CALIFORNIA COASTKEEPER ALLIANCE
A Statewide Voice for Our Waters

Heal the Bay

February 7, 2008

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: February 19, 2008 Workshop: "Draft Water Quality Enforcement Policy (Jan. 8, 2008)"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers spanning the state from the Oregon border to San Diego,[1] and Heal the Bay, we welcome the opportunity to submit these comments pertaining to the above-described workshop on the Draft Water Quality Enforcement Policy (Policy). As we articulated in our June 2007 letter on scoping for this Policy (attached), enforcement of water quality laws is a significant and ongoing issue, and has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for major, specific improvements in enforcement at the State and Regional Water Board levels.[2] **New approaches and renewed commitments to enforcement of all sources of pollution – both point and nonpoint, and to surface water and groundwater – are needed to ensure that continued violations stop and water quality improves.**

A number of the primary concerns raised in our June 2008 letter remain, unfortunately, unaddressed in the current draft Policy. In particular, we address the following points in this letter, and refer you to the attached June 2007 letter for additional details:

- **The Policy fails to set out a process for identifying non-filers, particularly where entire categories of pollutant discharges are unregulated.** This includes failure to enforce Porter-Cologne requirements with respect to many polluted runoff discharges to surface water, as well as many discharges to groundwater.
- **The Policy fails to set out a clear process for ensuring enforcement of waivers of waste discharge requirements.** Waivers do not have many of the same enforcement tools as WDRs, and so serious polluted runoff-borne contamination in the Delta and elsewhere is continuing essentially unabated. The Policy should be clearer about this difference and identify enforcement processes specifically geared to waivers, to ensure that discharges regulated by waivers do not continue to degrade water quality.

[1] Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.
[2] Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

- **The avoidance of enforcement by permit writers continues in the form of compliance schedules and serial TSOs and needs to be addressed in the Policy.** Both compliance schedules and serial TSOs should be integrated into or at least discussed in the Policy to connect the permit writers and enforcement staff and to prevent unseen off-ramps from enforcement.
- **The Policy needs to address the process the State Water Board will follow to utilize its own enforcement authority fully.** SB 729 (2006) granted new enforcement authority to the State Water Board, which now has a separate Office of Enforcement. The Policy should lay out how the State Board will exercise that authority in coordination with the regional boards.
- **The Policy should include recommendations for action to address unenforceably vague permits.** The recent 13385(o) report highlighted the significant investment of staff resources that are needed to identify stormwater violations due to vague permits. A specific commitment should be made to increasing the use of numeric limits in permits to increase enforceability and compliance.
- **The Policy should offer additional innovative solutions to the problem of ineffective fines and penalties.** We recommend that the Policy commit to implementing a streamlined fine payment policy like the IRS model; *i.e.* a violator should submit a check for the required fine with the violation report. If legislative changes are needed to accomplish this, the Policy should identify those changes. The Policy also should either re-direct more fine money to the regions, or evaluate the effectiveness of the current system of directing fine monies to Sacramento in achieving clean water.
- **The Policy should not redirect SEP money away from affected areas.** We have some significant concerns with the Policy's proposed changes to the SEP program.

We briefly discuss each category of concerns below, and welcome the opportunity to address them with you further at the February 19th workshop.

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<u>The Policy Fails to Establish a Clear Process to Address Non-Filers, Particularly Where Entire Categories of Pollution Discharges Are Unregulated</u>.

The Policy does not lay out a clear strategy for identifying and acting on non-filers, which is a particular problem with polluted runoff dischargers. As we already reported in our June 2007 letter but repeat here, **Porter-Cologne regulates discharges by <u>all</u> pollution sources, both point and nonpoint, to both surface water and groundwater**. Specifically, Porter-Cologne requires all who discharge or propose to discharge waste "that could affect the quality of the waters of the state" (defined as including groundwater) to report the discharge to the local Regional Water Quality Control Board. (Cal. Water Code § 13260.) The local Regional Board may regulate various discharges with WDRs or, if appropriate, with "waivers of WDRs, with conditions" to ensure that those discharges do not impact use of the state's waters. Water Code section 13269(a)(1) specifies, however, that waivers of WDRs should only be issued where the Regional Board has determined that a waiver would both be in the public interest <u>and</u> is "consistent with any applicable state or regional water quality control plan."

Although the Porter-Cologne Act gives the Regional Boards a clear directive to regulate all sources of pollution to surface water and groundwater, including polluted runoff not regulated under

the federal Clean Water Act, the Regional Boards all continue to fail to implement or enforce these provisions for one more categories of polluted runoff to surface water, and for many categories of pollution to groundwater. These illegal discharges cause and contribute to significant and lasting degradation of surface and groundwater, and yet no action on redressing these enforcement gaps is discernable.

