe
Director

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

October 18, 2016

Via US Mail and Email (commentletters@waterboards.ca.gov)



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

RE: COMMENT LETTER - WATER QUALITY ENFORCEMENT POLICY

Dear Ms. Townsend:

The County of San Bernardino and San Bernardino County Flood Control District (collectively referred to herein as "County") appreciate the opportunity to provide these comments to the State Water Resources Control Board ("State Board"), which is considering the adoption of revisions to its 2010 Water Quality Enforcement Policy.

Fair, Firm, Consistent and Transparent Enforcement

The goals of the State Board in amending its 2010 Water Quality Enforcement Policy¹ are laudable. However, the County is concerned that the proposed amendments set forth in the draft policy ("Draft Policy") are not likely to achieve the stated goals and, instead, are likely to make the enforcement policy less transparent, consistent, and fair for the reasons discussed below.

SECTION I, PREAMBLE, p. 2

The Draft Policy states that, "[i]n appropriate cases, the Water Boards may bring enforcement actions against contractors and/or agents, in addition to the legally responsible person(s) or permittees, for some or all of the same violations."

Comment:

As a threshold matter, the Water Boards lack legal authority to bring enforcement action against contractors and/or agents (e.g., who do not come within the definition of "legally responsible person(s)"). Further, the Draft Policy does not provide any guidelines regarding the circumstances under which Water Boards will pursue contractors and/or agents for enforcement or, assuming legal enforcement is pursued, the factors the Water Boards will use to determine the potential culpability of contractors and/or agents. Further, the Draft Policy by purporting to expand the categories of persons who can be subject to enforcement, without further defining how and when enforcement will be pursued against contractors and/or agents introduces significant uncertainty into the regulatory enforcement

¹ "It is the policy of the State Water Board that the Water Boards shall strive to be transparent, fair, firm, and consistent in taking enforcement actions throughout the State, while recognizing the unique facts of each case. Draft Policy at p. 2.

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process. Finally, how are contractors and/or agents defined for purposes of enforcement? In the likely event that an agency has an indemnification and hold harmless provision in its agreement with a contractor, this provision would disrupt that contractual shift of responsibility. These terms can be interpreted extremely broadly and could, for example, potentially make law firms and/or environmental consulting firms subject to water quality enforcement for advice given to their clients (which poses additional privilege issues).

SECTION I.C. CONSISTENT ENFORCEMENT

The Draft Policy provides that the Water Boards will achieve consistency in enforcement by applying the penalty calculator in Section VI. The Draft Policy further states: "The policy does not require a Water Board to compare a proposed penalty to other actions that it or another Water Board has taken or make findings about why the assessed or proposed amounts differ."

Comment:

2 The penalty calculator, in Section VI, is detailed and includes many subjective components. Because of the subjectivity inherent in the penalty calculation methodology required under Section VI, the Water Boards will not be able to achieve consistency *unless* a proposed penalty is compared to other similar actions and findings are made about why the proposed amounts differ. The County recommends that the State Board establish an overall "significance threshold" which (if exceeded) would necessitate findings to be made regarding why proposed amounts differ when compared to similar actions/violations. For example, the Penalty Calculation Methodology in Section VI.A. provides that "[f]airness requires the Water Boards to impose civil liabilities at levels sufficient that violators do not gain a competitive advantage from avoiding and/or delaying the costs of compliance." This fairness requirement mandates that some comparison be made when there is a significant difference between proposed penalty amounts between similarly situated alleged violators, particularly, where an industry-wide enforcement initiative is pursued by a Water Board. The County is concerned with the feasibility of achieving fairness without comparing an adopted or proposed penalty to other similar actions; where the overall goal is to preclude violators to gain a competitive advantage. As such, the County recommends a comparative tool be created to assist in the fairness assessment.

SECTION I.D. FAIR ENFORCEMENT

The Draft Policy provides that "Fair enforcement requires, at a minimum, adequate civil penalties to ensure that no competitive economic advantage is attained through non-compliance...and in many cases, merely recapturing the economic benefit gained by non-compliance is insufficient to establish an appropriate level of specific and/or general deterrence..."

Comment:

3 The Draft Policy does not adequately articulate how the Water Boards will determine whether a competitive economic advantage has been attained through alleged non-compliance. Additionally, economic advantage may be different for entities/agencies depending on the size and financial wherewithal of the entity/agency.

SECTION II. ENFORCEMENT PRIORITIES FOR DISCRETIONARY ENFORCEMENT ACTIONS

PREAMBLE AND SECTION II.A. RANKING VIOLATIONS

The preamble to this section states that the Water Boards shall rank violations, then prioritize cases for formal discretionary enforcement action and provides criteria for ranking violations as either Class I or Class II (everything that is not a Class I).

Comment:

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The County recommends that the Draft policy eliminate the "Class I" and "Class II" designation for ranking violations, since the only violations specifically identified in the Draft Policy are "Class I" and everything else is a "Class II" violation. Plus, because the Draft Policy states "Class I Violations ordinarily include, but are not limited to the following..." it creates confusion regarding other potential violations that may be classified as Class I.

SECTION II.B. CASE PRIORITIZATION FOR INDIVIDUAL ENTITIES

In assessing case prioritization, the Draft Policy adds the following: "Whether the entity has avoided the cost of compliance and therefore gained a competitive economic advantage and/or economic benefit."

