Agricultural Council of California
Association of California Egg Farmers
Buena Vista Coalition
California Agricultural Irrigation Association
California Association of Wheat Growers
California Cotton Ginners Association
California Cotton Growers Association
California Farm Bureau Federation
California Fresh Fruit Association
California Grain & Feed Association
California Pear Growers Association
California Seed Association
California Warehouse Association
Dairy Cares
East San Joaquin Water Quality Coalition
Kern River Watershed Coalition Authority
Kings River Watershed Coalition Authority
Pacific Egg & Poultry Association
San Joaquin and Delta Water Quality Coalition
Western Agricultural Processors Association
Western Growers Association
Western Plant Health Association
Westside San Joaquin River Watershed Coalition
Westside Water Quality Coalition

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 above-listed agricultural organizations have reviewed the proposed revisions to the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy. In general, we express concerns with some of the proposed revisions, but also with the Enforcement Policy in its entirety as it applies to agricultural-related enforcement actions. We provide first our general comments with respect to application of the Enforcement Policy to agriculture-related enforcement actions, and second, specific comments on proposed changes.

As a preliminary matter, the agricultural community recommends that the State Water Board defer adoption of the proposed revisions at this time. Instead, the State Water Board should engage a stakeholder process to review and discuss the Enforcement Policy in its

entirety and identify needed revisions. For agriculture in particular, such a process would help to provide meaningful consideration with respect to how the Enforcement Policy should be applied to agriculture-related enforcement actions. This is imperative considering the history of development of the Enforcement Policy, and the lack of consideration as to how it applies to non-point sources of pollution.

Over the last three to five years, as regulation of agricultural activities has matured, more enforcement actions are being brought against agricultural operations for violations of applicable orders. Some of the actions are for reporting violations, while others are for alleged wrongful discharges. In either case, these enforcement actions are subject to the provisions and procedures set forth in the Enforcement Policy. However, when the Enforcement Policy was established, and in its current configuration, the Enforcement Policy fails to recognize the unique nature of agriculture. Rather, the Enforcement Policy was written in a manner that looks to address violations from point source-type facilities that typically employ some level of treatment prior to discharge to a surface water. The Enforcement Policy does not provide appropriate guidance for enforcement actions that may be taken against non-point sources such as agricultural return flows, and stormwater runoff from agricultural fields and operations. Yet despite these inadequacies, the Enforcement Policy is applied to all dischargers subject to enforcement action.

Because of these overarching concerns, the above-listed agricultural and agricultural business-related organizations respectfully request that the State Water Board defer adoption of the proposed revisions until such time as a meaningful dialogue with all stakeholders can be facilitated. Our specific comments on certain policy provisions are provided below.

I. Application of Per-Gallon Assessments

As a general observation, the Enforcement Policy, as well as the proposed revisions, fail to account for the unique nature of agricultural releases that may occur. When per-gallon penalty provisions were adopted into the Water Code, it is highly unlikely that much thought was given to how such provisions would apply to non-point sources of pollution, and in particular to releases from agricultural operations. Rather, the focus was mostly likely on potential releases of untreated sewage or industrial waste from point source facilities. Currently, the per-gallon assessment provision is being used in agricultural enforcement actions and the per-gallon calculation is assessed on the total estimated volume of water released during the specified time period – not the estimated load of the pollutant of concern that may be in the water. Such an application of the per-gallon assessment is contrary to the language of the Water Code, which specifically states that the penalty is for "each gallon of waste discharged." (Wat. Code, § 13350(e)(2).) Volume of water by itself does not equal waste, and thus a generic calculation and application of the per-gallon assessment to water greatly overestimates the actual amount of pollutants that may have entered a water way. For

agriculture, this distinction is imperative considering the nature of irrigation, as well as potential stormwater runoff from the agricultural landscape.

Specific to the proposed revision to high-volume discharges, the changes appear to set a minimum per-gallon assessment at $2.00 per gallon, unless the discharge is recycled water or the volume is in excess of 2,000,000 gallons. This necessarily means that release of agricultural return flows or stormwater from agricultural operations that are less than 2,000,000 gallons and that are subject to an enforcement action would be assessed on a per-gallon basis higher than recycled water. This would occur even if the only pollutant of concern was sediment. Such an application of the per-gallon assessment for high-volume discharges is inequitable.

