



May 28, 2009

Via Electronic and U.S. Mail

Mr. Reed Sato, Chief, Office of Enforcement
State Water Resources Control Board
Office of Enforcement
1001 I Street
Sacramento, CA 95814

Attn: Jeanine Townsend, Clerk to the Board
commentletters@waterboards.ca.gov

RE: **Comments on May 6, 2009 Water Quality Enforcement Policy (WQEP)—
WQEP Workshop 6/4/09**

Dear Mr. Sato:

The above-listed clean water associations (Associations) appreciate the opportunity to review and comment on the May 6, 2009 draft of the Water Quality Enforcement Policy (WQEP). We are pleased that the WQEP addresses many of the comments we submitted in January 2009, and includes a number of our requested revisions. This letter includes comments on several new proposals contained in the WQEP, and explains in more detail some of our other concerns with the WQEP. In summary, we urge the State Water Resources Control Board (State Water Board) to adopt Alternative 1 for the Penalty Calculation Methodology. In addition, the Associations generally support the new discharge monitoring report (DMR) provisions that address situations when there is no discharge to surface waters.

COMMENTS ON NEW ISSUES

A. The WQEP Should Include Alternative 1 for the Penalty Calculation Methodology

We appreciate that the State Water Board is continuing to explore policy options and alternative approaches within the context of the WQEP, and is providing opportunities for interested parties to comment on them before they release a final draft. In the May 6th draft of the WQEP, Alternative 2 is proposed as a new approach to assessment of monetary liabilities, in

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the context of administrative civil liability (ACL) complaints. Under Alternative 2, the “Monetary Liability Recommendation Panel” would convene a panel of 5 senior management staff from the water boards that would be responsible for developing a proposed monetary civil liability assessment for each case. The Associations prefer Alternative 1 over Alternative 2, and for the following reasons, we recommend that it remain as the approach to penalty calculation contained in the WQEP. The primary reason we prefer Alternative 1 is that it provides all parties with greater transparency as to how penalties are calculated, which is a critically important element needed to attain the State Water Board’s goals of fair, firm and consistent enforcement. Alternative 2 is far less transparent and may not lead to greater consistency than currently exists (and we note that a stated goal of the WQEP is that any assessment of administrative liability should “be assessed in a fair and consistent manner” (*See* p. 11)). As the groups of regional water quality control board (Regional Water Board) representatives rotate on an annual basis, the decisions of the group will necessarily be influenced in different ways, potentially leading to inconsistency. An additional concern is the proposed dedication of five of the State and Regional Water Boards’ management staff to review each proposed ACL complaint and develop proposed discretionary ACL amounts. In these times of budget constraints, it does not seem appropriate to dedicate these high-level staff – who undoubtedly already have full responsibilities – to this task. Another concern is the creation of what appears to be almost a “rebuttable presumption” that the Panel’s recommended amount is appropriate by requiring Regional Board staff to justify why they did not adopt the Panel’s recommendation if their penalty amount is not within 10 percent of the Panel’s recommendation.

Lastly, we are concerned about the role of State Water Board staff as members of the Panel. In appeals of ACL penalty amounts, these same staff members may play a role in advising the State Water Board regarding the appeal. Because this Panel would be recommending the penalty amounts to the Regional Water Boards, the lack of clarity and separation of staff functions raises potential due process concerns. Another weakness of the proposed Panel approach is that Regional Water Board staff would be essentially required to adopt the Panel’s recommendation or something very similar to it in most instances, but, should there be an appeal or litigation over the ACL, the Regional Water Board would be required to defend the penalty amount even though it did not develop or produce the penalty recommendation in the first instance. In conclusion, Alternative 2 has significant disadvantages over Alternative 1 and we recommend against making this major change in the WQEP.

B. The DMR Provisions for Where There Is No Discharge to Surface Waters Are Appropriate and Necessary

The Associations appreciate the newly created section “Defining a ‘Discharge Monitoring Report’ Where There is No Discharge to Surface Waters.” (WQEP at pp. 31-32.) The provisions are necessary to avoid the punitive and unfair application of mandatory minimum penalties (MMPs) for failure to report. We agree that a report required to state that no discharge to surface waters occurred during the monitoring period is not appropriately a “discharge monitoring report” under Water Code section 13385.1(a). The report would not ensure

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compliance with permitted effluent limits and thus late submittal of the report would not be properly subject to MMPs.

The Associations request that the State Water Board revise this newly created section to address two key issues for purposes of clarity and uniform application of the WQEP. First, the section should provide that the Regional Water Board will timely notify the permittee in writing that it failed to submit a report and may therefore be subject to MMPs. The notification will allow the agency to submit a late report if appropriate, and will save both the Regional Water Board's and permittees scarce resources that would be necessary to assess and then, if warranted, dismiss, MMPs, in accordance with the WQEP. In order to clarify the process, we request that the first sentence in the last paragraph on page 31 be modified to read:

~~As a matter of practice, however, if such~~ After written notification to the discharger that such a report has not been received, the Regional Water Board may ~~presume that there were discharges during the relevant monitoring period and should~~ consider imposing MMPs for the failure to timely submit a discharge monitoring report.