CCKA has begun collecting information on such gaps, and attaches a table of preliminary results. One example is in Region 3, where there is abundant evidence that *E. coli* O157:H7 is a grazing- and ranching-related problem that affects waters and growing areas in Region 3 and is likely responsible for hundreds of serious injuries and perhaps several deaths from ingestion of *E. coli*-contaminated food (clearly making it a "Class I" violation). A June 2006 report[3] prepared by that Regional Board itself found that numerous water bodies are contaminated by O157:H7, and that the "most frequent occurrence of E. coli O157:H7 occurs at sites flanking areas used for grazing purposes."[1] The report added that cattle (which abut a number of affected growing areas) are significant sources of O157:H7, that the strain can persist in the soil for 10-11 months after livestock have been removed, and that O157:H7 has been found near and downstream of livestock areas.[1] The Board concluded that "what is certain is that livestock are a source of ... O157:H7" in the Central Coast region, and the "livestock have been observed roaming in surface waters as well as along riparian areas" of the area. Yet there continues to be no waiver or WDR for grazing activities, in violation of Porter-Cologne. In the absence of such required action, valuable riparian habitats are being ripped out or otherwise destroyed along irrigated lands on the misguided assumption that the *E. coli* problem is associated with rodents and other small creatures, compounding the impacts of regulatory inaction. **The Policy fails to address the gap created by an enforcement system that focuses on enforcement with established regulatory programs (waivers, WDRs), rather than enforcement with the reporting/filing requirements in Porter-Cologne, which exist regardless of whether there is a formal regulatory mechanism.**

Regardless of the lack of a formally-adopted program to oversee pollution, Water Code Sections 13260 *et seq*. make it clear that **discharges that occur without required reporting/filing and without associated, necessary waste discharge requirements violate the law**. The Policy should include a process for capturing those violations and acting on them.

The Policy Fails to Set Out a Clear Process for Ensuring Enforcement of Waivers of Waste Discharge Requirements.

As is evident throughout this letter, the Policy's focus tends to be skewed toward Clean Water Act-regulated discharges. Polluted runoff, which is generally (and, we believe, incorrectly) regulated by waivers, is relatively ignored. This is particularly apparent in the case of enforcement tools, many of which apply only to discharges regulated by WDRs. Without a clear Policy section specific to enforcement of waivers and their associated (and limited) enforcement tools, the Policy creates the misimpression that waivers can be enforced effectively – when in fact, they currently are not. This is of particular concern for waiver-regulated discharges into impaired water bodies, where we would argue strongly that waivers conflict with Porter-Cologne. Accordingly, **the Policy should have a separate section specific to enforcement of waivers; this section should identify enforcement tools and processes specifically applicable to waivers, and identify enforcement**

[3] http://www.waterboards.ca.gov/centralcoast/TMDL/documents/SalRivFecColPrelimProjRptJuly06_000.pdf.

gaps that may need to be filled to ensure that discharges regulated by waivers do not impact water quality.

The Policy Should Address the Continued Avoidance of Enforcement by Permit Writers through the Use of Lengthy Compliance Schedules and Serial TSOs.

Currently, enforcement staff can miss significant violations because of permit staff who extend compliance schedules in violation of the law. As former Cal-EPA Secretary Dr. Alan Lloyd recommended, the State and Regional Boards must "[c]reate a clear division of duties between permitting and enforcement staff...."[4] While this process has begun, it is not complete until permit staff cease practices that avoid enforcement, such as use of illegal compliance schedules. The issue of compliance schedules is being addressed separately, which is a positive step, but it also should be integrated into or discussed in the Policy to connect the permit writers and enforcement staff, and to prevent off-ramps from enforcement.

In addition to lengthy compliance schedules, we have informed the Board regularly about the problems associated with "serial TSOs" and lack of enforcement of TSOs. For example, a situation exists in Region 4 where, between October 12, 2000 and December 14, 2006, the Regional Board issued seven individual Time Schedule Orders (TSOs) to the City of San Buenaventura. An eighth draft TSO is now being proposed. The continuous cycle of TSOs with interim limits is inappropriate and potentially illegal, and will ensure that the discharger is never held accountable for meeting final effluent limits. Moreover, with this precedent, it is unlikely that other permittees will take their TSO seriously. A TSO is meaningless unless it is one TSO and one TSO only, which should include enforceable milestones and mandatory minimum penalties. Enforcement should begin on the first day after the TSO deadlines pass, rather than allowing for yet another TSO with a lack of enforcement – commonplace even where effluent limits are not close to being met – to be assigned instead.[5]

The Policy Should Address the Process the State Water Board Will Follow to Utilize Its Own Enforcement Authority Fully.

SB 729 provided the State Board with its own enforcement tools, to be used "after consulting with the regional board" to ensure that State Board action "will not duplicate the efforts of the regional board." The impetus for this provision was concern over lack of Regional Board action on clear violations, which arose out of the Hilmar Cheese incident in Region 5. This problem is ongoing, as illustrated vividly in Region 2 this week (see attached news story). Cal-EPA has called for an almost unprecedented investigation into Region 2's failure to act on a 2.5 million gallon sewage spill on January 25th; the Regional Board said staff didn't act immediately because they did not notice a revised report on the spill. In a letter to the Regional Board dated February 5th calling for an investigation into the Regional Board's actions, Cal-EPA Secretary Adams said the delay is "disturbing because of the potential environmental effects to the Bay through the lack of aggressive action" and stated that the Board should have immediately investigated the spill. Notably absent from this response was the State Water Board.

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[4] Lloyd Memo at 2.

