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

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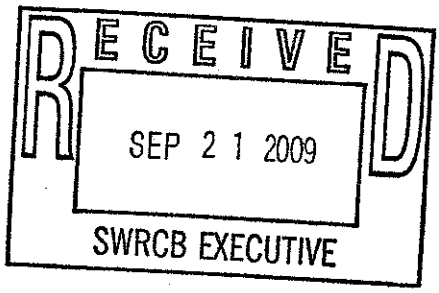

VIA E-MAIL & FACSIMILE

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
Office of Enforcement
1001 I Street
Sacramento, CA 95814

Re: Water Quality Enforcement Policy Revisions
October 20, 2009 SWRCB Hearing

Dear Ms. Townsend:

We represent numerous retail water suppliers in Southern California, three of which have had mandatory minimum penalties ("MMPs") imposed on them pursuant to Water Code section 13385.1 for failure to file quarterly discharge monitoring reports. The vast majority of those MMPs have been imposed for quarters in which no reportable discharges occurred. The remaining MMPs were imposed for inadvertent failures to file reports for quarters where relatively minimal discharges occurred and none of such discharges exceeded any numeric effluent limitations. Despite that no effluent limitation was exceeded and no environmental harm occurred, our three clients alone have cumulatively had over $1,000,000 in MMPs imposed. Our clients, and many other water suppliers, are thus very interested in the revisions to the Water Quality Enforcement Policy (the "Policy") the State Board will consider adopting at its October 20, 2009 hearing.

We have reviewed the revised draft Policy, with particular emphasis on Section VII – Mandatory Minimum Penalties for NPDES Violations, starting at page 25 of that revised draft. We thank the State Board and its staff for their consideration in adding provisions to the Policy to address some of the issues that have been brought to staff's and the Regional Water Quality Control Boards' attention regarding problems encountered in connection with the imposition of MMPs, particularly regarding the imposition of MMPs for failing to file discharge reports when no reportable discharges

occurred (see subdivision 2 on pages 29 and 30 of the July 14 draft revision of the Policy). We very much support the addition of that subdivision to the Policy.

However, we believe additional issues (including the first two non-substantive errors discussed below) remain to be addressed, as discussed below.

1. Page 16 – First Change. The last paragraph of "Step 2 – Assessments for Discharge Violations," set forth on page 16 repeats the last two sentences of the immediately preceding paragraph and that last paragraph should be deleted in its entirety.

2. Page 16 – Second Change. The second sentence of the first paragraph of "Step 3 – Per Day Assessments for Non-Discharge Violations" begins with "These are violations include, . . ." The word "are" should be deleted.

3. Timeframe for Issuance of Mandatory Minimum Penalties (MMPs). Subdivision A of Section VII sets forth the timeframe for issuance of MMPs. That subdivision provides, "The Water Boards should issue MMPs within eighteen months of the time that the violations qualify as mandatory minimum penalty violations." That subdivision also provides that the Water Boards should expedite MMP issuance, in part, if the total proposed penalty amount is $30,000 (see Comment 4, below).

An eighteen month time limit for the issuance of MMPs is simply too long of a delay in enforcement, particularly where the MMPs compound and overlap at $3,000 per month, as is the case for the failure to file a discharge monitoring report. By way of example, assuming a water supplier does not file a discharge monitoring report for the first quarter of Year 1, if a Water Board is not required to issue MMPs for 18 months, even with no imposition of MMPs for the first two months, $408,000 in penalties would have accrued during that 18 month period under the compounding now being applied in imposing those MMPs. If the Water Boards are to continue such compounding in enforcing the MMPs, then an 18 month period is far too long to delay in enforcement and such a period creates unduly burdensome (and likely unenforceable) penalties, particularly on small water suppliers.

In addition, that aspect of the proposed policy is inconsistent with the legislative intent underlying Water Code Section 13885.1. Water Code Section 13885.1 states that the failure to file a discharge monitoring report in a timely manner constitutes a "serious violation" that warrants the imposition of MMPs. However, the proposed Enforcement Policy allows a Water Board up to eighteen months to take action on that alleged "serious violation." If an act or omission is severe enough to constitute a "serious violation," then that "serious violation" ought to be dealt with much sooner than eighteen months after the violation gives rise to the MMPs. An alleged violation that constitutes a

"serious violation" because of its assumed severe environmental consequences requires more timely enforcement to more promptly remedy that "serious violation."

4. The Total Mandatory Penalty to Trigger Expedited MMP Issuance should be Reduced. Similar to the reasons set forth in the preceding paragraphs, a trigger of $30,000 is too high to trigger MMP issuance. Again, if the Policy's goal is to promptly remedy "serious violations" that give rise to MMPs, earlier notice and enforcement will result in more expeditious remediation of those "serious violations."

