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2/19/08 BdWrkshp Item 10
Water Quality Enf. Policy
Deadline: 2/7/08 by 12 p.m.

City of Richmond

ENGINEERING SERVICES DEPARTMENT

VIA ELECTRONIC MAIL AND U.S. MAIL

February 7, 2008

Tam Doduc, Chair, and Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

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SWRCB EXECUTIVE

ATTN: Jeanine Townsend, Clerk to the Board
commentletters@waterboards.ca.gov

RE: Proposed Revisions to Water Quality Enforcement Policy

Dear Chair Doduc and Members:

The City of Richmond ("City") appreciates the opportunity to provide comments on the proposed revisions to the Water Quality Enforcement Policy ("draft Policy"). The City of Richmond owns the Wastewater Treatment Plant for the Richmond Municipal Sewer District located at 601 Canal Blvd in Richmond, CA. The purpose of this letter is to highlight the City's concerns with specified proposed revisions in the draft Policy.

The Proposed SEP Revisions Are Problematic, Will Encourage Further Litigation, and Will Reduce Funds Available for Beneficial Environmental Projects That May Otherwise Not Secure Funding.

The proposed revisions regarding the availability of Supplemental Environmental Projects (SEPs) are problematic, will encourage further litigation, and will reduce funds available for beneficial environmental projects that may otherwise not secure funding. In many cases, a public agency permittee subject to enforcement will be willing to accept an imposed or negotiated penalty amount if ratepayer funds will be used for local, beneficial environmental projects. Without greater availability of SEPs, permittees may be more likely to challenge and litigate larger penalty sums, due to the undetermined destination of ratepayer funds deposited into the State's Cleanup and Abatement Account. Furthermore, the greater availability of SEPs does not diminish the punitive nature of the enforcement action, as the permittee must still pay the penalty sum, a significant hardship for many public agencies who are working with finite budgets. Finally, SEPs provide significant value to local environmental organizations and projects to aid in restoring and protecting the environment within local communities and watersheds. If adopted as proposed, the draft Policy will preclude numerous beneficial projects, an outcome that appears contrary to the goals of the State Water Resources Control Board to protect, enhance, and restore the natural environment.

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SEPs for ACLs (other than those for mandatory minimum penalties) should not be "capped" to a percentage of the total ACL amount.

Regional Water Boards should be able to take into account the specific facts giving rise to the enforcement action, the discharger's conduct during and subsequent to the violation (including voluntary cleanup efforts), and the importance and value of the proposed SEP in determining the appropriate amount to be directed to a SEP.

Dollar-for-dollar credit is appropriate for SEPs.

The draft Policy suggests that Regional Water Boards should give less than dollar for dollar credit for SEPs, an illogical approach if the State Water Board wants to encourage beneficial environmental projects that may not otherwise be funded.

SEPs should be encouraged and authorized for education and outreach programs.

The City does not understand the basis for eliminating education and outreach programs from eligibility for SEPs. Many current water quality problems will only be addressed through changing public behavior, and public education and understanding are of no less importance and value in protecting water quality than capital improvements, studies, monitoring and treatment.

The requisite nexus between a SEP and a violation is overly narrow.

The draft Policy would define a nexus to exist only if "the project remediates or reduces the probable overall environmental or public health risks to which the violation at issue contributes." The way in which the nexus requirement is expressed may make it difficult or impossible to use SEPs. It is sufficient to specify that a project must have a geographic, category or beneficial use nexus.

The proposed extension of required economic benefit recovery to non-NPDES violations is inconsistent with the Water Code.

The draft Policy incorrectly states that both sections 13351 and 13385(e) of the Porter-Cologne Water Quality Control Act require that civil liabilities be set at a level that accounts for any economic benefit or savings gained through violations. (draft Policy at p. 31) The requirement to capture economic benefit should be limited to enforcement actions undertaken pursuant to Water Code section 13385 (NPDES), not Water Code sections 13323-13351 (WDRs). Unlike Water Code section 13385(e), Water Code sections 13327 and 13351 state that economic benefit is simply a factor for consideration when calculating the appropriate penalty, not a mandated amount to collect.

The draft Policy should provide additional guidance regarding MMP application for chronic violations.

Water Code section 13385(i)(1)(a) requires that an MMP for "chronic" violations be assessed where a discharger exceeds "a waste discharge requirement effluent limitation" four times in any period of six consecutive months. Some Regional Water Boards have interpreted the statute so

that *any combination of effluent limitation violations* triggers the penalty. In other words, a violation of a copper effluent limitation, a violation of a TSS limit, a violation of a temperature limit, and a violation of a coliform limitation would result in an MMP. However, this interpretation has no basis, and the City requests the State Water Board to provide clear guidance in the draft Policy.

The appropriate interpretation of this section is that the chronic violations must be of the same pollutant parameter to result in liability because:

(1) The statute refers to violations of "a" waste discharge effluent requirement. The use of the word "a" rather than the word "any" indicates that the Legislature intended to penalize repeat violations of a single effluent limitation;

(2) Each of the other three categories of violations under subsection (i)(1) is very specific—one must fail to file the same report four times, etc.;

(3) The purpose of allowing three violations without penalty is to allow the discharger to identify and correct the problem that led to the violations. Applying the provision to unrelated effluent limitations does not serve this purpose, as the causes of the violations may be similarly unrelated. Further, under this approach, a discharger could get a penalty for "repeat" or "chronic" violations based upon a single sampling event on a single day; and

(4) The MMP law incorporates by reference federal regulations (see Water Code §13385(h)(2) referencing Appendix A to 40 C.F.R. §123.45), which provide that "effluent violations should be evaluated on a parameter-by-parameter and outfall-by-outfall basis" and, similar to the MMP law, "chronic violations must be reported ... if the monthly average permit limits are exceeded any four months in a six-month period." This federal regulation supports the suggested approach to addressing truly chronic violations.

Thank you for the opportunity to provide comment regarding the proposed revisions to the draft Policy.

Sincerely,

Richard Davidson

Rich Davidson, City Engineer
City of Richmond

Louise Renne, City Attorney
Mary Phelps, Senior Industrial Waste Inspector
Mark Grushayev, Veolia Water North America
EJ Shalaby, West County Wastewater District