



Sent via ELECTRONIC MAIL to commentletters@waterboards.ca.gov

October 18, 2016

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

RE: ACWA and CMUA Joint Comments on Proposed Changes to the Water Quality Enforcement Policy

Dear Ms. Townsend,

The Association of California Water Agencies (“ACWA”) and California Municipal Utilities Association (“CMUA”) appreciate the opportunity to provide comments on the State Water Resources Control Board’s (“SWRCB’s”) proposed changes to the Water Quality Enforcement Policy (“Enforcement Policy”). ACWA is a statewide association that represents over 430 public water agencies that collectively deliver approximately 90% of the water that is used for agricultural, industrial and municipal uses in California. CMUA represents 40 public water agency members that deliver water to over 70% of Californians. ACWA’s and CMUA’s member agencies are concerned with the proposed changes to the Enforcement Policy that reduce opportunities for discretion and could significantly increase penalties for discharges of potable water, a discharge that poses de minimus risk to water quality.

I. INTRODUCTION

Discharges from water distribution systems occur as a result of activities related to the construction, operation, and maintenance of water supply infrastructure and equipment for treatment, storage, and delivery of potable water to consumers. These systems may convey potable or recycled water, both of which pose a de minimus threat to water quality, yet could potentially be subject to the Enforcement Policy even when they comply with conditions of applicable National Pollutant Discharge Elimination System (“NPDES”) permit conditions and Waste Discharge Requirements (“WDRs”).

Water system operators are required to discharge at various times in order to comply with a number of regulations, including but not limited to the federal Safe Drinking Water Act, the California Health and Safety Code and the State Water Board's Division of Drinking Water. These types of discharges should not be subject to the Enforcement Policy. Changes are needed throughout the proposed Enforcement Policy update to properly reflect the de minimus threat posed by potable water discharges, to exempt discharges that are conducted in order to comply with drinking water quality regulations, and to ensure consistency with conditions of applicable NPDES permits and WDRs.

II. COMMENTS

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(a) Allowances for Environmental Justice and Disadvantaged Communities and Small Communities should be extended to potable water system and municipal separate stormwater system discharges.

Section I.G. of the draft Enforcement Policy update notes that "when water quality violations occur in disadvantaged communities, passing costs associated with facility upgrades and compliance measures through to ratepayers may create unduly burdensome financial hardships in the same way it does with small disadvantaged communities" (at p. 4)." Similarly, Section I.H notes that "complying with environmental laws and regulations will require higher per capita expenditures in small communities than in large communities" (at p. 4), and then proceeds to outline how enforcement and compliance assistance will be applied, as outlined in Appendix A. However, these two sections of the Policy only note that they apply to publicly-owned treatment works ("POTW") and sewage collection services. Since water supply systems and municipal separate stormwater system discharges are *also* regulated by NPDES permits and WDRs, and therefore are subject to this Enforcement Policy, these types of systems that serve disadvantaged and small communities and should be offered the same informal enforcement and compliance assistance as the POTW and collections systems operators.

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(b) Proposed changes to the Enforcement Priorities for Discretionary Enforcement Actions do not provide adequate differentiation between classes of violations, and contain provisions that contradict existing NPDES permits and WDRs.

The proposed Enforcement Policy substantially broadens the list of discharges that would be considered high priority Class 1 violations without consideration as to whether or not those discharges cause *actual harm* to receiving waters and their designated beneficial uses. The proposed Enforcement Policy update would define Class I priority violations as those that "pose an immediate and substantial threat to water quality and/or that have the *potential* to individually or cumulatively cause significant detrimental impacts to human health or the environment" (at p. 5), meaning that the exceedence of an effluent limit alone, without any demonstrable adverse consequences on the water body, is sufficient to establish a Class I violation.

The current Enforcement Policy requires both a permit violation and causation of an adverse impact in order to trigger prioritized enforcement action and penalty assessments. As currently drafted, the proposed Enforcement Policy update only requires that a discharge "contribute to"

exceedences, regardless of whether or not the discharge complies with NPDES and WDR requirements. This language change removes causation as a factor when categorizing a discharge as a Class 1 priority, even when conditions of many WDRs specify that an exceedence must *result in* actual harm to a receiving water body.

These proposed changes to the Enforcement Policy could improperly classify low-threat discharges as high priorities for enforcement action. Additionally, the proposed changes fail to account for the fact that some discharges are associated with the provision of essential public services, such as water supply. Language in the draft Enforcement Policy should be revised to ensure that discharges that comply with effluent limitations in NPDES permits and WDRs are not subject to enforcement actions, and that low-threat discharges, particularly those associated with essential public services, are not included in the definition of high-priority Class I violations.

Additionally, the draft Enforcement Policy update does not provide any examples of Class II violations, and completely eliminates the Class III priority. It is unclear why these changes were made, and where a Class II would apply. In fact, the revised language makes it appear that perhaps *all* discharges will be prioritized as Class I. ACWA and CMUA would like to suggest that the SWRCB revise language in this section to list examples of Class II priority violations, and to continue to include the Class III priority for discharges that pose minimal threat to water quality and little or no known potential for negative impact on human health and the environment.

