

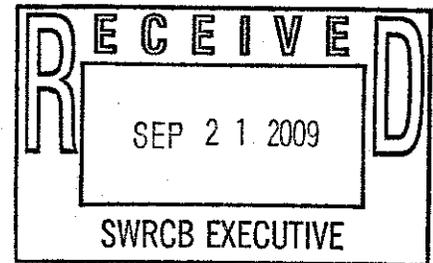


California Stormwater Quality Association™

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

September 21, 2009

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



Subject: Draft Water Quality Enforcement Policy (July 14, 2009)

Dear Ms. Townsend:

On behalf of the California Stormwater Quality Association (CASQA)¹, I am writing to you today to offer comments regarding the proposed revisions to the Draft Water Quality Enforcement Policy dated July 14, 2009 (Policy). CASQA recognizes that the Policy has not been updated since 2002 and supports the State Water Resources Control Board's (State Water Board's) efforts to improve the Policy to provide fair and consistent enforcement actions throughout the state. CASQA has actively participated in the process to-date including attending the June 28, 2007 workshop and providing written comments on June 26, 2007, and February 6, 2008. CASQA appreciates the opportunity to continue to provide comments.

In general, CASQA supports the intent of the draft Policy and believes that it offers an improved approach for determining priority violations as well as the necessary framework for supporting more consistent statewide enforcement. However, we have an overarching concern that the Policy is generally directed at traditional point source discharges (i.e., wastewater dischargers) and does not fully consider how the Policy would be used to enforce stormwater permits (i.e., permitted stormwater discharges are by regulation defined as point sources). We, therefore, offer several recommendations for your consideration to improve the Policy relative to the enforcement of the stormwater program.

CASQA submitted comments on the draft Policies proposed in 2007 and 2008. We believe that many of our previous comments and recommendations are still relevant and request that they be considered and addressed prior to the adoption of the Policy. We have attached CASQA's prior comments for your convenience.

This letter focuses on the foundational issues that should be considered within the Policy when enforcing stormwater related permits.

¹ CASQA is composed of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout California. Our membership provides stormwater quality management services to more than 26 million people in California and includes most Phase I and many Phase II municipal programs in the State. CASQA was originally formed in 1989 as the Stormwater Quality Task Force to recommend approaches for stormwater quality management to the California State Water Resources Control Board.

Need to Fully Consider Stormwater-Related Issues

The Policy does not fully consider the range of complex issues related to stormwater management where compliance is primarily determined by the implementation of prescribed management actions. CASQA is concerned that this omission will lead to inconsistent and/or inappropriate enforcement actions, contrary to the intent of the policy. CASQA recommends that the Policy clearly identify how it should be applied to stormwater programs/permits. To remedy this, the following points should be considered and the Policy modified as needed.

- **Stormwater Program Violations**

Although the existing 2002 Policy includes (in section H.1 and H.2. – pages 12 and 13) specific language regarding stormwater program violations and identifies examples of what constitutes a priority stormwater-related violation and how violations should be addressed, the draft 2009 Policy does not include similar language. As a result, CASQA is concerned that regional interpretations may lead to inconsistent enforcement.

CASQA recommends that the Policy include specific language and examples describing violations associated with discharges of stormwater.

- **Small Communities (Section I.E.)**

CASQA agrees that the Policy should consider the special circumstances of small communities during enforcement actions. However, this section of the Policy only addresses publicly owned treatment works and sewage collection systems that serve small communities and does not address the municipal stormwater equivalent (Phase II communities).

CASQA recommends that the Policy also address small community stormwater programs (Phase II communities) within this section.

- **Ranking Violations (Section II)**

Although this section provides a prioritization for different types of violations, which CASQA commends, it is difficult to determine how the priority violations would be determined without specific examples.

Given the vagueness of several criteria under each class of violations, CASQA recommends that the Policy provide a series of examples of Class I, II, and III violations for the various regulatory programs, including the stormwater program, to clearly identify how the ranking process should be utilized to ensure that there is fair, firm and consistent enforcement statewide.

- **Monetary Assessments in Administrative Civil Liability (ACL) Actions (Section VI.)**

Although the liability calculation process included within the Policy identifies a methodology to ensure consistency with the Policy's objectives, it is unclear,

CASQA comments on Draft Water Quality Enforcement Policy

without a series of examples, how this methodology would be used for stormwater-related violations.

CASQA recommends that the Policy provide a series of examples of monetary assessments for the various regulatory programs, including the stormwater program, to clearly identify how the assessment process should be utilized.