[5] *See, e.g.*, Letter from Dr. Mark Gold, Heal the Bay to Jonathan Bishop, LA RWQCB (Aug. 28, 2006); Letter from Kirsten James and Dr. Mark Gold, Heal the Bay and Mati Waiya, Wishtoyo Foundation to Deborah Smith, LA RWQCB (June 6, 2007).

The Policy needs to include the State Water Board's own process for using its SB 729 authority to take enforcement action when the Regional Boards fail to do so. This is critical authority that should not be ignored in an attempt to spare a Regional Board some potential embarrassment. Carefully targeted State Board enforcement actions will help raise the bar for enforcement across the state and benefit all Regional Boards, as well as the waters that they are mandated to protect. Such actions should be the primary goal of the State Water Board's new enforcement unit, which is a potential model for separation of permit writing and enforcement that should be replicated throughout the regions.

The Policy Should Include Recommendations for Action to Address Unenforceably Vague Permits.

As discussed in detail in our June 2007 joint letter, the Cal-EPA Enforcement Initiative found that "one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable. Permit requirements must be unambiguous. They should be written in such a way that they are clear, easy to understand, and determining compliance is simple. Similarly, the enforcement consequences for violation should be clear."[6]

The State Water Board's recent 13385(o) report[7] similarly found that, unlike the numeric effluent limitations found in the "vast majority" of wastewater NPDES permits, which are self-monitored and self-reported by the discharger,

> stormwater NPDES permits currently contain no numeric effluent limitations and instead rely upon a suite of general narrative effluent limitations, made specific by a plan that is only kept at the site. Compliance determination these effluent limitations at stormwater facilities therefore depends heavily on site visits . . . .[8]

In other words, tracking enforcement of permits with numeric limits is far less staff intensive (and so far less costly) than tracking enforcement with narrative limits, which need site visits. As articulated in the two Cal-EPA enforcement memos referenced earlier, this clearly points to a recommendation to increase use of numeric limits in stormwater permits in order to streamline both compliance and enforcement. **We ask that the Policy include a process for incorporating numeric limits in stormwater permits wherever possible to address this ongoing issue. This is the same recommendation that former Secretary Lloyd made in 2005**:

> Where appropriate to achieve water quality protection, numeric limits based on sound science should be incorporated into permits that define the allowable discharge or pollutants that the Boards determine are high priority.[9]

We agree with the Secretary that numeric limits, as well as clearly established deadlines, are essential to a sound enforcement program and should be part of the Policy.

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[6] Enforcement Initiative at 8.
[7] SWRCB, "Draft Enforcement Report per California Water Code Chapter 5.5 Section 13385(o)" (Jan. 2008).
[8] *Id.* at 16.
[9] 2005 Lloyd Memo at 2.

The Policy Should Offer Additional Innovative Solutions to the Problem of Ineffective Fines and Penalties.

The January 2008 13385(o) report makes numerous references to relatively low enforcement rates resulting from a lack of staff. But enforcement staff time is partly used in exercises that could be far more efficient.[10] For example, when a NPDES discharger submits a self-monitoring report indicating violations, regional board staff must then use valuable enforcement time to seek and collect the necessary penalties, even when mandatory minimum penalties are required. The process would be more efficient and staff time would be saved if dischargers included a check for the minimum fine, instead of making the Boards go after them. The Policy should explore the steps needed to implement this IRS-type process, which could be a potentially critical piece of the solution to the problems of relatively low fine collection and MMP backlogs. If legislative changes are needed to accomplish this, the Policy should identify those changes.

In addition, the Policy should explore the idea of keeping more fines and penalty money in-Region. CCKA and individual Waterkeepers have been told by a number of Regional Water Boards that since much of the fine and penalty money is re-routed to the State Board, there is a disincentive to increase costly enforcement that is not supported with fines kept in-Region. Our understanding of the reason that this has not occurred is that the State Water Board has concerns that more of the fines need to be deposited centrally and redistributed to support regions that have less of an opportunity to collect penalty money. Unfortunately, to date there has been no clear accounting of these funds to determine the extent to which the fines/penalties processing structure actually creates incentives or disincentives for enforcement. Given the serious state of the 2008-09 California budget, and the equally significant need for increased enforcement, a clear answer to this question is critical at the current time. We ask that the Policy either increase the amount of fines and penalties that are kept in-Region, or establish a process for evaluating the utility of that money in achieving clean water (a) under the current system of directing significant funds to the State Water Board and (b) under a new system of re-directing more of that money to the Regions that are investing staff time and resources in increased enforcement.

The Policy Should Not Redirect SEP Money Away from Affected Areas.

Many areas of the state have experienced significant water quality benefits resulting from the implementation of Supplemental Environmental Projects ("SEPs") that staff pursued in lieu of a monetary assessment imposed in an ACL complaint. The Policy, however, proposes to reduce the credit permitted for a SEP from 50% to 25%, stating that "[t]he State Water Board has a strong interest in the use of funds for SEPs that would otherwise be paid into accounts for which it has statutory responsibilities to manage and disperse." This proposed reduction in funding for SEPs would greatly limit positive regional impacts on the ground, in the areas affected by the pollution. As touched upon in the "Nexus Criteria" section of the Policy, it is important that penalty monies stay in the Region to benefit the areas that were degraded by the illegal action.