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II. Ranking of Violations

Under the proposed policy, Class I violations would include (1) discharges causing or contributing to exceedances of primary maximum contaminant levels in receiving waters with the MUN beneficial use, and (2) discharges causing or contributing to in-stream turbidity in excess of 100 NTU in receiving waters with COLD, WARM and WILD beneficial uses, except during storm events. The concern here is that not all receiving waters are created equal. For example, due to blanket designations of MUN from the Sources of Drinking Water Policy, many waterbodies are considered to have the MUN beneficial use even though actual MUN use may not occur in that water body. Similarly, due to the tributary rule, many receiving waters have COLD, WARM and WILD beneficial uses even though the water body in question may actually be a drainage canal, or modified channel. Generic classification of violations based solely on beneficial use designations, without case-specific information regarding the water body to which the discharge occurred, would result in inequitable enforcement.

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III. Recovery of Minimum Economic Benefit

The proposed policy inappropriately seeks to extend minimum economic benefit recovery to all discretionary enforcement actions, including non-NPDES discharges. (See, footnote 1, Proposed Policy.) Such an extension is inconsistent with the law and should be rejected. Rather, under the statute, economic benefit is one factor for consideration. (See, e.g., Wat. Code §13327.) The policy needs to remain consistent with the law, and thus economic benefit should be a consideration, not a mandatory assessment in an enforcement action.

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IV. Ability to Pay

The proposed policy would state that any financial evidence submitted with respect to ability to pay would be treated as a public record, and that in camera or private review of such

information may only be requested in the context of settlement discussions. These revisions are arguably contrary to the Public Records Act, and certain exceptions within the Act. It is inappropriate for the Enforcement Policy to dictate what is, or is not, a public record. Rather, the Public Records Act should control with respect to financial information provided in an enforcement action. Further, the proposed policy inappropriately removes due process for alleged violators by stating that if a discharger fails to produce evidence about its finances or fails to respond to a subpoena, this should be treated as a waiver of the right to challenge the ability to pay at the hearing on the matter. Alleged violators should be afforded all due process rights at a hearing, and should have the ability to provide testimony at a hearing with respect to finances. To treat failure to produce evidence as a waiver of a right is unlawful and cannot be supported. At hearings, regional water boards have the discretion to consider the veracity of testimony with respect to ability to pay, and may adjust penalties accordingly. It is a fundamental violation of a persons' due process rights to take away this ability to provide testimony at a hearing. Further, many agriculturalists subject to enforcement actions may not be represented by counsel, and thus may not understand that failure to produce evidence prior to a hearing is considered a waiver of their right. For these reasons, such proposed revisions need to be rejected by the State Water Board.

V. Maximum and Minimum Liability Amounts

The proposed policy would mandate that maximum and minimum liability amounts be included in proposed settlement agreements, and that express findings to support the imposition of liability below the minimum, including in proposed settlement agreements, needs to be provided. We are concerned that mandating inclusion of maximum and minimum liability amounts in proposed settlement agreements undermines the intent and purposes of settlement agreements. As proposed, it suggests that proposed settlements would need to be imposed at the minimum liability amount unless there are express findings otherwise. Settlement agreements are entered into for a number of reasons, including for judicial efficiency and other public interest factors. Mandating the amount of settlement as implied here undermines this process, and makes it more difficult for dischargers to negotiate appropriate settlement agreements. Accordingly, the proposed revisions should be rejected as they apply to proposed settlement agreements.

VI. Settlement Considerations

The proposed policy would include footnote 4, which is a legal conclusion with respect to statutes of limitations, laches and similar equitable defenses. This conclusion is inappropriate for inclusion in the Enforcement Policy and needs to be deleted.

In summary, we encourage the State Water Board to refrain from adopting the proposed policy at this time. Much further discussion and dialogue is needed with respect to

the specifically proposed changes, as well as application of the policy in general to agriculture-related enforcement actions. Please contact Tess Dunham at (916) 446-7979, or tdunham@somachlaw.com, for questions regarding the above comments.

Sincerely,

Theresa A. Dunham

cc: CJ Croyts-Schooley

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