- **Penalty Calculation Methodology (Section VI.A., Step 2 – Per Gallon and Per Day Assessments for Discharge Violations)**

CASQA is very concerned with this portion of the Policy because it seems to directly equate stormwater discharges with sewage spills instead of considering the complexities associated with stormwater. Stormwater generally carries a much lower contaminant load than sewage, can have far greater volumes, and, thus, can be extremely difficult to control during storm events.

Because the volume of a stormwater-related discharge is governed by the duration and intensity of a rain event and is often impacted by run on from adjacent areas, CASQA recommends that the per gallon charges generally not be applied to stormwater violation base calculations. Since municipal stormwater program permittees do not have control over the volumes of stormwater discharged, the Policy could reasonably specify that a per gallon charge will not be included. If the Board believes that it must include some per gallon element, it should be considerably lower than \$2.00 for stormwater discharges².

CASQA recommends that, instead of trying to address non-compliant discharges of stormwater in the same way as sewage spills, the Board should refine the existing approach for stormwater-related ACLs to ensure that there is a defined economic methodology within the Policy so that there is consistent enforcement statewide. CASQA recommends that the Board:

- *Define a methodology or set of methodologies for determining the economic benefit for construction sites, industrial facilities, and municipalities³*
- *Determine the liability based on the following factors:*
 - *Determine base calculations by days of violation and not per gallon charges*
 - *Ensure recovery of economic benefit and staff costs to the extent required by law, estimating economic benefit as appropriate for municipal stormwater permittees*
- *Consideration of the adjustment factors (Step 4)*

In closing, we hope that our comments will assist you in identifying additional improvements to the Draft Water Quality Enforcement Policy. Please feel free to contact

² For example, Complaint No. R8-2005-0100 assessed a per gallon charge of \$0.01 and Complaint No. R8-2006-0059 assessed a per gallon charge of \$0.005.

³ A review of existing ACLs indicates that the economic benefit assessments range considerably throughout the state

CASQA comments on Draft Water Quality Enforcement Policy

me at (714) 955-0630 or Geoff Brosseau, our Executive Director at (650) 365-8620 if you have any questions or would like to discuss this further.

Very truly yours,



Chris Crompton, Chair
California Stormwater Quality Association

Attachments: Water Quality Enforcement Workshop, June 26, 2007
Draft Water Quality Enforcement Policy, February 6, 2008

cc: Charles Hoppin, Chair, State Water Board
Dorothy Rice, Executive Director, State Water Board
Jonathon Bishop, Chief Deputy Director, Division of Water Quality, State Water Board
Bruce Fujimoto, Section Chief-Stormwater, DWQ, State Water Board
CASQA Executive Program Committee
CASQA Board of Directors



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June 26, 2007

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

Subject: Water Quality Enforcement Workshop

Dear Ms. Her and Members of the Board:

On behalf of the California Stormwater Quality Association (CASQA), thank you for the opportunity to provide comments on policy direction for water quality enforcement. CASQA understands that the primary goal of the June 28, 2007 workshop is to gather input in preparation for the revision and reissuance of the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy, and that the State Water Board is seeking input from the public and stakeholders on the Water Boards' approach to enforcement. CASQA appreciates the opportunity to provide early comments in an informal setting.

CASQA is composed of stormwater quality management organizations and individuals, including both Phase I and II cities and counties, special districts, industries, and consulting firms throughout the state, and was formed in 1989 to recommend approaches to the State Water Board for stormwater quality management in California. In this capacity, we have assisted and continue to assist the State with the development and implementation of stormwater permitting processes.

To ease review of our comments, we have organized them according to questions 2-6 (with **emphasis added**) posed in the Public Workshop Notice regarding issues identified by the State Water Board to focus comments and discussions on water quality enforcement.

2. What **factors** should the Water Boards consider in ranking their **enforcement priorities**?
What particular water quality issues should the Water Boards make a priority for enforcement?

CASQA recommends the Water Boards prioritize their efforts on the regulatory programs that are characterized by low levels of compliance and are resulting in little corrective action. CASQA is concerned that there is a general lack of compliance review being conducted by Water Boards, which creates a disincentive for compliance and effectively penalizes compliant and proactive permittees. Additionally, Water Boards should prioritize their efforts on referrals received from local agencies. Responding promptly to these referrals communicates the vital role of enforcement in maintaining credible regulatory programs at both state and local levels and builds cooperative and synergistic relationships that can offset resource constraints.

3. How can and should the Water Boards **measure the effectiveness** of their **water quality enforcement programs** in such areas as compliance rates, environmental quality indicators, etc.

