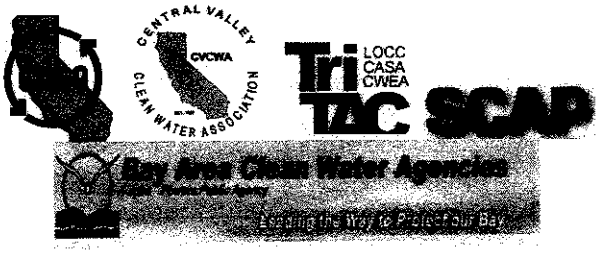
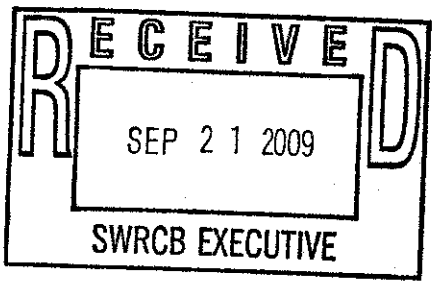
10/20/09 Bd. Hearing
**Water Quality Enf. Policy**
Deadline: 9/21/09 by 12 noon




September 21, 2009




*Via Electronic Mail*
Charles Hoppin, Chair, & Members
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

c/o Jeanine Townsend, Clerk to the Board
commentletters@waterboards.ca.gov

**SUBJECT: COMMENT LETTER—ENFORCEMENT POLICY**

Dear Chairman Hoppin & Members of the Board:

The above-listed clean water associations (Associations) appreciate the opportunity to review and comment on the July 14, 2009 draft of the Water Quality Enforcement Policy (WQEP). We greatly appreciate the careful and deliberative process that the Board has undertaken with regard to this important policy. Since review of the existing policy was initiated nearly two years ago, there have been multiple workshops and opportunities for review and comment on draft revisions. Many of our previous comments have been addressed in the final draft, and we believe that overall, the proposed revised WQEP represents an improvement over the existing version.

Nonetheless, the Associations believe that additional changes are needed before adoption if the policy is to fulfill the stated goals of fair, firm and consistent enforcement. As detailed below, these issues either arise from new language inserted into the July 14th version for the first time, or are significant concerns that remain unaddressed despite our previous comments. To expedite the final set of revisions, we have provided suggested language, in redline, for each of our requested changes.

### *1. The Policy Should Not Limit the Scope of State Water Board Review Specified by Statute.*

The most significant proposed revision to the WQEP is the addition of language stating that the State Water Board will "defer" to the Regional Water Boards' calculations of administrative liability amounts under the policy. (Proposed WQEP at p. 11.) The proposed language is very troubling, in that the Board would be artificially and inappropriately constraining the scope of review afforded to aggrieved persons under the Water Code. (Water Code section 13320.) The statute provides that the State Water Board "may consider any relevant evidence which in the judgment of the State Board should be considered to effectuate and implement" legislative policies and may find that the Regional Water Board's action was "inappropriate or improper." (*Ibid.*) The State Water Board does not act as a strictly appellate body, limited to ruling on the legal correctness of a challenged Regional Water Board action under a highly deferential standard. Rather, the State Water Board has broad authority to review, modify and remand Regional Water Board quasi-adjudicatory actions on both legal and policy grounds. We are not aware of any other area of review—adoption of permits and waste discharge requirements, for example—where the State Water Board has self-imposed such a significant constraint on its authority.

The State Water Board's stated goal of "consistent" enforcement will not be well-served if the Board declines to subject administrative civil liability assessments to scrutiny. Civil liability amounts for similar violations could vary significantly by region, and even within a single region, yet these decisions would be afforded a presumption of correctness. Moreover, such abstention is unnecessary, given that State Water Board review is discretionary and not automatic. The State Water Board is free to consider and assess the strengths of individual petitions on their merits, and can decline to hear those that do not raise issues worthy of review. There is no need to establish a blanket approach of deference to the Regional Water Boards' calculations when significant rights and obligations are at issue.

