SCAP
SOUTHERN CALIFORNIA ALLIANCE OF PUBLICLY OWNED TREATMENT WORKS

October 18, 2016

VIA EMAIL to: commentletters@waterboards.ca.gov
Copy to: cj.croyts-schooley@waterboards.ca.gov

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

RE: **COMMENT LETTER – WATER QUALITY ENFORCEMENT POLICY**

Dear State Water Board members:

The Southern California Alliance of Publicly Owned Treatment Works (SCAP) provides the following comments on the draft changes to the State's Enforcement Policy. While SCAP agrees that modifications to the Policy are warranted, the proposed changes on the whole do not make the Policy better or more consistent, but seem to merely ensure that future Administrative Civil Liability (ACL) fines will be higher. The Office of Enforcement's goals should not be seeking the highest penalties possible, but instead should be assisting people, municipalities, and businesses having difficulties with compliance. Compliance, not penalties, should be the ultimate goal.[1]

Primary Concern

SCAP opposes the removal of language assessing only per day penalties for effluent limitation violations. *See* Proposed Redline Version at p. 19 (removing "Generally, it is intended that effluent limit violations be addressed on a per day basis."). This proposed modification would allow for supplemental per gallon penalties for such discharges. When applied to a large entity discharging millions of gallons per day, this value would be enormous and could be economically catastrophic. This very substantial modification was not even discussed in the Statement of Initial Reasons. SCAP members negotiated this protection from ruinous penalties in the last version of the Enforcement Policy, and strongly urge that this language be maintained in the next adopted version.

[1] "[C]ivil penalties may have a punitive or deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives." (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148 [279 Cal.Rptr. 318] cited in *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4th 1302, 1315 [92 Cal.Rptr. 418] (emphasis added).

Comments on the Statements of Initial Reasons (SIR)

One of the proposed changes is to clarify the term "fair" used in the current version of the Enforcement Policy. SIR, p. 2. To SCAP members, "fair" means that two ACL penalty actions for two similar situations receive similar results.[2] This concept is guaranteed by the Equal Protection Clause of the 14th Amendment of the United States Constitution.[3] However, this is not the definition used to justify changes to the Enforcement Policy. The Initial Statement of Reasons says the changes to the Policy "clarify that the principle of 'fairness' relates to eliminating the economic advantage gained by those who do not incur the costs to comply with regulatory obligations under the Water Code." *Id.* SCAP believes both concepts of fairness should be incorporated into the revised Policy.

SCAP appreciates the insertion of the concept of transparency, and the inclusion of the legal requirement to include specific findings to support conclusions, and that the findings must be based on specific and identified evidence. SIR, p. 2. Although this is a current legal requirement, many enforcement actions have arguably lacked these basic components.

SCAP is concerned about the removal of the Classes of violations. SIR, pp. 2-3. The only problem with these Classes was that they were not used, not that the Classes themselves were problematic. SCAP would encourage maintenance of Class III violations, which would only be subject to informal enforcement. Perhaps the Classes should be organized in a different way to make them more usable (e.g., eliminating use of data algorithms), instead of eliminating whole classes.

SCAP agrees that the amendments should include a temporal limit, and that the harm factors should be determined based on the characteristics of the material discharged *before* discharge. SIR, p. 3. However, the concept of dilution must be considered in conjunction with any determination of harm.

SCAP is concerned about allowing harm factors to utilize the concept of "potential for harm" when there is no evidence of actual harm. SIR, p. 3. This concept has the ability for abuse in actions where no harm is demonstrated or anticipated. If maintained, specific additional guidance on how and when this concept will be utilized is needed.

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[2] See Air Resources Board, ENFORCEMENT PENALTIES: BACKGROUND AND POLICY (September 30, 2011) at p. 16 ("Fairness. To treat the regulated community fairly requires both consistency and flexibility. Treating similar situations similarly is key to fairness. The consideration of each case must be flexible enough to reflect legitimate differences between violations.")

[3] *See also* California Constitution, Art. 1, Section 3(b)(4): "Nothing in this subdivision supersedes or modifies any provision of this Constitution, including the guarantees that a person may not be deprived of life, liberty, or property without due process of law, or denied equal protection of the laws, as provided in Section 7;" Art. 1, Sec. 7 (a): "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws…."

SCAP agrees that the factor for susceptibility of cleanup and abatement is unclear. SIR, p. 3. Thus, SCAP would support the change to consideration of whether 50 percent or more of the discharge was actually cleaned up or abated.

SCAP agrees that modifying the weighting irregularities in the factors would be helpful. SIR, p. 4. This change would also eliminate the ability to game the score by leveraging these anomalies to get higher or lower penalties. However, there still seems to be anomalies in the numbering.