To assess the effectiveness of the State's enforcement programs, CASQA recommends the Water Boards focus on permittees' compliance with permit provisions. Additionally, CASQA commends to the Water Boards its Municipal Stormwater Program Effectiveness Assessment Guidance, which was developed for MS4 compliance programs that administer and enforce many local regulatory programs related to the protection and management of surface water quality. The conception of effectiveness assessment in this guidance document is directly applicable to the Water Boards' water quality enforcement programs. Candidate programmatic indicators include:

- *how quickly enforcement actions take place once a violation is identified,*
- *how expediently the violation was corrected,*
- *the lack of subsequent violations,*
- *declining number of and severity of pollution incidents, and*
- *the lack of counter lawsuits against the enforcement agency.*

CASQA strongly recommends the Water Boards generally not use environmental quality indicators for assessing the effectiveness of the State's enforcement programs related to stormwater. Stormwater quality professionals generally concur that it is very difficult and therefore rare to establish a cause-and-effect relationship between an action taken on land to reduce pollutants carried in stormwater and the quality of the receiving waters. This presumed cause-and-effect relationship is difficult to establish because of several factors, including:

- *Highly variable water quality conditions of stormwater and of natural systems*
- *Degrees of separation phenomenon (temporal and spatial) between actions and effects*
- *Complicating effects of receiving waters integrating inputs from all transport mechanisms and from direct sources*

Additionally, the legal standards for demonstrating that a formal enforcement action is warranted are high – much higher than can generally be established using environmental quality indicators for the reasons described above.

4. What **information on enforcement** should the Water Boards make available to the public through their websites?

CASQA recommends the Water Boards develop and disseminate an annual report on their enforcement activities. Individual compliance and enforcement order documents are published on a weekly basis to the Water Boards' website but there does not appear to be a readily available comprehensive report with summary information and comparative statistics and analyses region-by-region. Key indicators of effectiveness could be used in these comparative statistics and analyses and the use of the same indicators region-by-region would have the added benefit of promoting statewide consistency.

5. How can the Water Boards more effectively use existing water quality enforcement tools?

CASQA recommends the Water Boards analyze their use of existing tools and look for opportunities for optimization. The analysis should include answering questions such as:

- *Stormwater permit non-filers – Should penalties for non-filers be more severe?*
- *Response timelines – Should Water Boards have to meet response deadlines?*
- *Follow-through – How complete is the Water Boards' follow-through? How many Notices of Violation actually result in correcting the problem?*

CASQA also recommends the Water Boards coordinate as much as possible with local agencies, who often have more direct and detailed information, when considering enforcement actions at industrial and construction sites.

5. (cont') Are there specific additional enforcement tools, methodologies, or protocols you would recommend?

CASQA recommends the Water Boards consider using CASQA's Progressive Approach – in particular its effectiveness assessment methods and its action levels (as defined by the State's expert Blue-Ribbon Panel) as new compliance determination and enforcement methodologies and tools. These new methods and tools are specifically designed to yield a clearer and more accurate assessment of the effectiveness of a municipal stormwater program and the basic concepts can be used for the same purpose for any regulatory environmental program. CASQA's methods and tools move the state of assessing environmental program effectiveness from level of effort to level of achievement measures, which can then be more directly tied to water quality. And consistent with the State's expert Blue-Ribbon Panel findings, CASQA's action levels are designed and set at levels that may be used to identify and focus attention on atypical performance.

6. What are the most significant inconsistencies, if any, between the Water Boards in their enforcement activities? What suggestions do you have to address any inappropriate inconsistencies?

The apparent lack of a readily available comprehensive annual report on the Water Boards' enforcement program makes it hard to identify inconsistencies. So, as we recommended in response to question 4, CASQA recommends such reports be generated and provided to the public. CASQA also recommends the Water Boards develop an Enforcement Consistency Guidance document to accompany the Policy that would identify how one selects the type of enforcement action and what criteria should be used. Local agencies have such documents and they are very helpful in avoiding inappropriate inconsistencies. The Water Boards should also provide staff with training on the Policy and guidance.

In closing, thank you for your consideration of our comments. Please feel free to contact me at 916-808-1434 if you have any questions regarding these comments, alternately you may contact Geoff Brosseau, Executive Director at 650-365-8620.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Busath". The signature is fluid and cursive, with the first name "Bill" and last name "Busath" clearly distinguishable.