5. Expedited MMP Issuance Should Apply to any Community that is Faced with Financial Hardship. While we recognize that subdivision (k) of Water Code section 13385 specifically identifies small, rural communities with financial hardship for special treatment under that statute, for purposes of application of the Policy's expedited MMP issuance set forth in Subdivision (A) of Section VII, we believe that same expedited treatment should apply across the board to any community that faces financial hardship under the applicable criteria. The financial burden of MMPs on an economically disadvantaged community is not dependent on whether the community is urban, rather than rural. That burden and hardship is the same and the Policy should not differentiate as between urban and rural communities.

6. Discharges That Do Not Exceed Effluent Limitations. The final Assembly Report of AB 1541, which enacted Water Code Section 13385.1, states that the intent of that statute is to punish dischargers who hide Clean Water Act violations. The Policy itself similarly acknowledges on page 28 that the Legislature enacted Section 13385.1 "primarily to ensure better reporting by dischargers who might otherwise avoid penalties for violations of their NPDES permits by failing to submit monitoring reports that could disclose permit violations."

However, where effluent limitations are not exceeded, there is no underlying permit violation to be disclosed and, accordingly, there is nothing for the discharger to hide by failing to submit its monitoring report. It is therefore entirely consistent with the legislative history and purpose of Water Code Section 13385.1 for the Policy to provide that where no effluent limitation is exceeded, the failure to file a quarterly discharge monitoring report is not a "serious violation" for purposes of Section 13385.1 and MMPs should not be imposed.[1] Certainly, a Water Board would retain its

[1] It should also be pointed out that violations of the sort discussed in this letter are considered under Appendix A to the Policy to be "minor" violations – see subdivision C(1)(4) on pages 35-36, which categorizes as a "minor" violation "an insignificant discharge of waster or a threat thereof; provided, however, that there is no significant threat to human health, safety or welfare, or the environment."

discretion to levy some monetary penalties, but those penalties should conform to the factors set forth in subdivision (e) of Section 13385.

In this regard, if the State Board concludes that it lacks the authority to establish such revisions to the Policy, we encourage the State Board to seek statutory revisions that provide the Water Boards with the flexibility to determine, on a case-by-case basis, whether a failure to timely file a monitoring report during a period involving discharges that do not exceed effluent limitations constitutes a minor violation as opposed to a serious violation. That flexibility will avoid required imposition of MMPs that may eventually total hundreds of thousands of dollars in a situation where the violation is unintentional and ministerial in nature, where no environmental harm results and where no financial benefit is derived by the discharger.

7. Calculation of MMPs. The July 14 draft of the Policy does not propose any revisions regarding how MMPs are calculated. Under Water Code Section 13385.1, as it is currently being applied, each failure to file a quarterly monitoring report is an individual "serious violation" to which a $3,000 MMP applies. Additional violations and the accompanying $3,000 MMP then accrue for each subsequent 30-day period for which the report is not filed. Under the current interpretation that is being applied, these monthly penalties overlap with other quarters for which reports have not been filed, resulting in substantial penalties, particularly where a permittee is completely unaware of any violation and the Regional Board is under no compulsion (for at least 18 months under the revised draft Policy) to inform the permittee of the violations.

The current interpretation also conflicts with the provision of Water Code section 13385(h)(1), which imposes a mandatory minimum penalty of $3,000 for "**each** serious violation." Under principles of statutory interpretation, where such a conflict exists, the conflicting statutes should, where possible, be harmonized. Here, the two statutes can be harmonized by reading the two statutory provisions together to apply a single penalty of $3,000 for each quarterly report that is not timely filed, rather than the continuing accrual of $3,000 penalties for each subsequent month. That interpretation avoids the absurd result of the far more severe penalizing of late reporting as compared to other "serious violations" (such as effluent limitation exceedances) that result in actual environmental harm but are subject to only a single $3,000 MMP.

In addition, the use of compounding now in place results in substantial penalties that far exceed any harm to the environment that has occurred (which is non-existent in the cases with which we have been involved) and apply where the permittee obtains no financial benefit from its failure to report. In light of these factors and given the de minimis nature of the violations, we believe that adequate notification, as discussed our comments above, and a single penalty, if warranted, should eliminate future failures to file monitoring reports.

Thank you for your consideration of these comments. Our water supplier clients want the State Board to understand that they concur in the State Board's and Regional Boards' goals in protecting water quality. However, imposition of MMPs in the hundreds of thousands of dollars, as has recently occurred, would result in significant financial harm to water suppliers, and ultimately their customers, in instances where absolutely no harm to the environment occurred, no Clean Water Act violations occurred and no such violations were hidden.

Sincerely,

James D. Ciampa

JDC/cc

cc: Mr. Mark Grajeda, Pico Water District (via e-mail only)
Mr. Dennis Erdman, Crescenta Valley Water District (via e-mail only)
Mr. Gustavo Villa, Maywood Mutual Water Company No. 2 (via e-mail only)