

**POLICY FOR IMPLEMENTATION AND ENFORCEMENT OF THE  
NONPOINT SOURCE POLLUTION CONTROL PROGRAM**

State Water Resources Control Board

California Environmental Protection Agency

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# **POLICY FOR IMPLEMENTATION AND ENFORCEMENT OF THE NONPOINT SOURCE POLLUTION CONTROL PROGRAM**

## **Guidance for Developing An Integrated Program for Implementing and Enforcing the “Plan for California’s Nonpoint Source Pollution Control Program”**

### **I. INTRODUCTION**

In December 1999, the State Water Resources Control Board (SWRCB), in its continuing efforts to control nonpoint source (NPS) pollution in California, adopted the *Plan for California’s Nonpoint Source Pollution Control Program* (NPS Program Plan) (SWRCB, 1999). The NPS Program Plan upgraded the State’s first *Nonpoint Source Management Plan* adopted by the SWRCB in 1988 (1988 Plan) (SWRCB, 1988). Upgrading the 1988 Plan with the NPS Program Plan brought the State into compliance with the requirements of section 319 of the Clean Water Act (CWA) and section 6217 of the Coastal Zone Act Reauthorization Amendments of 1990 (CZARA). This document, the SWRCB *Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (NPS Implementation and Enforcement Policy), explains how the NPS Program Plan will be implemented and enforced and, in so doing, fulfills the requirements of California Water Code (CWC) section 13369 (a)(2)(B).

To continue receiving federal funds to implement the State’s NPS pollution control program, the State was required to obtain approval of the NPS Program Plan from the U. S. Environmental Protection Agency and the National Oceanic and Atmospheric Administration. Federal approval required the SWRCB to provide assurances that it has the legal authority to implement and enforce the NPS Program Plan. In providing these assurances, the SWRCB cited the mandates and authorities granted it and the Regional Water Quality Control Boards (RWQCBs) by the Porter-Cologne Water Quality Control Act (Porter-Cologne Act). The Porter-Cologne Act designates the SWRCB and RWQCBs as the State agencies with primary responsibility for water quality control in California and obligates them to address all discharges of waste that could affect the quality of the waters of the State, including potential nonpoint sources of pollution. To carry out this mandate, the Porter-Cologne Act has provided the SWRCB and RWQCBs with:

- Planning authority to designate beneficial uses of the waters of the State, establish water quality objectives to protect those uses, and develop implementation programs to meet water quality objectives and maintain and/or restore designated beneficial uses;
- Administrative permitting authority in the form of waste discharge requirements (WDRs), waivers of WDRs, and basin plan prohibitions; and
- Enforcement options to ensure that dischargers comply with permitting requirements.

This NPS Implementation and Enforcement Policy explains how these Porter-Cologne Act mandates and authorities, delegated to the SWRCB and RWQCBs by the California Legislature, will be used to implement and enforce the NPS Program Plan. The policy also provides a bridge between the NPS Program Plan and the *SWRCB Water Quality Enforcement Policy* (Enforcement Policy) (SWRCB, 2002).

The information provided in this policy is designed to assist all responsible and/or interested parties in understanding how the State's NPS water quality control requirements will be implemented and enforced. The parties involved include the SWRCB and the RWQCBs, federal, state and local agencies, individual dischargers, designated third-party representatives and any other interested public and private parties.

In addition to using the Porter-Cologne Act's planning, permitting, and enforcement authorities to prevent and control nonpoint sources of pollution, the SWRCB and RWQCBs have implemented a broad program of outreach, education, technical assistance and financial incentives. This program is supplemented by collaborative efforts with other agencies and non-governmental organizations (NGOs) to help implement and coordinate the use of their programs that contribute to NPS control. The goal is to provide an integrated statewide approach to controlling nonpoint sources of pollution. In structuring this document, a review of the Porter-Cologne Act is provided in Section II, including an overview of the Act related to planning requirements and administrative permitting authorities; Section III provides history and background on development of the State's NPS pollution control program; Section IV discusses the structure of the NPS implementation program including statewide implementation, and the mandatory five key elements of an NPS implementation program. Sections V and VI discuss RWQCB compliance assurance, implementation success, and future considerations.