Bill Busath, CASQA Chair

cc: Dorothy Rice, Executive Director – State Water Board
Bruce Fujimoto – State Water Board
CASQA Executive Program Committee
CASQA Board of Directors



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Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

February 6, 2008

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

Subject: Draft Water Quality Enforcement Policy

Dear Ms. Townsend:

On behalf of the California Stormwater Quality Association (CASQA), I am writing to you today to offer comments regarding the proposed revisions to the Water Quality Enforcement Policy (Policy). CASQA recognizes that the Policy has not been updated since 2002 and supports the State Water Resources Control Board's (State Water Board's) efforts to improve the Policy so that it provides for fair and consistent enforcement actions throughout the state. We have actively participated in the process to-date including providing written comments on June 26, 2007 (see attached) and attending the June 28, 2007 workshop. CASQA appreciates this opportunity to provide comments on the Draft Water Quality Enforcement Policy.

CASQA was formed in 1989 to recommend approaches to the State Water Board for stormwater quality management in California and, in particular, the development and implementation of stormwater permitting processes. CASQA is composed of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout the state. Our membership provides stormwater quality management services to over 26 million people in California and includes almost every Phase I municipal program in the State.

In general, CASQA supports the intent of the Draft Water Quality Enforcement Policy and feels that it offers an improved approach for determining priority violations, as well as the necessary framework for supporting more consistent statewide enforcement.

While CASQA supports the modifications to the Policy, we have some concerns and recommendations for your consideration. These are outlined below in the form of general comments.

General Comments

- **Need to Fully Consider Stormwater-Related Issues**

While CASQA supports the need to revise the Policy to provide a more defined framework for enforcement priorities and actions, we are concerned that the Policy appears to be written

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to primarily address wastewater-related programs and issues and does not fully consider the complex issues related to stormwater management and other areas of regulation where compliance is predicated on the implementation of prescribed management actions. Our concern is that this omission will lead to inconsistent and/or inappropriate enforcement actions, contrary to the intent of the Policy. ***Consequently, CASQA recommends that the State Water Board consider how the Policy should be applied to stormwater management and other challenging areas of regulatory oversight.***

- **Need for Additional Guidance to Achieve Statewide Consistency**

CASQA strongly agrees that enforcement should be “fair, firm, and consistent” throughout the state and be conducted in a timely manner. Our position is consistent with the goals, objectives, and actions proposed in the January 2008 Draft Strategic Plan Update (2008-2012) for the Water Boards’ Organizational Performance Priority: 7. Consistency. However, CASQA is concerned that the current Draft Water Quality Enforcement Policy’s permissive language (i.e., “should” rather than “will”) is not consistent with the language in the Draft Strategic Plan Update’s Objective 7.1, and that if left un-reconciled, such language in the Policy will effectively negate meaningful progress toward statewide consistency. ***Therefore, CASQA recommends that the State Water Board review the Policy language against the Strategic Plan Update language and modify the draft Policy language so that it provides the direction necessary to ensure statewide consistency.***

CASQA also recommends that the State Water Board pare down the document to just address the policies and develop an accompanying Enforcement Consistency Guidance document (Guidance document). The Guidance document would provide the detail necessary to ensure that the Policy is interpreted in a similar manner throughout the state including the prioritization of enforcement resources, how the type of enforcement action should be selected, examples of model enforcement orders, etc. An example includes the Enforcement Consistency Guidance document that was developed by Orange County for their stormwater program¹.

- **Modification of Compliance Assurance**

In our letter dated June 26, 2007, CASQA recommended that referrals from local agencies (especially non-filers) should be a priority in order to maintain the credibility of the regulatory programs at the state and local level and in order to build cooperative and synergistic relationships that can offset resource constraints. However, Section II does not recognize Referrals from Local Agencies as a Compliance Assurance aspect. ***CASQA recommends that this section be modified to recognize this important compliance assurance reporting mechanism that is required in most municipal NPDES stormwater permits.***

- **Need for Linkage Between Violation Priorities and Enforcement Actions**

When reviewing Section IV - Enforcement Actions, there were several issues that CASQA would like to see addressed.