For example, as a result of a settlement for an 841,000-gallon sewage spill that closed beaches in Los Angeles County for many days, nearly $2.5 million was provided for SEPs in Los Angeles County. One of the funded SEPs will directly improve beach water quality in the vicinity

[10] The issue of enforcement staff time used to manually enter discharger reports online is another important issue that needs to be addressed expeditiously.

of the closed beaches. If only a 25% credit was allowed, as is proposed in the Policy, Region 4 would have seen approximately $1.75 million dollars less in local program funding, an extremely significant reduction in local benefits. Further, there is no guarantee that the monies re-directed to the State Board would ever come back to the region or even be used for direct water quality improvements in general, let alone benefit the specific area impacted by the illegal activity. This is of significant concern to our organizations and others, and we ask that the 50% credit be restored.

In addition, the Policy outlines general SEP qualification criteria and includes specific examples of types of SEPs. "Public awareness projects" have been deleted from the list of example projects. In fact, education-related SEPs can be extremely beneficial. For instance, a SEP recently selected in Los Angeles County funded an 8.1-acre environmental education facility that will serve to educate the entire community on water quality issues. The State Water Board has long recognized the importance of education in protecting and maintaining water quality. Indeed, the stated mission of the State Board's Education and Outreach Program is "... to educate all Californians about the importance of water quality so that they will support our efforts and understand their role in protecting our state's rivers, lakes, streams and coastal waters." We ask that the Policy maintain public awareness projects and education programs as part of the SEP program.

* * *

The impacts of continued failure to enforce water quality laws are clear. Every listing of an impaired water body in the state is an example of a lack of enforcement, and the number of impaired waters is rising. California can afford no more delays in developing a meaningful enforcement Policy that covers all discharges to waters of the state, that fully uses all enforcement tools available to both the State and Regional Water Boards, and that identifies gaps that need to be filled in order for enforcement to be most effective.

We appreciate the opportunity to provide these comments, and we look forward to working with you to set California on an enforcement path that will ensure clean water now and in the future.

Sincerely,

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Kirsten James, Water Quality Director
Heal the Bay
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attachments

ATTACHMENT 1

Gaps in Regulatory Programs for Key Pollution Sources (Draft)

Gaps in Regulatory Programs for Key Pollution Sources (CCKA Draft, 2-08)

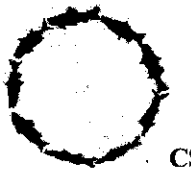
[illegible]	[illegible]	[illegible]
(1) North Coast	*Irrigated Ag*	WDR for Wineries, no other waiver or WDR in place (but considering).
	Grazing	No WDRs or waiver program.
	Non-NPDES CAFOS	No current WDR/Waiver for non-NPDES permitted facilities, proposing some regulation of dairies high on staff priority list.
	Marinas	Considering WDR or waiver, monitoring and waiting for templates from State or other regions.
(2) San Francisco Bay	*Irrigated Ag*	Staff claims no irrigated ag, save some vineyards; Farm Bureau websites in Region indicate differently. Has issued individual WDRs to a few wineries.
	Grazing	No waivers or WDRs except waiver for TMDL purposes; currently "studying the issue"
	Marinas	Staff claimed that only facilities of concern in region are regulated under industrial storm water permit. No WDR for marinas otherwise.
	Timber	No WDRs issued; staff asserts no timber harvesting in region.
(3) Central Coast	*Grazing*	No waivers or WDRs; assessing the issue as do TMDLs.
	Non-NPDES CAFOS	No WDRs or waiver program for non-NPDES permitted facilities.
	Marinas	No WDRs or waiver program.
(4) Los Angeles	*Grazing*	No WDRs or waiver program.
	Non-NPDES CAFOS	No WDRs or waiver program. Address problems on case by case basis.
	Marinas	No WDRs or waiver program (other than general storm water permits).
	Timber	No WDRs or waiver program. Staff claims no activity in region.
(5) Central Valley	*Irrigated Ag*	Waivers; but groundwater not covered (unlike Central Coast)
	Grazing	Staff states they are working on a waiver, but it is a low priority issue.
	Marinas	No WDRs or waiver program. Staff claims they've studied it but don't think there are problems that need to be addressed. Lake Shasta has MOU with other agency to address gray water on houseboats.
	Timber	Private lands regulated by Cal Dept of Forestry and Fire Protection; RB1 serves as advisor to CDFFP in approving Timber Harvest Plans.
(6) Lahotan	*Irrigated Ag*	No WDRs or waiver program.
	Grazing	Developing waiver for grazing operators in the Bridgeport and East Walker River Watersheds, which include numerous streams listed as impaired for pathogens.
	Non-NPDES CAFOS	No WDRs or waiver program. Do have some under individual WDR (Mojave River area), considering possibility of general order, but have about a half a dozen facilities in region.

