



California Regional Water Quality Control Board Los Angeles Region



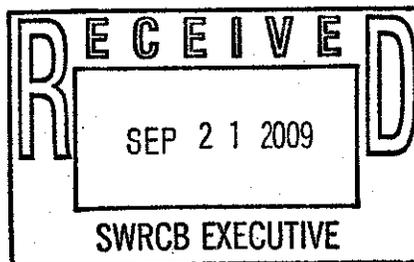
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September 21, 2009

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LOS ANGELES REGIONAL WATER QUALITY CONTROL BOARD (LOS ANGELES REGIONAL BOARD) COMMENTS ON THE PROPOSED WATER QUALITY ENFORCEMENT POLICY, DRAFT DATED JULY 14, 2009

Thank you for the opportunity to review the proposed Water Quality Enforcement Policy (Policy). The Los Angeles Regional Board's comments on the Policy are listed below. Comments on the Monetary Assessments in Administrative Civil Liability (ACL) Actions (Section VI) portion of the Policy are based on enforcement coordinator collaboration amongst the Regional Water Boards.

Section II. A.1. Class I Priority Violations:

1) Violations Susceptible to Assessment of MMPs:

Provisions of the California Water Code require assessment of penalties for certain effluent and reporting violations. Furthermore, Section VII.A. of the Policy states that the Water Boards *shall* expedite MMP issuance if (a) the discharger qualifies as a small community with financial hardship, or (b) the total proposed mandatory penalty amount is \$30,000 or more. Further, where the NPDES Permit is being revoked or rescinded because the discharger will no longer be discharging under that permit, the Water Boards should ensure that all outstanding MMPs for that discharger are issued prior to termination of its permit to discharge." The Policy also states that the Water Boards should issue MMPs within 18 months of the time that the violations qualify as MMP violations. Therefore, the Policy has clearly made addressing the types of violations referenced above a high priority, but they are not identified and categorized as such in Section II.

Recommendations for Categorizing MMP Violations:

The Los Angeles Regional Board recommends that all violations susceptible to assessment of MMPs should be included as Class 1 priority violations.

2) Acute Toxicity Violations:

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Violations of acute toxicity requirements where the discharge may adversely affect fish or wildlife are categorized as Class II violations. Acute toxicity, by definition, is likely to affect fish or wildlife.

Recommendations for Categorizing Acute Toxicity Violations:

The Los Angeles Regional Board recommends that all violations of acute toxicity requirements be included as Class 1 priority violations.

Section VI.A. Penalty Calculation Methodology:

1) Deference to the Regional Water Boards on Petitions:

Page 11 of the Policy states that "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." The Los Angeles Regional Board believes that it is inappropriate for a violator to challenge the use of the methodology in a petition if the Policy requires use of the methodology. Rather, a petition can challenge the amount of the civil liability that is derived from the use of the methodology.

Recommendations for Language:

The Los Angeles Regional Board recommends revising the referenced language on page 11 to read: "In reviewing a petition challenging the amount of civil liability derived from the use of this methodology"

2) Step 1 - Potential Harm Factor for Discharge Violations

The Los Angeles Regional Board recommends revising the description of values under Factors 1 and 2 to reduce the uncertainty in interpreting how to assign a value to a given violation and to make the definitions more inline with the Water Board's mission. Our suggested changes are indicated below.

Recommendation for Factor 1: Harm or Potential Harm to Beneficial Uses

0 = Negligible - no actual or potential harm to beneficial uses.

1 = Minor - low threat to beneficial uses (i.e., no observed impacts; but potential impacts to beneficial uses with no appreciable harm).

2 = Below moderate - less than moderate threat to beneficial uses (i.e., impacts are observed or plausible, harm to beneficial uses is minor).

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3 = Moderate - moderate threat to beneficial uses (i.e., impacts are observed or plausible and impacts to beneficial uses are moderate and likely to attenuate without appreciable acute or chronic effects).

4 = Above moderate - more than moderate threat to beneficial uses (i.e., impacts are observed or likely substantial, temporary restrictions on beneficial uses (e.g., less than 5 days), and human or ecological health concerns).

5 = Major - high threat to beneficial uses (i.e., significant impacts to aquatic life or human health, long-term restrictions on beneficial uses (e.g., more than 5 days), high potential for chronic effects to human or ecological health).

Recommendation for Factor 2: The Physical, Chemical, Biological, or Thermal Characteristics of the Discharge

0 = Discharged material poses a negligible risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material are benign or will not impact potential receptors).

1 = Discharged material poses only minor risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharge are relatively benign or are not likely to harm potential receptors).

2 = Discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharge have some level of toxicity or pose a moderate level of concern to potential receptors).

3 = Discharged material is a direct risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharge exceed known risk factors and/or there is elevated concern regarding receptor protection).

4 = Discharged material poses a significant risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the material are elevated relative to risk factors or receptor harm is considered imminent).

3) Steps 2 And 3 – Deviation from Standard

The Regional Water Boards' enforcement coordinators understanding of how "Deviation from Standard" would be applied remains clouded even after numerous discussions about the topic and testing of case scenarios.