## **II. STATUTORY AND REGULATORY BACKGROUND**

### **A. Overview of the Porter-Cologne Water Quality Control Act**

The Porter-Cologne Act is the principal law governing water quality control in California. It establishes a comprehensive program to protect water quality and the beneficial uses of waters of the State. The Porter-Cologne Act applies broadly to all State waters, including surface waters, wetlands, and ground water; it covers waste discharges to land as well as to surface and groundwater, and applies to both point and nonpoint sources of pollution.<sup>i</sup>

The Legislature has declared that it is the policy of the State that:

1. The quality of all the waters of the State shall be protected;
2. All activities and factors that could affect the quality of State waters shall be regulated to attain the highest water quality that is reasonable; and
3. The State must be prepared to exercise its full power and jurisdiction to protect the quality of water in the State from degradation.<sup>ii</sup>

The Porter-Cologne Act is administered regionally, within a framework of statewide coordination and policy involving both the SWRCB and RWQCBs.<sup>iii</sup> The SWRCB adopts State policy for water quality control and statewide water quality control plans in addition to regulations that are binding on the RWQCBs. The RWQCBs each govern one of the nine hydrologic regions into which California is divided, adopting regional water quality control plans (basin plans) for their respective regions.<sup>iv</sup> Basin plans are reviewed and updated on a triennial basis. The SWRCB must approve basin plans, or any amendments thereto, before they become effective.<sup>v</sup> Statewide plans adopted by the SWRCB supersede any RWQCB-adopted plans to the extent of any conflict. The RWQCBs also issue permits and waivers to implement basin plan water quality requirements and, when necessary, take enforcement actions.<sup>vi</sup> The SWRCB adopts statewide general permits.<sup>vii</sup> The SWRCB also reviews RWQCB decisions on petitions for review.<sup>viii</sup> The primary point of contact for dischargers and other interested parties to receive information regarding the laws, regulations and programs related to NPS pollution control is at the regional level.

## **B. Porter-Cologne Act Water Quality Control Act Planning Requirements**

Planning authority under the Porter-Cologne Act extends to any activity or factor that may affect water quality.<sup>ix</sup> For example, factors that affect water quality include not only waste discharges, but also saline intrusion, reduction of waste assimilative capacity caused by reduction in water quantity, hydrogeologic modifications, watershed management projects, and land use.<sup>x</sup>

Water quality control plans designate beneficial uses of water, establish water quality objectives to protect those uses, and provide a program to implement the objectives.<sup>xi</sup> The beneficial use designations and water quality objectives, together with the State's antidegradation policy,<sup>xii</sup> constitute water quality standards for purposes of the CWA.<sup>xiii</sup> The water quality control plan implementation programs are required to describe the nature of actions that are necessary to meet water quality objectives, including recommendations for action by both private and public entities.<sup>xiv</sup> Implementation programs also must include a time schedule and describe proposed monitoring activities to assess compliance with water quality objectives.<sup>xv</sup>

## **C. The Porter-Cologne Water Quality Control Act and Waste Discharge Regulation**

The Porter-Cologne Act provides that "All discharges of waste into the waters of the State are privileges, not rights."<sup>xvi</sup> Furthermore, all dischargers are subject to regulation under the Porter-Cologne Act including both point and NPS dischargers.<sup>xvii</sup> In obligating the SWRCB and RWQCBs to address all discharges of waste that can affect water quality, including nonpoint sources, the legislature provided the SWRCB and RWQCBs with administrative permitting authority in the form of administrative tools (waste discharge requirements [WDRs], waivers of WDRs, and basin plan prohibitions) to address ongoing and proposed waste discharges. Hence, all current and proposed NPS discharges must be regulated under WDRs, waivers of WDRs, or a basin plan prohibition, or some combination of these administrative tools.