Lahotan (*cont.*)	*Marinas*	Lake Tahoe Basin only (General NPDES Permit for Discharges of Storm Water Runoff Associated with Industrial Activities and Maintenance Dredging at Marinas).
(7) Colorado River Basin	*Irrigated Ag*	No WDRs, claim to address through voluntary TMDL compliance program.
	Grazing	No WDRs or waiver program.
	Non-NPDES CAFOS	Waiver applies to large facilities (over 1000 animals), otherwise no WDR or waiver.
	Marinas	No WDRs or waiver program.
	Timber	No WDRs or waiver program.
(8) Santa Ana	*Irrigated Ag*	Staff doesn't think that level of activity poses problem in watershed, though some areas in Orange Co being addressed through the 3-tier program
	Grazing	Claims no significant grazing in region.
	CAFOS	General WDR adopted 9/07 but addresses cows only - for operations that are dairies over 20 cows, or heifer/calf ranches of herd size over 50. No WDR or waiver for non-dairy facilities.
	Marinas	Nothing but voluntary education program in place.
	Timber	Claim none in region.
(9) San Diego	*Marinas*	No waiver or WDRs.

***Into surface water only.**

ATTACHMENT 2

Comment Letter from CCKA *et al* to SWRCB, Water Quality Enforcement, June 2007



June 13, 2007

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: June 28, 2007 Workshop: "Policy Direction on Water Quality Enforcement"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers spanning the state from the Oregon border to San Diego,[11] NRDC, Heal the Bay, Sierra Club California, Environment California, the California Sportfishing Protection Alliance, and the Pacific Coast Federation of Fishermen's Associations, we welcome the opportunity to submit these initial comments pertaining to the above-described workshop on water quality enforcement. The issue of enforcement of environmental laws generally, and water quality laws in particular, has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for significant, specific improvements in enforcement at the State and Regional Water Board levels.[12] While some action has been taken on several of the recommendations in these and other directives, it is our experience that there remains continued, systemic problems with enforcement that simply will not be redressed without a policy direction overhaul and accompanying redirection of staff resources.

In brief, our concerns with respect to enforcement of state and federal water quality laws can be divided roughly into the following categories:

[11] Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.
[12] Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Cal/EPA Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

- **There is a complete failure to enforce entire categories of laws**. This includes failure to enforce Porter-Cologne requirements with respect to many polluted runoff discharges to surface water, as well as the vast majority of discharges to groundwater.
- **The system of enforcement of permits by the permit writers is inherently flawed.** The need to separate permit writing and enforcement duties was specifically identified in the 2005 Lloyd Memo.
- **Permits are written in many cases to be unenforceable.** This reflects two major concerns: first, a lack of clarity in the provisions themselves (which are often ambiguous and subjective); and second, a lack of enforceable deadlines for compliance. As to the latter, compliance schedules often extend indefinitely the time for meeting legal requirements, leading to ongoing water quality degradation.
- **There is little on-the-ground-enforcement presence.** Regular visits from personnel – State or Regional Board or other enforcement personnel – are needed both for enforcement and education purposes.
- **Fines and penalties fail to address and solve the problem at hand.** Typically low to nonexistent, they at best they appear to be driven by MMPs, which were adopted to ensure that <u>some</u> enforcement action was taken, not to become the focus of the enforcement program. Streamlining the MMP process would free up staff time to focus on consent decrees, higher penalties, and other measures needed to deter and redress violations.
- **There is no reliable system for staff, decisionmakers or the public to track enforcement actions and compliance rates.** Despite many millions of dollars spent over the years and clear legislative and administrative direction in this area, the State and Regional Boards have yet to develop a reliable enforcement tracking system. Without such a system, there can be no needed course correction or proper allocation of enforcement resources.

Tinkering with the existing Enforcement Policy will not address these concerns. A new approach and renewed commitment to enforcement is needed to ensure that continued violations stop and water quality improves. We outline a few examples of each category of concerns below, and welcome the opportunity to discuss them with you further at the June 28th workshop.

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There Is a Complete Failure to Enforce Entire Categories of Laws.

The federal Clean Water Act regulates discharges by point sources to waters of the U.S. to protect the health of those waters. Discharges by all pollution sources, both point and nonpoint, to both surface water and groundwater are regulated by California's Porter-Cologne Water Quality Control Act. Specifically, Porter-Cologne requires all who discharge or propose to discharge waste "that could affect the quality of the waters of the state" (defined as including groundwater) to report the discharge to the local Regional Water Quality Control Board. (Cal. Water Code § 13260.) The local Regional Board may regulate various discharges with WDRs or, if appropriate, with "waivers of WDRs, with conditions" to ensure that those discharges do not impact use of the state's waters. Water Code section 13269(a)(1) specifies, however, that waivers of WDRs should only be issued where the Regional Board has determined that a waiver would both be in the public interest <u>and</u> is "consistent with any applicable state or regional water quality control plan."

Although the Porter-Cologne Act gives the Regional Boards a clear directive to regulate all sources of pollution to surface water and groundwater, including polluted runoff not regulated under the federal Clean Water Act, the Regional Boards all continue to fail completely to enforce these provisions for one more categories of polluted runoff to surface water, and for almost all categories of pollution to groundwater. These illegal discharges cause and contribute to significant and lasting degradation of surface and groundwater, and yet no action on redressing this enforcement chasm is discernable. For example, the Lost River, the Scott River and the Shasta Rivers are case studies for what lack of enforcement of can do to waterways, as these rivers suffer from continued agricultural, CAFO and other discharges and are not meeting their beneficial uses beyond agriculture water supply.