Recommendation for defining Deviation from Standard (beneath Tables 1, 2, and 3)

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The Regional Board recommends that the "Deviation from Standard" be better defined as stated below:

This factor compares the root cause of the violation against the legal standard or the regulatory requirement, and it considers repercussions from the violation. The categories for Deviation from Standard in Table "x" are defined as follows:

Minor – The intended effectiveness of the requirement remains generally intact (e.g., while the requirement was not met, there is general intent by the discharger to follow the requirement, and the consequences resulting from the violation are not significant).

Moderate – The intended effectiveness of the requirement has been partially compromised (e.g., the requirement was not met, and there are some consequences associated with the violation).

Major – The requirement has been rendered ineffective (e.g., blatant disregard for the requirement, and/or there are significant consequences associated with the violation).

4) Step 3 – Per Day Assessments for Non-Discharge Violations

The potential harm values proposed in Table 3 could result in excessively high penalties because the base penalty generated by Table 3 for non-discharge violations will be ratcheted upward due to discharger conduct factors associated with these types of violations. Non-discharge violations which are elevated to ACL enforcement involve some combination of:

- prior knowledge of the requirement, where the base penalty will be increased up to 1.5 times due to "Culpability";
- poor cooperation or recalcitrance by the discharger, which can increase the base penalty up to 1.5 times via the "Cleanup and Cooperation" factor; and
- prior violations, where the penalty increases up to 1.1 times if there is a "History of Violations."

Recommendation for Step 3 (Table 3)

The Regional Water Boards' enforcement coordinators have undertaken efforts to recommend revisions to Table 3 considering the typical scenarios associated with ACL enforcement of non-discharge violations, but there has not been time for sufficient peer review of any adjustments for Table 3. While there is a preference for improving Table 3, the "multiple day calculator" proposed in the Policy provides a means of lowering penalty assessments for these types of violations. We therefore do not recommend revising Table

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3 at this time, but do recommend that Table 3 be amended before the Policy is next revised (on an approximate 5-year timeframe).

We recommend allowing for the penalty calculation methodology to be revised and amended as necessary before the next revision of the Policy by including specific language in the Policy to revisit the methodology within an approximately 2-year timeframe. We request that the Office of Enforcement take responsibility in the interim for tracking statewide penalty assessments for non-discharge violations and for working with the Regional Water Boards' enforcement coordinators on developing more reasonable base values for Table 3 and/or an alternative approach for non-discharge violation penalty assessments.

Section VII.A. Timeframe for Issuance of Mandatory Minimum Penalties (MMPs):

Expediting MMP Issuance:

Page 25 of the Policy states that "The Water Boards *shall* expedite MMP issuance if (a) the discharger qualifies as a small community with financial hardship, or (b) the total proposed mandatory penalty amount is \$30,000 or more." (emphasis added). Due to the Los Angeles Regional Board staff's limited enforcement resources and competing enforcement priorities, and in light of the Governor's recent order calling for mandatory furloughs, we believe that the term "shall" is unnecessarily restrictive.

Language Recommendation:

The Los Angeles Regional Board recommends revising the referenced language on page 25 to read: "The Water Boards should expedite MMP issuance if"

Section VIII. Compliance Projects (CPs):

1) Water Code section 13385, subdivision (k):

The Policy makes reference to Water Code section 13385, subdivision (k). However, the Policy is silent as to what subdivision (k) requires. We believe clarification would be beneficial to the public.

Recommendation:

In connection with MMPs, the reference to Water Code section 13385, subdivision (k), in this section should make clear that the subdivision only applies to publicly owned treatment works serving a small community with a financial hardship as determined by the State Water Board.

2) Definition of Compliance Project):

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We believe that number 6 on Page 31 has a grammatical error since a compliance project is a project that is designed to address problems related to the violation and, thus, a discharger is obligated to perform the project independent of an ACL.

Language Recommendation:

The Los Angeles Regional Board recommends revising the referenced language on page 31 to read: "A CP is a project that the discharger is not otherwise obligated to perform, independent of the ACL."

Appendix A: Enforcement Actions, Section B.2. Notices of Violation (NOV):

Combining NOV's and 13267 Orders:

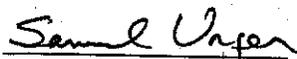
This section states that NOV's can be combined with a request for technical information pursuant to California Water Code section 13267. Office of Chief Counsel (OCC) guidance to the Los Angeles Regional Board has been to separate informal enforcement actions such as NOV's from Regional Board orders since NOV's are not petitionable to the State Water Board and 13267 orders are petitionable to the State Water Board. To this end, OCC has provided the Los Angeles Regional Board with separate templates for NOV's and 13267 orders.

Recommendation:

The Los Angeles Regional Board recommends that the section be revised to suggest that NOV's and 13267 orders not be combined.

Should you have any questions or require further clarification regarding these comments, please call Hugh Marley at (213) 620-6375 or Ms. Paula Rasmussen at (213) 576-6791.

Sincerely,



Samuel Unger, P.E.

Assistant Executive Officer

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