SCAP agrees that problems exist with the "High Volume Discharges" section as this section has been implemented in ways that were unintended. SIR, p. 4. The intent of the SCAP members that participated in negotiating the earlier modifications to the policy was that all sewage and construction storm water discharge penalties would be assessed at $2.00 per gallon *or less*, and that all recycled water discharges would be assessed at $1.00 *or less*. However, that was not how the Policy has been implemented. To lessen the confusion caused by this section, SCAP requests that the title of this section should be modified to be "***Per Gallon Assessments for Specific Discharges and Volumes***." This title more accurately reflects the content, and removes the term "high volume discharges," which was never defined.

SCAP does not support the amendments to remove the lower dollar levels for the identified types of discharges discussed in the last paragraph. SIR, p. 4. However, SCAP could support adding more flexibility for other types of discharges. For other types of discharges, SCAP would support additional text specifying a $2.00 per gallon maximum for other non-sewage, non-construction storm water, non-recycled water discharges between 50,000 and 2,000,000 gallons and $1.00 per gallon for *all* discharges over 2,000,000 gallons. The Policy should also state that the maximum amounts in each category need not be used if reasons exist not to use the maximum per gallon amount. Currently, the highest allowable number is automatically used as the default value.

SCAP is unclear of the reasons for the need for the change to findings of potential harm and the assessments for non-discharge violations. SIR, p. 4. More clarity is needed to determine how these proposed modifications will work in actual enforcement situations.

SCAP does not agree that dischargers with a good history of no violations should not be given "credit" for that history. The proposed amendment would eliminate that possibility of credit for good compliance. SIR, p. 4. SCAP would suggest that 0.9 be used for good history of no violations, 1.0 be used for intermittent violation history where no one type of violation is recurring, and 1.1 or 1.2 should be used for history of regular and recurring violations, depending on severity. The proposed amendments do not provide an upper limit for this multiplier, and merely says that "a minimum multiplier of 1.1 should be used. Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1." This creates more uncertainty and arguably allows a much higher (e.g., 5.0 or 10.0) multiplier to be used, which is not appropriate. A range from at least 0.9 to 1.2

should be specified, or more preferably each factor would have the same range of 0.5 to 1.5 for maximum flexibility.

SCAP does not agree with the required findings in the "Multiple Day Violations" section. SIR, p. 5. There is no definition or explanation of what would constitute "daily detrimental impacts to the regulatory program." Could this include that a staff person is working on that violation, or is unable to work to address another violation? If so, then it would be impossible to demonstrate an absence of this factor. Similarly, a long term violation could probably always be alleged to have had a daily detrimental impact to the environment, even if miniscule. Thus, this first finding should be removed as impossible to meet, or should be further clarified that these impacts must be discrete and separable from impacts on other days. It is also unclear why a 5 day unit of time is used to collapse the penalty instead of 7 days to correspond with a week. Justification for the unit selected needs to be provided.

SCAP would like the "Ability to Pay" to be a broader analysis than just analyzing individuals or business entities and to also consider public agencies. SIR, p. 5. A public agency's income and net worth are not the correct metrics to evaluate ability to pay as this revenue is committed to capital projects, and operation and maintenance of publicly funded facilities. An agency's net worth also includes the value of public facilities that cannot be leveraged or mortgaged to free up funding to pay a regulatory penalty. In many cases, public entities have had to do rate increases to pay penalties and these increases are subject to the requirements of Propositions 218 and 26. These unique situations of public agencies must be included, and not be deleted as proposed. The proposed changes include removal of language considering "widespread hardship to the service population or undue hardship to the discharger." *See* Proposed Redline Version at p. 26. These concepts must be maintained in the proposed amendments.

SCAP has issues regarding the new requirements about recouping staff costs. SIR, p. 6. SCAP understands that the State Auditor has raised issues with this practice and that the State Water Board put a moratorium on this practice. Since these costs do not and should reimburse the agency for its staff costs, and are merely paid to the Cleanup and Abatement Account, it is unclear why these costs need to be added. In addition, there are no controls on staff "churning the file" to increase the penalty amounts. Finally, it is not clear why overhead and benefits would be included since, again, this is not a reimbursement issue. Those costs are paid by the taxpayers or by discharge permit holders, and in the case of public entities would be paid again by the ratepayers, equating to a double payment of the same costs. We would urge the State Water Board to remove staff costs from the equation.