The State Water Board's 2006 Enforcement Report to the Legislature indirectly acknowledges this problem by reporting only on discharges to surface water under the federal Clean Water Act.[13] There is no similar reporting for enforcement of violations under Porter-Cologne, which of course covers many more discharge activities and correspondingly more enforcement actions (in theory). If the Regional Boards do not act to enforce these laws, the State Board should step in to protect the health of the state's surface and groundwater.

Even where there is an acknowledgment that some enforcement is necessary, often violations are not handled by enforcement but by stakeholder groups that are not set up as guardians of water health. For example, the Central Valley Regional Board takes complaints from citizens about dairies discharging raw waste onto their property and waterways, and then simply forwards many of those to the Dairy Task Force, which takes little to no formal action or follow-up under state or federal water quality law. As noted in the next section, enforcement units within the State Water Board and each Regional Water Board are the appropriate entities to handle enforcement, not stakeholder groups or permit writers.

The System of Enforcement of Permits by the Permit Writers Is Inherently Flawed.

As articulated by the Secretary in the 2005 Lloyd Memo, the current system whereby the permit writers enforce their own permits is inherently flawed. Dr. Lloyd recommended instead that the State and Regional Boards "[c]reate a clear division of duties between permitting and enforcement staff, including separating Board legal counsel from enforcement attorneys, and redirect more regulatory staff as enforcement duties are increased."[14] He also recommended that there be "dedicated enforcement units at each Regional Water Quality Control Board";[15] we would add to that that there should be an attorney at each Regional Board full-time on enforcement.

In addition, in light of new SB 729 enforcement authority, the State Water Board needs to develop its own policy for taking enforcement action when the regional boards fail to do so. This is critical authority that should not be ignored in an attempt to spare a Regional Board some potential embarrassment. Carefully targeted State Board enforcement actions will help raise the bar for enforcement across the state and benefit all Regional Boards, as well as the waters that they are mandated to protect. Such actions should be the primary goal of the State Water Board's new

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[13] SWRCB, *Enforcement Report per Cal. Water Code Sec. 13385(o)* (Aug. 18, 2006) http://www.waterboards.ca.gov/legislative/docs/2005/enforcementrpt2004_13385o.pdf (2006 Enforcement Report).
[14] Lloyd Memo at 2.
[15] *Id.*

enforcement unit, which is a potential model for separation of permit writing and enforcement that should be replicated throughout the regions.

Permits Are Written in Many Cases to Be Unenforceable.

Lack of Clarity in the Permits Themselves

The 2003 Cal/EPA Enforcement Initiative succinctly found that:

> Currently, one of the greatest difficulties faced by enforcement staff is complicated, ambiguous and/or poorly written permits or multiple, conflicting and confusing regulatory requirements that are unenforceable. Permit requirements must be unambiguous. They should be written in such a way that they are clear, easy to understand, and determining compliance is simple. Similarly, the enforcement consequences for violation should be clear.[16]

The lack of clarity and objectivity in the permits impacts enforcement, which necessarily becomes extremely staff-intensive. Straightforward requirements will lend themselves to straightforward enforcement and conserve valuable staff resources. For this reason, the 2005 Lloyd Memo recommended that:

> Where appropriate to achieve water quality protection, numeric limits based on sound science should be incorporated into permits that define the allowable discharge or pollutants that the Boards determine are high priority.[17]

We agree with the Secretary that numeric limits, as well as clearly established deadlines, are essential to a sound enforcement program.

Lack of Enforceable Deadlines for Compliance.

Permits also become unenforceable if their requirements are continually extended, as is the case with many permits now. We wrote in detail to the State Water Board on this issue in our letter dated October 19, 2006 on the problems associated with lengthy compliance schedules; this letter is included for the Board's reference.

In addition to lengthy compliance schedules, we have informed the Board regularly about the problems associated with "serial TSOs" and lack of enforcement of TSOs. For example, a situation exists in Region 4 where a discharger has received at least three TSOs over five years and is currently up to over $1 million in penalties at an F-rated beach. A TSO is meaningless unless it is one TSO and one TSO only, which should include enforceable milestones and mandatory minimum penalties. Enforcement should begin on the first day after the TSO deadlines pass, rather than allowing for yet another TSO with a lack of enforcement – commonplace even where effluent limits are not close to being met – to be assigned instead.[18]

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[16] 2003 Enforcement Initiative at 8.

[17] 2005 Lloyd Memo at 2.

[18] *See, e.g.*, Letter from Dr. Mark Gold, Heal the Bay to Jonathan Bishop, LA RWQCB (Aug. 28, 2006); Letter from Kirsten James and Dr. Mark Gold, Heal the Bay and Mati Waiya, Wishtoyo Foundation to Deborah Smith, LA RWQCB (June 6, 2007).

There Is Little On-The-Ground-Enforcement Presence.

Of over 1,500 State and Regional Water Board staff, only a handful are on the ground identifying violations of water quality laws. As a result, the State Water Board's 2006 Enforcement Report found that "Water Board staff does not detect violations for several months after they occur."[19] Public Record Act requests, for example, found that in Region 2, well under 10% of industrial stormwater permittees are checked each 2-3 year review cycle; this is likely typical of many Regional Boards.