Comment:

5
How will the Water Board determine whether an entity has gained a competitive economic advantage without comparing similarly situated entities? The Draft Policy specifies how an economic benefit will be determined, but not how a competitive economic advantage will be evaluated for purposes of calculating any penalty amount. While this approach may work for private entities, how will this be applied to public agencies?

SECTION VI. MONETARY ASSESSMENTS IN ACL ACTIONS

Overall, the Draft Policy provides more clarity than the existing policy regarding the penalty calculation methodology and the application of various factors to the penalty calculation. However, the County is concerned that the proposed changes to the penalty calculation methodology could result in significantly higher penalties for discharge violations that are not major, but which involve significant amounts of water. This would be contrary to the stated objectives of the Draft Policy and, in particular, the objective of fair enforcement and the goal of ensuring that penalty amounts are tied to competitive economic advantage and/or economic benefits associated with non-compliance.

Comment:

6
Under the proposed amendments, the numerical factors have been increased for low to moderate harms, in some cases by more than 50%. If implemented, this could result in significantly higher penalties for discharge violations that are not major violations, but which involve significant amounts of water. The existing Policy authorizes Regional Boards to apply adjustment factors for each discharge violation, which application may reduce penalties. In some cases, the Regional Boards can reduce a penalty by 50%, based on the discharger's degree of culpability. Under the proposed amendments, however, this adjustment factor is eliminated. The only adjustment factor for reducing a penalty is a 25% reduction for cooperation during cleanup. As a result, the adjustment factors have been revised to result in less overall potential reductions, and greater increases in penalties associated with discharge violations. Additional details, such as proposed amendments addressing staff costs in the total civil liability calculation, will lead to new or additional costs of enforcement under the proposed amendments.

Step 1 (Actual or Potential Harm for Discharge Violations)/Factor 3 (Susceptibility to Cleanup or Abatement)

Scores are assigned based on whether the discharger cleans up 50% or more of the discharge "within a reasonable amount of time." The term "reasonable amount of time" is not defined in the Draft Policy and will lead to confusion and lack of consistency in calculating penalties, if not clarified or if parameters for making a reasonableness determination are not provided. Also,

the Draft Policy provides, *inter alia*, that a score of 1 is assigned if 50% or more of the discharge is susceptible to cleanup, "but the discharger failed to clean up 50 percent or more of the discharge within a reasonable time." In most cases, an enforcement action will ensue and penalties will be calculated long before a "reasonable time" for completing a cleanup has elapsed. As a result, it is not clear how this factor would be applied.

7 Also, the Draft Policy states that "natural attenuation...is not considered cleanup or abatement for purposes of evaluating this factor." The County believes that natural attenuation should be taken into account in evaluating this factor because the environmental impacts are, therefore, decreased. If, based on natural attenuation, the impact of the discharge is abated within a reasonable amount of time, the discharger should get credit in the penalty calculation.

Step 2 (Assessments for Discharge Violations)

The Draft Policy provides that NPDES permit effluent limit violations should be addressed on a per day basis only, except that some effluent limit violations—including storm water discharges—should be assessed both per gallon and per day penalties. The word "storm water discharges" should be deleted from the proposed language "some NPDES permit effluent limit violations and violations such as effluent spills or overflows, ~~storm water discharges~~, or unauthorized discharges, the Water Boards should consider whether to assess both per gallon and per day penalties."

8 Storm water effluent limit violations should be specifically excluded from the per gallon penalties calculation, unless there is an objective way to determine the source and extent of any alleged discharge on a per gallon basis in storm water. It is well-established that numeric effluent limits for storm water dischargers are largely infeasible. Both EPA and the State have acknowledged that, "Due to economic and technical infeasibility of full-scale end-of-pipe treatments and the complexity of urban storm water runoff quality and quantity, MS4 permits generally include narrative requirements for the implementation of BMPs in place of numeric effluent limits." See Fact Sheet to San Bernardino County MS4 NPDES Permit at p. 24. Thus, penalties for storm water discharges should be tied only to the narrative requirements in storm water permits and should be assessed on a per day basis only.

Step 2 (High Volume Discharges)

9 The County requests that construction and municipal storm water discharges be excluded from the per gallon assessments. The current policy recognizes that the volume of water associated with a construction or municipal storm water discharge can be very large. However, the Draft Policy provides states that "dischargers that could be subject to a reduction [in per gallon assessments] include...construction or municipal storm water discharges."

Step 10 (Final Liability Amount)

10 The Draft Policy provides that "A Water Board's final determination should transparently reflect the analytical route it traveled." It is unclear what is meant by the phrase "analytical route it traveled." The County requests that the State Board clarify this provision.

Please note that the County Board of Supervisors has not adopted an official position on the Draft Policy. However, to assist the State Board with its consideration of the Draft Policy, the undersigned has provided the above comments.

J. Townsend, State Water Resources Control Board

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We are available to provide any further assistance so that the State Board clearly understands the comments submitted by the County. Should you wish to discuss the County's comments, Harold Zamora of the Department of Public Works, Environmental Division may be reached at (909) 387-8109.

Sincerely,



GERRY NEWCOMBE, Director
Flood Control District

GN:MR:sr

Cc: CJ Croyts-Schooley (cj.croyts-schooley@waterboards.ca.gov)
Harold Zamora P.E., Chief, Environmental Management Division
Marc Rodabaugh P.E., Public Works Engineer III