Proposed Language Change, Proposed WQEP at p. 11:

"The liability calculation process set forth in this chapter provides the decision-maker with a methodology for arriving at a liability amount consistent with these objectives. This process is applicable to determining administratively-adjudicated assessments, as well as those obtained through settlement. ~~In reviewing a petition challenging the use of this methodology by a Regional Water Board, the State Water Board will defer to the decisions made by the Regional Water Boards in calculating the liability amount unless it is demonstrated that the Regional Water Board made a clear factual mistake or error of law, or that it abused its discretion.~~"

### 2. *The Proposed Liability Calculation for Recycled Water Releases Should Be Revised in Order Not to Discourage Use of this Important Alternative Water Supply.*

The proposed WQEP includes a number of appropriate adjustments to calculation of the per gallon component of administrative civil liabilities. We appreciate that the policy sets a lower per gallon threshold for recycled water spills, in recognition of the high quality of the water and the low threat presented by these discharges. As producers and suppliers of recycled water, however, the Associations' members remain concerned that even as proposed, the policy would generate ACL amounts for recycled water releases that are disproportionate to the potential environmental harm. The State Water Board's Recycled Water Policy mandates increased usage of recycled water, and characterizes it as a valuable water source. (Resolution 2009-003.) A policy which creates the potential of significant monetary sanctions for releases of recycled water could frustrate the State's attainment of its recycling goals. As an example, a release of 40,000 gallons of tertiary treated recycled water need not even be reported under the Water Code, yet could be subject to a penalty of tens of thousands of dollars. (See Water Code section 13529.2.)

Proposed Language Change, Proposed WQEP at p. 15:

"Similarly, for releases of recycled water that has been treated for reuse, a maximum amount of ~~$1.00~~ $0.50 per gallon should be used with the above factor."

### 3. *The Statutory Maximum Should Not Be the Recommended Penalty for Non-NPDES Effluent Limitation Violation.*

Section VI of the proposed WQEP promotes the imposition of the statutory maximum as an appropriate penalty for all water quality violations, unless the discharger can demonstrate that the penalty should be less than the statutory maximum. We appreciate that alternatives to use of the statutory maximum have been placed in the proposed WQEP for NPDES effluent violations, recycled water releases, sewage spills, municipal stormwater discharges, and stormwater from construction sites. However, the proposed WQEP does not contain an alternative approach for violations of non-NPDES waste discharge requirement (WDR) violations. Under statute, WDR discharges are subject to either the maximum per gallon penalty of $10 per gallon, or the maximum daily penalty of $5,000 per day. The proposed WQEP calls for the maximum per gallon penalties allowed under statute to be used as the starting point for determining liability. In the case of non-NPDES WDR discharges for publicly-owned treatment works (POTWs), this would lead to potentially exorbitant penalties, many orders of magnitude higher than penalties traditionally have been and far higher than would be warranted based on most reasonably foreseeable circumstances.

In one hypothetical example (using reasonable assumptions), calculation of the adjusted base liability amount, prior to final adjustments by the Water Board staff based on recovery of economic benefit (if any) and application of discretionary factors, an exceedance of a *single monthly average effluent limitation* in a non-NPDES WDR for a facility discharging 15 MGD would garner an adjusted base liability amount of *$256 million dollars*. This is clearly an inappropriate starting point and would be excessively punitive in any circumstance we can imagine for a single exceedance of one monthly average limitation. Given that non-NPDES WDRs for POTWs contain numerous stringent monthly average limits that could each result in an exceedance, this creates a huge potential liability for permit-holders. Because the potential per gallon penalty amounts could be unreasonably high for what may be relatively inconsequential violations (in terms of number, type, magnitude or duration), we recommend that the proposed WQEP be amended to specify that the adjusted base liability for non-NPDES WDR effluent violations be calculated on a per-day basis as the starting point, rather than a per-gallon basis. Use of the maximum per day liability of $5,000 as a starting point for penalty calculation will result in calculated liabilities more commensurate with the severity of these violations.