Increases in efficiencies from clearer permit requirements, as discussed above, will free up staff to spend more time in the field. Moreover, partners should be sought in other entities with enforcement authority. For example, Department of Fish and Game wardens have pollution authority under Fish and Game Code Section 5650 and are regularly in the field. Increased training for firefighters (who have hazardous waste responsibilities), building inspectors, and other government officials may provide assistance in enforcement of stormwater permits. Finally, improvements in development project review (EIRs) and auditing of municipal Jurisdictional Urban Runoff Management Plan (JURMP) annual reports for enforcement statistics will also help streamline municipal stormwater permit enforcement.

Fines and Penalties Fail to Address and Solve the Problem at Hand.

Table 8 of the State Board's 2006 Enforcement Report[20] lists violations and their follow-up actions. Of the listed NPDES permit violations that were actually identified, fully 86% statewide were left without a completed enforcement actions; 9% only received a letter, and just 7% had formal action taken. Indeed, the same report found that only 41% of violations requiring mandatory minimum penalties actually received those penalties.[21] In fact, many of the enforcement activities appear to be driven by MMPs, particularly where they are straightforward to calculate. As Table 8 indicates, more than that is rarely imposed. This "race to the bottom" process fails to target violations based on potentially more meaningful criteria, such as the seriousness of the impacts, and rarely results in relief other than MMPs (*e.g.*, few significant penalties or consent decrees with injunctive relief that will actually solve problems). Finally, again based on PRAs in Region 2, there is almost no effort to find non-filers, which is a particularly pervasive problem with under-regulated categories of discharges (as described above).

Two examples in San Diego illustrate the lack of enforcement activity and follow-up. The Hale Avenue Resource Recovery Facility (HARRF), owned by the City of Escondido, is permitted to discharge up to 16.5 MGD of treated wastewater directly into the Pacific Ocean. In December 2005, the Regional Board issued a complaint against the City of Escondido for more than 400 violations of HARRF's discharge permits during 2004 and 2005. The complaint called for over $1 million in fines for these violations, which includes the EPA's Water Code minimum penalties for significant violators. In May 2006, the City proposed a settlement that a third of the penalties off the top, a proposal that ignored federal minimum penalties as well as other federally mandated liabilities. In October 2006, the Regional Board accepted the City's settlement with no changes or revisions. This is just one example of how a Regional Board's enforcement policies allow generous

[19] 2006 Enforcement Report at 5.
[20] *Id.* at 13.
[21] *Id.* at 15.

compromises in favor of significant violators of discharge permits and against the environment, which undermines the State's Water quality enforcement goals.

In another example, in 2003 a water main break on Harbor Drive in downtown San Diego discharged a significant amount of water which infiltrated through heavily contaminated soils located under the street and around the water main. This contaminated water filled with PCBs then discharged into the adjacent San Diego Bay waters, directly adjacent to a public walkway, the Maritime Museum, and a cruise ship terminal. (See enclosed photos.) The Maritime Museum had to be evacuated for the first time ever, due to the foul odors emitting from the contaminated water discharge into the Bay. Numerous agencies, including the City Water Authority, as well as Regional Water Board representatives evaluated and witnessed this illegal discharge (a violation of the City's stormwater permit), and worked together to fix the water main as well as analyze the damage done to the Bay waters. The Regional Board even collected samples from the contaminated area, and San Diego Coastkeeper wrote letters to the Regional Board demanding enforcement action. However, four years later, no enforcement action has been taken. The City of San Diego has numerous water main breaks per month – including 38 water main breaks and 12 sewage spills in January and February alone of this year. Water main breaks are a chronic problem around San Diego, and contributes to significantly polluted discharge into watersheds. Enforcement is essential to preventing further water main breaks and violations of stormwater permits from being similarly ignored.

Numerous other examples, many even more egregious, unfortunately abound throughout the state. Only a significant redirection of attention and commitment to enforcement through meaningful fines and penalties will begin to reverse this trend.

There Is No Reliable System for Staff, Decisionmakers or the Public to Track Enforcement Actions or Compliance Rates.

A March 2006 report by U.S. PIRG found that "[n]ationally, more than 3,700 major facilities (62%) exceeded their Clean Water Act permit limits at least once between July 1, 2003 and December 31, 2004" and that "[t]hese facilities often exceed their permits more than once and for more than one pollutant."[22] California, however, was one of only three states excluded from this report because it "failed to provide reliable data to EPA."[23] (There is no reason not to assume that, with reliable reporting, California would demonstrate similar compliance problems.) The State Board's August 2006 Enforcement Report similarly found that enforcement "data quality and completeness problems persist."