We also request clarification of the intent of the 2nd paragraph on p. 32, which states: "If such a statement is submitted, the ongoing accrual of discretionary administrative civil liabilities, which the Regional Water Boards may assess under section 13385(a)(3), will cease upon the date the written statement is received by the Regional Water Board." It is our understanding that this section is intended to generally provide relief from the "compounding" method used to assess MMPs for non-reporting, but this statement is confusing because of its reference to the "ongoing accrual of discretionary administrative civil liabilities" and the fact that, if the regular methodology described in Section VI is applied, the penalties could be far greater than currently is the case, which would be contrary to that intent. We would like the opportunity to discuss this issue with you and your staff and, if necessary, to develop an alternative approach.

COMMENTS ON OUTSTANDING ISSUES

A. The Proposed Approach to Penalty Calculation for Recycled Water Releases Is Inconsistent with the State's Goal of Encouraging Maximum Use of Recycled Water

Since our prior comment letter, the State Water Board adopted the Recycled Water Policy (Policy), which was recently approved by the Office of Administrative Law and is now in effect. The potential for imposition of administrative civil liabilities for inadvertent recycled water releases is of great concern to our members, and sends a message that is contrary to the intent of the State Water Board to encourage increased water recycling. We believe that it will be very difficult to reach the much-needed, yet very challenging goal set in the Policy of increasing the use of recycled water over 2002 levels by at least one million acre-feet per year (afy) by 2020, and by at least two million afy by 2030.

To ensure that the WQEP does not create a disincentive to the development of recycled water projects or the use of recycled water by customers, we request that the WQEP be further revised to delineate additional areas of discretion in penalty calculation related to recycled water releases. We believe it is critical to ensure that the WQEP does not create a disincentive for the use of recycled water that could undermine the success of the Policy, and we would welcome the opportunity to discuss further changes with you and your staff related to recycled water and the WQEP.

B. The WQEP Should Clarify the Hearing and Petition Process for Enforcement Actions the State Water Board Takes Directly

The WQEP states that the State Water Board may itself pursue enforcement actions. (See WQEP at p. 9.) However, a formal enforcement action is a quasi-adjudicatory proceeding and as such requires the opportunity for a fair hearing before a neutral decision-maker. For example, a Regional Water Board that proposes to adopt a cease and desist order must afford the discharger an on-the-record adjudicatory hearing. The discharger also has the right to petition the State Water Board for review of the Regional Water Board's action or inaction. Entities against whom the State Water Board proposes to take direct, formal enforcement measures must have the same rights. The WQEP should clarify the hearing and petition process for such actions that the State Water Board takes directly.

C. Good-Faith Efforts to Eliminate Non-Compliance Should Be a Factor Used to Modify Initial Liability

Even publicly owned treatment works with an exemplary compliance rate may have a history of violations. In using the "History of Violations" adjustment factors in Table 4 of the WQEP to modify an initial monetary liability for a violation, the Water Boards should consider the discharger's good-faith efforts to eliminate the non-compliance. (See WQEP at p. 18.) This approach would reflect that not all violations result from "bad acts." The approach would also reflect that dischargers often must spend a significant amount of time, money and other resources to address a problem and return to compliance.

D. "Repeat Violations" that Trigger Mandatory Minimum Penalties Must Involve the Same Pollutant Parameter

The State Water Board has markedly improved the provisions related to MMPs since the original draft WQEP. However, we encourage the State Water Board to revise the proposed MMP provisions further to assure that the Regional Water Boards consistently and clearly apply MMPs throughout the state. Of particular concern to the Associations is that the WQEP specifies that to trigger MMPs for "repeat violations," the violations must be for the *same pollutant parameter*.

Under Water Code section 13385(i)(1)(a), the Regional Water Boards must assess an MMP for any “chronic” violation where a discharger exceeds “a waste discharge requirement effluent limitation” four times in any period of six consecutive months. Some Regional Water Boards interpret this to mean *any combination* of effluent limit violations triggers an MMP. For example, a Regional Water Board may impose an MMP for a chronic violation where the discharge had four total exceedances—one each for copper, temperature, iron, and total dissolved solids. The WQEP should eliminate this arbitrary practice, which is inconsistent with Water Code section 13385(i)(1)(a).

The reasonable and otherwise appropriate way to interpret Water Code section 13385(i)(1)(a) is that the discharge must exceed the same pollutant parameter for the violation to be chronic. First, the statute allows three violations to occur without an MMP to allow the discharger to identify and correct the underlying problem. Assessing MMPs for unrelated effluent limits does not serve this purpose. Different effluent limit violations typically occur for different reasons, and any similarity in timing is usually coincidental.