SCAP would like more flexibility inserted into the Enforcement Policy for the percentage of penalties that can be transitioned into Supplemental Environmental Projects (SEPs) or Enhanced Compliance Actions. The SIR incorrectly states that "Current regulations apply a 50 percent limit on the amount of liability that can be applied to SEPs, and thus to ECAs." SIR, p. 6. The

SEP policy sets the 50% amount "[a]s a general rule,"[4] yet the Office of Enforcement has determined this to be a hard "limit" not only in the 2009 Enforcement Policy and SIR, but also in practice. This interpretation flies in the face of the clear language of the SEP policy that the Director of the Office of Enforcement has the authority to move this "limit,"[5] yet normally chooses not to. For this reason, the SEP policy and the Enforcement Policy should be modified to allow for a higher percentage "limit" to take this decision out of one person's hands. In addition, there is not the same "limit" for ECAs because, although the Enforcement Policy states "any such settlement [using an ECA] is subject to the rules that apply to Supplemental Environmental Projects," there is a large qualifier stating "Except as specifically provided below." *See* 2010 Enforcement Policy at p. 30, Section IX. Below in the same section, the text states: "If an ECA is utilized as part of a settlement of an enforcement action against a discharger, the monetary liability that is not suspended shall be no less than the amount of the economic benefit that the discharger received from its unauthorized activity, plus an additional amount that is generally consistent with the factors for monetary liability assessment to deter future violations." *Id.* Thus, the statement that ECAs is limited to 50% is inaccurate and the Policy should not add this as a new limit. ECAs should be encouraged for all public entities and should not be arbitrarily capped, even for non-economically disadvantaged communities. Rate payers should not be forced to pay for the costs of compliance AND the cost of penalties for non-compliance. Instead, the best use of ratepayer funds is to bring the entity into compliance so non-compliance does not occur in the future.

Time schedules for ECAs should be able to be extended for good cause for anyone, not just economically disadvantaged communities. *See* Proposed Redline Version at p.40. The Water Boards should be able to grant an extension to anyone that can provide reasons beyond their control that hamper meeting the ECA implementation deadline.

Comments on the Other Required Showings

The Economic Impact Assessment section makes unsubstantiated conclusions that the amendments will "not impose any new financial obligations on the business community or otherwise affect the cost of doing business," and will "not change the civil administrative penalties ultimately reached utilizing the amended policy." For the reasons stated above, many of the proposed changes have the ability to substantially modify and increase proposed penalties. Thus, these conclusions are inaccurate. In addition, as the ability of dischargers to comply with ever tightening regulations decreases and the penalties for non-compliance increase, more companies choose to leave California, which has rippling effects in the economy. This text fails to recognize that problem. SIR, p. 7.

[4] *See* Policy on Supplemental Environmental Projects (Feb. 3, 2009) at p. 1.

[5] *Id.* at p.2.

The section on "Reasonable Alternatives Considered" states that "[n]o reasonable alternatives have been identified or brought to the attention of the agency." *Id.* This statement is inaccurate as this letter and other comment letters provide numerous alternatives to the agency that should be considered and implemented. Another alternative would be to implement the California Environmental Protection Agency (Cal/EPA) "Recommended Guidance on Incentives for Voluntary Disclosure" issued in October of 2003 and attached to the ARB Enforcement Policy, cited in footnote 2 above, as Appendix C. This Guidance is designed to encourage "regulated entities to prevent or to discover voluntarily, disclose, and correct violations of federal, state and local environmental requirements." Because Clean Water Act and California Water Code are self-monitoring and disclosure statutes, these same incentives should apply.

The section on "Duplication or Conflicts with Federal Regulations" states that the amendments do not unnecessarily duplicate or conflict with federal regulations. However, for NPDES permit violations, which are limited by federal law to $37,500 per day per violation, the imposition of per gallon penalties can be orders of magnitude higher than this federal statutory maximum. This raises equal protection issues since dischargers in California are penalized much more severely than a discharger with the exact same issues in the other 49 states. This discrepancy should at least be recognized.

Comments on Proposed Specific Language Changes

SCAP is including with this comment letter a redline/strikeout document to propose changes to and comment on the proposed language changes set forth in the Redline Version provided to stakeholders for review in July of 2016. Some of these comments will be to add back in language proposed for deletion and that will be so indicated in that document. Others are to change problematic language. There are also embedded comments where specific language was not proposed. One of these suggestions was to add a template for both an ACL Complaint and Hearing Procedures, so that there will be a greater level consistency in these documents. However, we understand that the facts and timelines may necessarily differ from document to document.

Many of SCAP's members have been subjected to enforcement under the current 2009 Enforcement Policy and have provided educated comments on how to make the process and Policy better. SCAP sincerely hopes that the State Water Board members will take these comments into consideration.

Sincerely,

John Pastore, Executive Director