As noted in the September 15, 2006 CCKA letter to the State Water Board on enforcement, CIWQS,[24] which is the current vehicle for reporting enforcement activity, is a noble vision of integrated permit, compliance, enforcement and water quality reporting. However, as with its predecessors (WDS, SWIM1, SWIM2, WIN, etc.), CIWQS suffers from significant deficiencies that were recently examined by a panel of nationwide experts. As a result, the reliability of the State Board's 2006 Enforcement Report – which was due to the Legislature on January 1, 2006, but

[22] U.S. PIRG, *Troubled Waters: An analysis of Clean Water Act Compliance, July 2003- December 2004,* http://www.uspirg.org/uploads/iN/ZM/iNZM2tGz4x7smwVULhTpow/troubledwaters06.pdf, Executive Summary (March 23, 2006).
[23] *Id.* at 9.
[24] California Integrated Water Quality System Project, http://www.swrcb.ca.gov/ciwqs/index.html.

provided only after the Legislature requested it in August – is questionable at best. For example, Table 2 of the Enforcement Report indicates that violations of NPDES waste discharge requirements went down by 50% or more in four of the nine regions over the last year; this figure goes up to five of the nine regions if Region 8, in which violations reportedly dropped just under 50%, is included. With no reasonable level of confidence in the data, decisionmakers do not know whether to prioritize their enforcement dollars toward the seemingly "lower-performing" four regions, or conversely to spend the money doing a better job collecting violation information in the five regions that may be missing enforcement data.

A CIWQS report to the State Water Board at the Board meeting on June 5, 2007 confirmed that the CIWQS enforcement reporting system is largely nonfunctional as of today, and that numerous corrections need to be made before the system is reliably usable. Without regular, transparent, quality, and easily accessible data and reports from the State and Regional Water Boards, the public cannot hold its government accountable for implementing and enforcing state and federal water quality laws. Such information is also essential in order to prioritize use of limited funds for enforcement, as it will help target areas that need particular attention and save funds on areas that are doing well. Indeed, the State Board itself concluded in the 2006 Enforcement Report that "[t]he SWRCB should institute a 'Compliance Report Card' on the Internet to engage the public in a productive dialogue about discharger performance, environmental effects, Water Board workload, and Water Board performance." The State Board should insist on a reliable endpoint for when this type of basic information will be made available.

In addition, while there is at least some data on past enforcement activity, there is no real information available about pending enforcement actions, or what is being done about the violations that have no enforcement actions. The public should be able to see pending enforcement actions or specific violations that still need to be enforced. This will allow the public to track when actions are followed up on (as noted above, follow-up is relatively rare, but may improve if the public is observing).

One of the key recommendations in the Lloyd Memo was to "[m]easure compliance rates among all potential violators of water laws, filers and non-filers, and post information about violations and compliance rates on the Internet."[25] This recommendation was echoed by the Legislature and Governor in 2006, when they passed into law SB 729. This new law requires the State and Regional Boards to report rates of compliance with the requirements of Porter-Cologne; identify and post summary lists of all enforcement actions undertaken by the regional boards and the dispositions of those actions, including any fines assessed, on a quarterly basis; and provide to the public notice of any proposed and final administrative civil liability actions, including waivers of ACL hearings. Significant work remains to comply with these clear and essential directives.

* * *

The impacts of continued failure to enforce water quality laws are clear. Every listing of an impaired water body in the state is an example of a lack of enforcement, and the number of impaired waters is rising. California can afford no more delays in developing a meaningful enforcement program.

[25] Lloyd Memo at 2.

We appreciate the opportunity to provide these comments, and we look forward to working with you to set California on an enforcement path that will ensure clean water now and in the future.

Sincerely,

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ATTACHMENT 3

San Francisco Chronicle, 2-7-08
"State EPA demands probe of sewage spills"

San Francisco Chronicle
State EPA demands probe of sewage spills

Marisa Lagos, Chronicle Staff Writer

Thursday, February 7, 2008

(02-06) 08:17 PST SACRAMENTO -- The chief of California's Environmental Protection Agency on Tuesday asked for an independent investigation into the regional state agency charged with regulating the Bay Area's water quality.

The request came the same day that the San Francisco Bay Regional Water Quality Control Board announced that two sewage spills occurred in Marin County between Jan. 25 and Jan 31 - not just one, as the agency previously had reported. In announcing the second spill Tuesday, the board's executive director said it would ask for an independent review, and blamed the sewage treatment agency where the spill occurred for the delay. In a statement, Bruce Wolf said the Sewerage Agency of Southern Marin used an incorrect date when it told the regional board of the first spill, and did not estimate the amount of sewage spilled in its initial report.

The sewage agency has been under scrutiny since Friday, when authorities told the public that the agency's Mill Valley facility had released nearly 3 million gallons of treated and untreated sewage into Richardson Bay 20 hours prior. The delayed announcement angered many Bay Area residents and some local officials, and several days later, State Sen. Carol Migden announced she would investigate incident.

Then, on Tuesday, the Water Quality Control Board, which regulates these types of incidents, said there had been another spill of 2.5 million gallons of sewage on Jan. 25. The board blamed the sewage agency for an inaccurate initial report and said **staff at the regulating board didn't immediately notice when the report was corrected a few days later.**

In a letter to the Wolfe dated Tuesday, EPA secretary Linda Adams said the delay is "disturbing because of the potential environmental effects to the Bay through the lack of aggressive action."

Adams said it appears that the sewage agency is at fault for its failure to accurately report the Jan. 25 incident but that the water board was also remiss in failing to immediately investigate the incident.

"This is, in my opinion, a disservice to the citizens of the Bay Area and, therefore, unacceptable," Adams wrote.

She asked for a "thorough and independent investigation," to be completed within 60 days in addition to the investigation into the sewage agency, which is to be conducted by the regional water board.

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http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/02/07/MNRJUT6RE.DTL