¹

http://www.ocwatersheds.com/StormWater/PDFs/2003_DAMP/2003_DAMP_Section_4_Exhibit_4_I_Enforcement_Consistency_Guide.pdf

CASQA comments on Draft Water Quality Enforcement Policy

- The Policy should clearly link the types of enforcement actions described to the classes of violation and identify the range of enforcement actions that are appropriate for each of the three classes of violations. Without this linkage it will be difficult to achieve statewide consistency. ***CASQA recommends that this section be revised so that it provides a seamless and clear linkage between the classes of violation and the range of enforcement actions that could be utilized. In addition, the priority for enforcement efforts should be based on the significance classification of Class I, Class II, or Class III.***
- In several places Section IV still refers to “priority” violations instead of the revised approach of using the three classes (Classes I, II, and III). As such, it is unclear what class(es) the terminology “priority” is referring to. ***CASQA recommends that this older language be updated to reflect the new classes of priorities and that the State Water Board consider the following when updating the language:***
 - ***The Policy should be consistent throughout when referring to the significance of violations (i.e., the classification as Class I, II, or III) rather than “priority” violations.***
 - ***Section III should be entitled, “Determining the Significance of Violations”***
 - ***Section III.A should be entitled “Class I Violations”***
- Within the “Formal Enforcement Actions” section there are several sections that should not be included as a formal enforcement actions, rather, they should be included in another section of the document that describes the enforcement process and/or other actions that staff can take as a result of noncompliance:
 - Section C.3 – Technical Reports and Investigations – These are not strictly enforcement statuses.
 - Section C.8 – Modification or Rescission of Waste Discharge Requirements – This is not strictly an enforcement action as much as it is a result of noncompliance.
 - Section C.11 – Referrals – This should be in a section that describes the process for enforcement.***CASQA recommends that these sections be moved into another section of the document that describes other requirements that the Water Boards can require to in part, help avoid or supplement an enforcement action.***
- **Modification of Supplemental Environmental Project (SEP) Language**

CASQA is concerned that the modifications to the Policy have substantially restricted the SEP provisions. SEPs have multiple benefits and play an important role in settling enforcement actions. Most importantly, they encourage local governing boards to settle enforcement actions without a hearing before the Regional Water Boards and assist public agencies in keeping the local dollars in the community so that the local community (which funds the SEP) receives some of the benefit.

One of our biggest concerns is that the Policy states “the credit permitted for a SEP generally should not exceed 25% of the total monetary assessment” and “only in

CASQA comments on Draft Water Quality Enforcement Policy

exceptional circumstances should the value of the SEP be greater than 25% of the total monetary assessment that the discharger is required to pay". We feel that this is overly restrictive and would adversely impact the benefit of allowing SEPs. ***CASQA recommends that this restriction be removed from the Policy. In addition, public awareness projects should be included in the list of types of projects that would be approved (page 43).***

- **Modification of Enforcement Reporting**

In our letter dated June 26, 2007, CASQA recommended that the Water Boards report on implementation as well as the effectiveness of the enforcement program. As you know, Enforcement Program Effectiveness was one of just six programmatic priorities listed in the Water Board's November 2007 Draft Strategic Plan Update (2008-2012). The organization and categorization of priorities, goals, objectives, and actions in the November Draft was significantly revised in the subsequent January 2008 Draft Strategic Plan Update (2008-2012) document. And although enforcement program effectiveness is no longer shown as a stand-alone priority; the goals, objectives, and actions associated with it are now incorporated across the priorities listed in both the Environmental Priorities and the Organizational Performance Priorities sections. Our recommendations are consistent with the goals, objectives, and actions proposed in the Draft Strategic Plan Update.

Some of the indicators we proffered in our June 26, 2007 letter on updating the Policy included how quickly enforcement actions take place once a violation is identified, how expeditiously the violation was corrected, the lack of subsequent violations, etc. However, Section XIII of the Water Quality Enforcement Policy does not include any metrics for determining the effectiveness of the enforcement program. ***Since program effectiveness assessment is critical in understanding if a program is working or not, and how to improve it; and since improvement in the enforcement program is a significant component of a number of the priorities in the Water Board's Draft Strategic Plan Update for the next five years, CASQA recommends that Section XIII of the Water Quality Enforcement Policy be modified to incorporate effectiveness assessment metrics in addition to implementation reporting in Water Board enforcement reports.***

In closing, we hope that our comments will assist you in identifying additional improvements to the Draft Water Quality Enforcement Policy. Please feel free to contact me at (714) 567-6360 or Geoff Brosseau, our Executive Director at (650) 365-8620 if you have any questions or would like to discuss this further.

Very truly yours,



Chris Crompton, Chair
California Stormwater Quality Association

CASQA comments on Draft Water Quality Enforcement Policy

Attachment - CASQA comments on revision of the Water Quality Enforcement Policy (June 26, 2007)

cc: Tam Doduc, Chair, State Water Board
Dorothy Rice, Executive Director, State Water Board
Jonathan Bishop, Chief Deputy Director, State Water Board
Bruce Fujimoto, Manager, State Water Board
Gail Linck, State Water Board
CASQA Executive Program Committee
CASQA Board of Directors