

Department of Water and Power



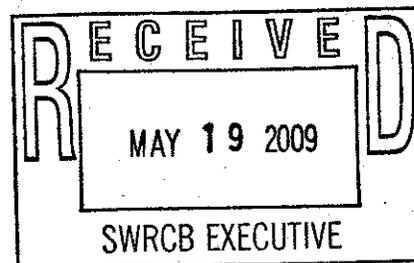
the City of Los Angeles

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May 19, 2009



Ms. Jeanine Townsend  
Clerk to the Board  
State Water Resources Control Board  
Office of Enforcement  
1001 "I" Street, 24<sup>th</sup> Floor  
Sacramento, California 95814

Dear Ms. Townsend:

Subject: Comments on State Water Resources Control Board  
Draft Water Quality Enforcement Policy

The Los Angeles Department of Water and Power (LADWP) is a municipally-owned utility that serves approximately 3.8 million residents and businesses. In order to provide electrical and water services, LADWP maintains a large number of NPDES permits as part of its operations. LADWP takes very seriously its role in preserving and protecting the environment while providing its services to the citizens of Los Angeles. LADWP understands that a rigorous enforcement policy is a critical element in maintaining surface water quality and to that end, appreciates the efforts being made by the State Water Resources Control Board (State Board) in revising the enforcement policy. LADWP understands the challenges inherent to applying the policy to an environment as diverse and vast as California's. LADWP has a general concern regarding the mechanism that the State Board will use to differentiate between "inadvertently" and "intentionally". Throughout the policy there is not a clear distinction to the application of enforcement when an activity has been done with callous disregard and when it is unintentional. Therefore, LADWP requests that the Enforcement Policy clearly distinguish these types of activities and apply enforcement as appropriate. LADWP appreciates the opportunity to comment on the revised Water Quality Enforcement Policy and raises the following specific issues.

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**Comment 1. - Section II. Enforcement Priorities for Discretionary Enforcement Actions, pp 5-7**

The previous policy (dated February 19, 2002) detailed "Priority" specific violation types, grouped pollutants and provided specific numeric and narrative guidelines. In general, priority violations were well defined by numeric and narrative guidelines for defined sets of pollutants and actions/non-actions, respectively.

The draft document (dated May 16, 2009) includes three levels of prioritization: Class I, Class II, and Class III (Class I being the most serious violations).

This new determination system is significantly more general and interpretative than its predecessor. The language defining each Class appears highly subjective. For example, discerning between discharges that pose threats that are "significant" versus those that are "moderate, indirect, or cumulative" (i.e, Class I vs. Class II) appears arbitrary without defined parameters and limits to draw distinctions. Several language uses in the prioritization language are problematic; specifically:

- A. Class I Priority Violations, Item F: "falsification of information" submitted to the Water Boards or "intentional withholding of information" required by applicable laws, regulations, or enforceable orders.
- B. Class II Violations, Items D and E: "negligent or inadvertent failure to comply with monitoring requirements" and "negligent or inadvertent failure to submit information."

LADWP requests that the State Board make transparent the methodology to be utilized to establish a finding of intentional information withholding, and similarly, a finding of a negligent failure to submit information. The framework or process to be used to determine whether this behavior and/or action would pose a "moderate" or "significant" threat to water quality appears to be missing and, at present, wholly subjective. The previous document (February 19, 2002) provides guidelines that are well defined. LADWP suggests that the format for determining the prioritization be continued along these guidelines.

**Comment 2- Section VI-Monetary Assessments in Administrative Civil Liability (ACL) Actions, Step 2- Assessments for Discharge Violations, p 15.**

The Draft Water Quality Enforcement Policy includes language that infers that treated recycled water is a waste. While LADWP understands that its inclusion in this section appears to be volume-based and related to inadvertent releases, it must be noted that

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recycled water is treated to potable water standards and does not present the same threat to surface water quality as wastewater such as construction storm water and/or sewage. Recycled water to be used as irrigation water has been treated to tertiary standards and is not a threat to public health and safety. In addition, groundwater recharge is done by injecting recycled water into an aquifer and therefore a release of this water to surface waters is not plausible. This section refers to "the release of recycled water" and that water quality enforcement is based on quantity released. This would imply that the "release" of the recycled water is a waste and possibly hazardous, the "release" of tertiary treated recycled water is no different from using potable water to irrigate the grass. In addition, LADWP believes that "releases of recycled water" are the same as "release" of potable water and therefore, enforcement and fines are not warranted.