Proposed Language Change, Proposed WQEP at p. 16:

Amend the third full paragraph as follows:

"Where allowed by code, both the per gallon amount and the per day amount should be determined and added together. This becomes the initial amount of the ACL for the discharge violations. <u>For effluent limitation violations of non-NPDES waste discharge requirements, where the Water Code allows only a per gallon amount or a per day amount, the per day amount should be calculated and used to determine the initial amount of the ACL for the discharge violations. The initial amount should be adjusted upward or downward where the facts and circumstances of the violation warrant a higher or lower liability."</u>

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

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

Proposed Language Change, Proposed WQEP at p. 18:

Modify the final cell of Table 4, "History of Violations" row as follows:

"Prior history of violations. Where there is a history of repeat violations, the amount of the initial liability should be increased by a minimum of **10%** to reflect this. <u>However, the discharger's culpability and clean-up and cooperation with respect to prior violations should be taken into account in determining whether, and by what percent (if any), the amount of the initial liability should be adjusted</u>."

### 5. *All Small and/or Disadvantaged Communities Should Receive Compliance Assistance Consistent with Existing State Water Board Policy.*

Prior versions of the proposed WQEP stated that, generally, "informal enforcement and/or compliance assistance will be the first steps taken to return a small and/or disadvantaged community to compliance." (May 6, 2009 Draft WQEP at p. 3.) The proposed version of the policy, however, would delete the "and/or" and limit the communities to which informal enforcement and compliance assistance would be extended to those that are *both* small and disadvantaged. This change is inconsistent with the State Water Board's Small Community Compliance Strategy, which specifically addresses small "and/or" disadvantaged communities. (Resolution 2008-0048.) The Board's existing policy is to provide "technical and financial assistance" to bring small communities, and disadvantaged communities, into compliance. (*Ibid.*) We recognize that certain small community considerations, such as availability of compliance projects under the Mandatory Minimum Penalty (MMP) law are limited to small communities "with a financial hardship"; however, the WQEP is much broader, encompassing the wide array of discretionary enforcement mechanisms exercised by the State and Regional Water Boards. Therefore, we urge the Board to restore the language making clear that informal enforcement and/or compliance assistance are to be the first steps for small communities and disadvantaged communities.

Proposed Language Change: Proposed WQEP at p. 3:

In recognition of these factors, informal enforcement <u>and/or</u> compliance assistance will be the first steps taken to return a small <u>and/or</u> disadvantaged community to compliance, unless the Regional Water Board finds that extenuating circumstances apply.

### 6. *The Recommended Performance Measures for Evaluating Compliance Rates Should Be Based on Overall Permit Compliance.*

The proposed WQEP specifies that compliance rates be measured using a "[p]ercentage of facilities in compliance, based upon the number of facilities evaluated." (Proposed WQEP at p. 47.) We are concerned that this method of measurement will create an unbalanced picture of actual compliance with the Water Boards' programs. For example, a facility with one violation of a single parameter (whether evaluated on a monthly or annual bases) would be considered out of compliance using the proposed measure, even if the facility is complying with all other permit provisions and is in compliance 99% or more of the time with the one parameter exceeded. We recommend that this matrix be modified to account for the overall compliance rate of the facilities.

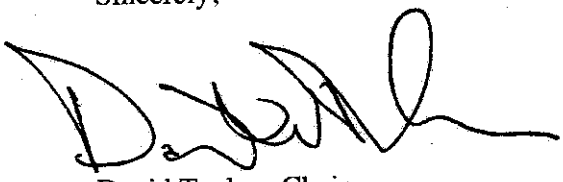
Proposed Language Change: Proposed WQEP at p. 47:

~~Percentage of facilities in compliance~~, Average compliance rate with permit provisions based upon the number of facilities evaluated.

As a final matter, the Associations note our support for the proposal to delegate to the Regional Water Boards the determination of whether a POTW meets the criteria for a small community with a financial hardship pursuant to Water Code section 13385(k). (Proposed WQEP at p. 26.) The Regional Water Boards are already charged with determining whether a POTW satisfies the population threshold, and it is more efficient and appropriate for the Regional Water Boards to also evaluate and determine the financial hardship prong of the test. With regard to the population threshold, we request that the final WQEP include a footnote that recognizes the Legislature may amend the Water Code to revise the definition of small community and that the WQEP will be implemented in accordance with any statutory requirements.

Thank you for your consideration of our comments.

Sincerely,



David Tucker, Chair
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SCAP

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Ben Horenstein, Chair
Tri-TAC