

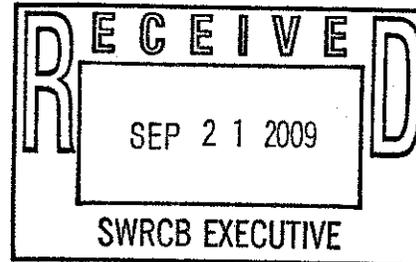


Association of California Water Agencies

Leadership Advocacy Information Since 1910

September 21, 2009

Mr. Charlie Hoppin, Chair
State Water Resources Control Board
Attn. Ms. Jeanine Townsend
1001 "I" Street
Sacramento, California 95814



RE: Proposed Water Quality Enforcement Policy – July 14 , 2009 Version

Dear Mr. Hoppin:

The Association of California Water Agencies ("ACWA") submits the following comments regarding the "Mandatory Minimum Penalties for NPDES Violations" section (pages 28-33) of the revised draft *Water Quality Enforcement Policy*, ("Enforcement Policy"), dated July 14, 2009. ACWA represents nearly 450 public agencies that collectively provide 90 percent of the water for agricultural, business and residential use throughout California. Our members and their customers rely on a predictable and affordable supply of water for human consumption as well as commercial and agricultural use.

Background

The existing policy requires the regional water boards ("RWBs") to impose Mandatory Minimum Penalties ("MMPs") whenever a NPDES permit holder fails to file a quarterly monitoring in a timely manner. Under the existing policy no consideration is given to whether or not there has been any impact on water quality. For example, of the nineteen water suppliers that were issued Notices of Violation ("NOVs") by the Los Angeles Regional Water Quality Control Board's ("LARWQCB"), approximately ninety percent of the alleged violations involved quarters in which no discharge occurred. Of the remaining NOVs, none of the discharges, that we are aware of, exceeded any discharge limitation. In other words, NOVs involving MMPs were issued for ministerial oversights that did not involve any adverse impact to water quality or the beneficial uses of water.

Furthermore, several regional waterboards have delayed notifying the permit holders of the alleged violations for extended periods of time. Given the compounding nature of MMPs, water agencies have been exposed to extremely significant penalties. Not only do the penalties continue to accrue for each thirty day period subsequent to the date in which a quarterly report was due, but with each new quarter comes a new penalty scheme that begins to toll independent of the previous quarter. For example, the Los Angeles Regional Water Quality Control Board ("LARWQCB") alleges that failures to file

monitoring reports extend back as far as 2005. Yet the LARWQCB staff did not issue notices for these alleged violations until 2008. During that period (2005-2008) penalties continued to mount. For nineteen water agencies the combined total for MMPs exceeded **three million dollars**. One water agency has received NOV's totaling more than \$625,000.

To ACWA, these two factors – assessing penalties for ministerial oversights involving no environmental harm, and continued compounding of penalties when no notice of violation has been issued – undermines the very notion of “fairness” that SWRCB states is a cornerstone of its Enforcement Policy.

Given this background, ACWA offers the following specific comments:

1. Applying MMPs to Those Situations That Do Not Involve Any Discharge

ACWA concurs with the conclusion on pages 32 -33 of the draft Enforcement Policy that “[a] report whose submittal is required to document that no discharge to surface waters occurred during the relevant monitoring period is not a “**discharge monitoring report**” for purposes of section 13385.1(a)...and therefore, the late report would ...not be subject to MMPs.” Emphasis added. We also concur with the proposed language directing the Regional Water Boards not to take final action to impose MMPs if the permittee submits a written statement explaining that no discharge occurred during the quarterly monitoring period and states the reason(s) why the report was not submitted by the required deadline.

We believe this revision to the Enforcement Policy is a reasonable resolution for those situations involving no discharge and consequently no possible harm to water quality. We encourage the Board to adopt the proposed revisions on pages 31 and 32.

2. Applying MMPs to Those Situations Involving Discharges That Do Not Exceed Discharge Limitations.

ACWA acknowledges that situations involving a discharge(s) during the monitoring period are less clear than the situations involving no discharge. But we do believe that there is a rational basis for the Board to consider a similar approach for those circumstances where there have been discharges but no discharge limitation has been exceeded. As the draft Enforcement Policy points out on page 32, “[t]he legislative history of section 13385.1 indicates that the Legislature enacted the statute 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.” Emphasis added. In those cases where discharges did occur but did not exceed discharge limitations, there were no violations of water quality standards (i.e. no discharge limitations were exceeded), and therefore no penalties would be “avoided” by not filing the quarterly monitoring report. It would be consistent with the legislative history for the Enforcement Policy to provide that under these circumstances the failure to file a monitoring report in a timely manner does not constitute a “serious violation” under section 13385.1. Therefore, MMPs would not be

appropriate. In some cases the facts might warrant reasonable discretionary civil liabilities.

If the Board concludes that currently it lacks the authority to establish such policy, ACWA encourages the State Board to pursue the necessary amendments to existing statutory language to provide the Board with the necessary authority.

3. Lack of Notification Requirement

Page 8 of the draft Report states that "mandatory actions should be taken, **within 18 months** of the time that the violations qualify as mandatory minimum penalty violations." Emphasis added. Page 27 once again concludes that "[t]he Water Boards should issue MMPs within **eighteen months...**" Emphasis added. We believe that this proposed policy is inconsistent with the legislative intent that gave rise to section 13885.1. On the one hand, the applicable legislation and subsequently California Water Code section 13885.1 find that the failure to file a discharge monitoring report in a timely manner constitutes a "serious violation" warranting the imposition of Mandatory Minimum Penalties. On the other hand, the proposed Enforcement Policy allows a Regional Water Board has up to eighteen (18) months to take action on an alleged violation. We are hard pressed to find any justification, other than staff convenience, for a policy that allows an eighteen month delay before any action, including notification, is required for a "serious violation". If an alleged violation has such dire environmental consequences that it constitutes a "serious violation" it certainly warrants more timely interaction between RWB staff and the permit holder.

ACWA believes that a more equitable approach would be to require RWB staff to notify the permit holder of the alleged violation within thirty (30) days from the time that the alleged violation occurred. This would allow the permittee an opportunity to resolve the alleged violation by filing the report before the penalty compounds, and most importantly, to ensure that any possible environmental harm will not continue to occur.

4. Calculating MMPs

The draft Environmental Policy continues to maintain the current process for compounding penalties. Currently, each failure to file a quarterly monitoring report is an individual violation requiring a \$3,000 MMP. Furthermore, an additional \$3,000 is imposed for each subsequent 30-day period for which the report is not filed. Finally, each quarter renews the penalty assessment process, while the previous penalties continue to toll. Obviously the total penalties can quickly add up, especially if the Regional Water Board staff fails to inform the permit holder for eighteen months.

Given the ministerial nature of the alleged violation and the lack of any environmental harm, in most cases, we believe that adequate notification, as discussed above, and a single penalty, if warranted, should eliminate future failures to file monitoring reports. ACWA encourages the State Board to adopt such policy language. Once again, if the

Board believes that the existing legislation prohibits you from adopting such a policy, we encourage the Board to pursue the necessary statutory authority.

This concludes ACWA's comments. We thank you for considering our comments and proposed revisions to the State Board's Enforcement Policy. We also appreciate the efforts of your staff to address our most significant concerns. If you have any questions regarding our comments please do not hesitate to contact me at (916) 441-4545, or by e-mail at markr@acwa.com.

Sincerely,



Mark S. Rentz, Esq.
Director of Regulatory Affairs

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