Second, the MMP law (Wat. Code § 13385(h)(2)) incorporates by reference federal regulations, which provide that “effluent violations should be evaluated on a parameter-by-parameter and outfall-by-outfall basis.” (40 C.F.R. § 123.45, App. A.) Similar to the MMP law, the federal regulations provide that “chronic violations must be reported ... if the monthly average permit limits are exceeded by any four months in a six-month period.” (40 C.F.R. § 123.45, App. A.) This federal regulation supports the suggested approach to addressing truly chronic violations.

Further, Water Code section 13385(i)(1)(a) refers to violations of “a” waste discharge effluent requirement. The use of “a” instead of “any” indicates that the Legislature intended to penalize repeat violations of a single effluent limit. Each of the other three categories of Water Code section 13385(i)(1) are very specific—one must fail to file the same report four times, etc. Finally, the Legislature already addressed random, individual effluent limit violations by creating a category of “serious” violations.

E. Where a Permit Expresses an Effluent Limit as a “Rolling” Average or Median, A New Rolling Average Should Be Calculated After an Exceedance

The State Water Board can also further assure that the Regional Water Boards consistently and clearly apply MMPs throughout the state by providing guidance on “rolling” averages or medians. In particular, the WQEP should specify that for violations that involve effluent limits expressed as “rolling” averages or medians, a new rolling average should be calculated after each exceedance.

The Office of Chief Counsel advises Regional Water Boards that for rolling averages or medians, there are “violations for each new time period that the average or median was exceeded.” The problem with this approach is that a single sample result yields multiple

penalties where the averaging period “straddles” the exceedance. At least one discharger received 21 penalties for a single sample because of the way in which the period of the rolling average was specified. To prevent the unfairness and multiple counting under this single-data-point scenario, the WQEP should direct that when the Regional Water Boards enforce this type of effluent limit, they are to “start over” with a new rolling average following an exceedance. This logic is similar to that applied with regard to repeat and serious violations, where the State Water Board has recognized the unfairness of “double counting” violations.

F. The Policy Should Clearly Distinguish the Calculation of Economic Benefit for Surface Water and Other Violations

As explained in our previous comment letter, the WQEP blurs the role of economic benefit in calculating ACLs for non-surface water violations. We understand that the California Water Code requires that minimum liability for surface water discharges must recover the economic benefits derived from the acts that constitute the violation. However, for non-surface water discharges, the Water Code merely directs the Water Boards to take economic benefit or savings, if any, into consideration in determining the amount of civil liability. (Wat. Code § 13327.) Therefore, we request that the first sentence under Step 8 (p. 22) be revised as follows: “The Economic Benefit Amount shall be estimated for every violation *for which enforcement action is brought pursuant to Water Code section 13385, and the Economic Benefit Amount shall be considered for every violation for which enforcement action is brought pursuant to Water Code section 13350.*”

G. The Policy Should Be Modified to Provide Additional Flexibility for Small and/or Disadvantaged Communities

The Associations appreciate the efforts of State Water Board staff to include provisions in the WQEP that assist small and/or disadvantaged communities. As explained in our previous letter and at the staff workshop, we recommend that the WQEP be modified to: (1) clearly allow small communities to *estimate* the number of people served (p. 29); (2) allow the Water Boards to use discretion for small and/or disadvantaged communities regarding whether to apply the adjustment factor (minimum increase of 10%) when considering the history of violations (p. 18); (3) give the Water Boards discretion to waive the cost of investigation and enforcement for small and/or disadvantaged communities (p. 22); and, (4) make the economic benefit adjustment for small and/or disadvantaged communities discretionary (p. 22).

CONCLUSION

There are a number of other comments that were included in our letter of January 30, 2009 which were not addressed in the May 6, 2009 version of the WQEP, and we request that they be reconsidered and addressed in the next draft of the WQEP.

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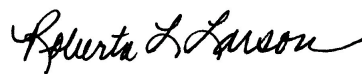
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In conclusion, the Associations thank you for considering our comments on the May 6, 2009 draft of the WQEP. We may be unable to have a representative attend the June 4, 2009 workshop, and we hope for additional opportunity to discuss these issues with you and your staff. We would like to schedule a meeting in June and we will be in touch with you to find a time that is mutually convenient.

In the meantime, please free to contact Jim Colston at (714) 593-7458 or jcolston@ocsd.com, or Bobbi Larson at (916) 446-7979 or blarson@somachlaw.com if you have any questions about our comments.

Sincerely,



Roberta Larson, CASA



James Colston, Tri-TAC



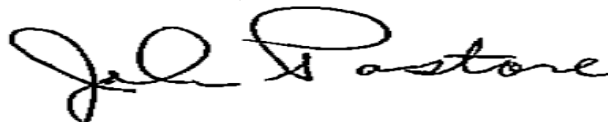
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