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(c) Susceptibility to cleanup or abatement should properly reflect the nature of the discharge, whether it is possible to clean it up, and the natural attenuation of chlorine in discharges from drinking water systems.

Section VI.A. Step 1, Factor 3 outlines the score that would be assigned in calculating a penalty if the discharger cleans up a percentage of the discharge (at p. 16). Due to the nature of water system discharges, there is no way to clean up the discharges once they have reached a receiving water, and therefore these types of discharges would be assigned a score of 4. Additionally, this Factor notes that “natural attenuation of discharged pollutants in the environment is not considered cleanup or abatement for purposes of evaluating this factor” (at p. 17). This statement is inconsistent with the discharges from drinking water systems NPDES permit, which outlines natural attenuation as an accepted Best Management Practice (“BMP”) for discharges from drinking water systems. Language in this section of the draft Enforcement Policy update should be modified to reflect the minimal threat posed by discharges of potable water, and to reflect this accepted BMP that is outlined in the NPDES permit that regulates these types of discharges.

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(d) Additional rationale is needed to reflect updates to factors outlined in the Assessments for Discharge Violations section of the draft Enforcement Policy updates.

Both Tables 1 and 2 in Section VI.A. Step 2 of the draft Enforcement Policy update outline new factors for discharges. However, the proposed Policy update does not provide rationale for any of these new factors. In addition, this section of the Policy proposes a number of changes to the

methodology used for High Volume Discharges. Again, there is no justification for these changes, which will dramatically increase penalties for all high volume discharges. In the interest of the stated goal of transparency in enforcement actions, additional information should be provided to demonstrate why these factors are being changed.

5 The proposed Policy update also includes a provision for discharges of recycled water that “the Water Boards may elect to use a maximum of \$1.00 per gallon” (at p. 19). Since the chemistry of potable water is very similar to that of recycled water that has been treated for reuse, this provision should be extended to discharges from drinking water systems.

6 **(e) Changes to the Violator’s Conduct Factors should properly incentivize “good behavior” by including appropriate multipliers for all factors.**

Table 4 in Section VI.A. Step 4 proposes a number of new multipliers for all three factors listed under Violator’s Conduct. In order to incentivize “good behavior,” the Enforcement Policy should include multipliers that are less than 1 in all three factors. For example, removing the 0.5 multiplier for “Degree of Culpability” removes the credit for discharges that are cooperative, responsive, and collaborative with the Water Boards.

In addition, there needs to be limitations applied in the “History of Violations” factor. There should be a prescribed timeframe on how far back the Water Boards can consider when looking at an agency’s history, and there should also be an upper limit on this multiplier. Additional rationale is needed for how this multiplier is applied.

7 **(f) Allow penalties to be used for projects that promote long-term compliance.**

ACWA’s and CMUA’s member agencies strongly support the Policy’s continued inclusion of Enhanced Compliance Actions (“ECAs”) as a mechanism to maximize the positive impact of the enforcement process on the environment. We would like to encourage the SWRCB to go beyond the 50 percent cap on penalties and to allow 100 percent of penalty dollars to be applied towards ECAs. Reinvesting penalty money into infrastructure improvements supports long-term compliance and sustainability, as well as environmental enhancement and protection, and should be an option for *all* communities regardless of size or socioeconomic status. We also encourage the SWRCB to consider additional ECA allowances in areas of special biological significance for enhanced protection of these critical areas.

8 **(g) More information and outreach is needed to ensure that all stakeholders understand how the proposed Enforcement Policy changes will apply.**

Many water system operators have not been issued violations under the current Enforcement Policy. Therefore additional information regarding the process that is used in calculating penalties would be very helpful in providing clarity on this policy.

In addition, the SWRCB has not held any stakeholder outreach on these proposed changes. We encourage the SWRCB to consider holding some technical workshops throughout the state in

order to provide opportunities for public comment and interaction, to clarify the impact that these changes will have on stakeholders.

III. CONCLUSION

Considering the overall de minimus threat that discharges of potable water pose to water quality, changes are needed throughout the proposed Enforcement Policy updates. In addition, there is a need for more outreach and explanation on the significant changes that are already being proposed, especially for those that will reduce discretion and increase factors that are applied when calculating fines. ACWA and CMUA understand that a number of other associations have developed detailed comments on these proposed changes. Therefore, we encourage the SWRCB to circulate a revised draft of this policy once all comments have been received, and to conduct stakeholder outreach prior to taking this policy to the Board for adoption. We look forward to working with the SWRCB as this policy is refined.

Sincerely,



Rebecca Franklin
Regulatory Advocate
Association of California Water Agencies



Danielle Blacet
Director for Water
California Municipal Utilities Association