LADWP requests that all references to "the release of recycled water" be removed from this section. It is important to recognize that recycled water is a resource and not refer to it as a waste.

**Comment 3- Section VI-Monetary Assessments in Administrative Civil Liability (ACL) Actions, pp 10-25.**

The assessment protocol used to calculate fines includes a "Deviation from Standard" factor that defines a non compliant discharge event as "Minor", "Moderate", or "Major". The amount of a fine levied is predicated on this designation coupled with the "Potential Harm Factor" score, which is determined by the scoring of the following three factors: 1) Harm or Potential Harm to Beneficial Uses; 2) Chemical, Biological, or Thermal Characteristics of the Discharge; and 3) Susceptibility to Cleanup or Abatement. The purely narrative definitions of each are again, subjective and ambiguous. Consequently, according to Table 1 on page 15 of the proposed enforcement policy, an assessed monetary fine may vary by a factor of 200 per gallon depending on the interpretation of narrative standards. LADWP suggests that the State Board propose numeric criteria to differentiate between the provided tiers, as it represents the only mechanism onto which an equitable enforcement policy may be applied.

**Comment 4- Paragraph B. Monetary Liability Recommendation Panel, page 26.**

The draft document includes the option of creating a Monetary Liability Recommendation as an alternative to the above-mentioned Penalty Calculation Methodology. Utilizing this mechanism, ACL penalty recommendations would be assessed by a panel composed of the State Board Director of the Office of Enforcement, the Deputy Director responsible for Water Quality Programs, and three Assistant Executive Officers from the Regional Boards. Their recommendations would then be reviewed for adoption by Water Board

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enforcement staff. Any liability not adopted within 10 percent of the Panel's recommendations would require written explanation by enforcement staff.

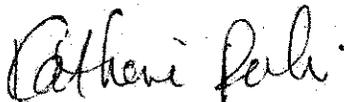
The State requests input as to the whether this protocol (Alternative 2, Paragraph B) would be preferable to the Penalty Calculation Methodology. Given the limited information presented regarding this second option, it is difficult to ascertain whether its implementation would be advantageous in applying a fair, uniform, and equitable enforcement policy. It appears that the second alternative centralizes the penalty mechanism at the State Board level and potentially may streamline the system to assess liabilities; however, whether penalties are assessed by the individual Regional Boards or at the State level, if the mechanism for establishing those monetary liabilities is based on narrative criteria as opposed to numeric criteria, the system will be inherently ambiguous and subjective.

Again, LADWP commends the State Board's efforts in revising the Enforcement Policy and looks forward to working with State Board staff. To that end, it was conveyed at the January 16, 2009, workshop that the State Board hosted a meeting attended by staff members of the Regional Boards regarding the proposed Enforcement Policy to "try out" the policy and calculate violations for different scenarios. It was also conveyed that using the proposed enforcement narrative, the theoretical fines calculated by the different regional staffers for the different scenarios were remarkably consistent (+/- 10 percent).

LADWP suggests that the scenarios and their respective calculations be made available for the stakeholders review (via e-mail or the State's website). Additionally, to facilitate the development of this Policy, LADWP believes that this process would benefit from the inclusion of stakeholders at all future meetings involving the State and Regional Boards on this issue.

If you have any questions regarding these comments, please feel free to contact Mr. Larry Kerrigan of LADWP's Wastewater Quality and Compliance Group at (213) 367-4425.

Sincerely,



Katherine Rubin  
Manager of Wastewater Quality and Compliance

LK:rp

c: Mr. Larry Kerrigan, LADWP