



## California Stormwater Quality Association®

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September 4, 2013

Mr. Kenneth Landau, Advisory Team  
Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive, Suite 200,  
Rancho Cordova, CA 95670

Mr. Patrick Pulupa, Staff Counsel, Advisory Team  
State Water Resources Control Board, Office of Chief Counsel  
1001 I Street,  
Sacramento, CA 95814

Subject: Comments on need for consistent, statewide application of Enforcement Policy as raised by proposed Administrative Civil Liability (ACL) Order No. R5-2013-0519

Dear Advisory Team Members, Mr. Landau, and Mr. Pulupa:

The California Stormwater Quality Association (CASQA) is taking this opportunity to comment on a matter raised by the pending enforcement action referenced above. As a matter of policy, CASQA generally only comments on regional issues that have the potential to be precedent setting or that appear to deviate from statewide policy with little or no justification provided. We want to clarify that we are not commenting on the merits of the enforcement action but rather on the application of the Enforcement Policy (Policy). CASQA is concerned the ACL before you either deviates from the State Water Board's Policy and/or raises important questions regarding interpretation and application of this relatively new Policy to the development of ACL penalties.

### **Classification of the discharge in the subject ACL is not consistent with prior application of the High Volume Discharges section of the State Water Board's 2010 Enforcement Policy**

In the proposed penalty for the alleged discharge violations in ACL No. R5-2013-0519, the Regional Water Board proposes to use \$10 per gallon to compute a base liability amount even though the 2010 Enforcement Policy states that a **maximum amount of \$2 per gallon** should be used to determine the per gallon penalty amount for "high volume discharges," including stormwater (the discharge volume in the subject ACL is 76,613 gallons):

"Since the volume of sewage spills and releases of stormwater from construction sites and municipalities can be very large for sewage spills and releases of municipal stormwater or stormwater from construction sites, a maximum amount of \$2.00 per gallon should be used with the above factor to determine the per gallon amount for sewage spills and stormwater." (2010 Enforcement Policy at pg. 14 (emphasis added).)

While the Enforcement Policy does not define a “high volume discharge” it appears that a stormwater discharge over 1,000 gallons could be considered a “high volume discharge” that receives the per gallon reduction set forth in the Enforcement Policy. This is consistent with the Enforcement Policy’s removal of the first 1,000 gallons from the penalty equation. Further, this is consistent with other recent ACL complaints that alleged *lower volumes* than the 76,613 gallons in the subject ACL were “high volume discharges” subject to the \$2 per gallon assessment. (See e.g., ACL No. R5-2013-0520 (37,500 gallons); ACL No. R8-2010-0024 (55,887 gallons).)

### **Using \$10 per gallon is not consistent with other construction stormwater ACLs**

The State Water Board’s Enforcement Policy strives to have enforcement actions be consistent statewide. (2010 Enforcement Policy at pg. 1.) The 2010 Enforcement Policy reiterates this theme of ensuring that enforcement actions are consistent throughout California.

- p. 1 “Timely and consistent enforcement of these laws is critical”; “create a fair and consistent statewide approach to liability assessment”;
- p. 2 Chapter Heading - “FAIR, FIRM, AND CONSISTENT ENFORCEMENT”; “Water Boards shall strive to be fair, firm, and consistent”; “Water Board orders shall be consistent”; “Water Boards shall implement a consistent and valid approach”; “providing consistent treatment for violations that are similar in nature”;
- p. 9 “the public expect them to fairly and consistently implement”;
- p. 10 “a consistent outcome can be reasonably expected using this Policy”; “Be assessed in a fair and consistent manner”;
- p. 32 “In order to provide a consistent approach to enforcement throughout the State, enforcement orders shall be standardized to the extent appropriate.”

Based on this emphasis in the Enforcement Policy, CASQA believes Regional Water Boards must adopt similar penalties for comparable construction stormwater discharges, and must determine these penalties in a manner consistent with the stated goals, intent, and applicable sections of the 2010 Enforcement Policy. The proposed ACL No. R5-2103-0519 does not appear to meet this requirement for consistency without supporting information of why this action deserves to be assessed differently<sup>1</sup>.

Construction stormwater ACL penalties adopted since the effective date of the 2010 Enforcement Policy have all used \$2 per gallon as the starting point, except one; EI-PLA 75 LLC, ACL No. R8-2010-0025, used \$3 per gallon. The EI-PLA case had a history of violations and other contributing factors that were considered in the determination of the penalty. The record for ACL No. R5-2013-0519 does not make a similar demonstration of additional factors that would warrant a higher per gallon penalty.

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<sup>1</sup> The only justification provided for not using the High Volume Discharges section of the Policy appears to be the statement “While the Enforcement Policy states that a lower initial per-gallon value may [Note: Policy states “should”] be used for “high volume” discharges, for this case, Water Board staff do not recommend using less than \$10/gallon in the initial penalty calculation, given the relatively small volume of discharge on 30 November 2012 and the beneficial uses of the receiving water.” (Page 3, Attachment A, Administrative Civil Liability Complaint R5-2013-0519).

CASQA Comments on application of Enforcement Policy as raised by proposed ACL

For the reasons given in this letter, we urge the Regional Water Board to classify the subject discharge as a high volume discharge subject to the maximum \$2 per gallon penalty amount to be consistent with the Enforcement Policy and with other past construction stormwater ACLs, or make clear in the record why this discharge warrants staff taking such an extraordinary exception to the clear direction provided in the Policy.

Additionally, given the important questions raised in the development of the subject ACL regarding interpretation and application of the Enforcement Policy to high volume discharges of municipal and construction site stormwater, CASQA recommends a discussion between Office of Enforcement, CASQA, and other appropriate parties. The purpose of the discussion would be to provide clarity regarding application of the “high volume discharges” section of the Enforcement Policy.

Thank you for the opportunity to provide comments. Please contact Geoff Brosseau, our Executive Director, at (650) 365-8620 if you have any questions or need additional information, or me at (714) 955-0670.

Sincerely,

A handwritten signature in black ink that reads "Richard Boon". The signature is written in a cursive, slightly slanted style.

Richard Boon, Chair  
California Stormwater Quality Association

cc: Steve Rosenbaum, Central Valley Regional Water Board  
Wendy Wyels, Central Valley Regional Water Board  
Pamela Creedon, Central Valley Regional Water Board  
CASQA Construction Subcommittee, Executive Program Committee, Board of Directors