The SWRCB and RWQCBs use their permitting authorities to implement the requirements of applicable State policies and state and regional water quality control plans. Permits take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the provisions of CWC section 13241.<sup>xviii</sup>

With the exception of persons discharging into community sewer systems, any person discharging or proposing to discharge waste that could affect water quality must file a report of waste discharge (RoWD) with the appropriate RWQCB, unless the RWQCB waives the filing.<sup>xix</sup> A RoWD also is required if a discharger proposes a material change in the character, volume, or location of a discharge.<sup>xx</sup> The RWQCB must then determine the appropriate action to take, either issuing WDRs to the discharger, or conditionally waiving the requirements.<sup>xxi</sup> WDRs can prohibit the discharge of waste or certain types of waste, either under specific conditions or in specified areas. As an alternative, the RWQCB may prohibit the discharge of waste or certain types of waste in a water quality control plan.<sup>xxii</sup>

Because a RWQCB may choose to use the basin planning process to adopt some of these administrative approaches, there is some overlap between the planning and administrative processes. A categorical waiver of waste discharge requirements, for instance, could be adopted as a RWQCB basin plan amendment. The SWRCB and RWQCBs have broad discretion in how they use the administrative tools provided by the Porter-Cologne Act.

## **1. Waste Discharge Requirements**

The RWQCBs have primary responsibility for issuing WDRs. The RWQCBs may issue individual WDRs to cover individual discharges or general WDRs to cover a category of discharges.<sup>xxiii</sup> WDRs may include effluent limitations or other requirements that are designed to implement applicable water quality control plans, including designated beneficial uses and the water quality objectives established to protect those uses and prevent the creation of nuisance conditions. As in a basin plan prohibition, a WDR may specify certain conditions under which, or areas where, the discharge of waste or certain types of waste will not be permitted. Dischargers operating under a WDR must submit an annual fee to the appropriate RWQCB to cover administrative costs. The fee schedule is determined by the SWRCB, based upon factors such as total flow, volume, number of animals or area involved, etc. These fees help provide the SWRCB and the RWQCBs with resources to administer the WDR program.

The SWRCB also can issue general WDRs under specific conditions.<sup>xxiv</sup> Violations of WDRs may be addressed, for example, by issuing Cleanup and Abatement Orders (CAOs) or Cease and Desist Orders (CDOs), assessing administrative civil liability or seeking imposition of judicial civil liability or judicial injunctive relief.

## **2. Waivers of Waste Discharge Requirements**

The requirements for a discharger to submit a RoWD or for a RWQCB to issue WDRs may be waived by the RWQCB or SWRCB for a specific discharge or a specific type of discharge if the SWRCB or RWQCB determines, after a public meeting, that the waiver is consistent with any applicable State or regional water quality control plan and is in the public interest.<sup>xxv</sup> All waivers are conditional and may be terminated at any time. Except for waivers for discharges that the SWRCB or a RWQCB determines do not pose a significant threat to water quality, waiver conditions must include, but need not be limited to, individual, group or watershed-based monitoring.<sup>xxvi</sup> Waivers may not exceed five years in duration, but may be renewed. Prior to renewing a waiver, the SWRCB or RWQCB must determine whether the discharge in question should be subject to general or individual WDRs.

CWC section 13269(e) provides that “the regional boards and the state board shall require compliance with the conditions pursuant to which waivers are granted....” Therefore, even where the RWQCBs decide to waive the requirement to submit a RoWD for general WDRs, the RWQCBs are encouraged to have an enrollment process for coverage under the waiver of WDRs so that the RWQCBs can identify the dischargers who are required to comply with the general waiver of WDRs. Although the RWQCBs retain their prosecutorial discretion to decide how to ensure compliance with their conditional waivers, the language of section 13269(e), makes it clear that the legislature intends that the RWQCBs allocate some of their resources to ensuring that dischargers are in compliance. Following SWRCB adoption of a fee schedule, RWQCBs are authorized to collect annual administrative fees to establish and implement waivers of WDRs.<sup>xxvii</sup>

There are many different ways for the RWQCBs to ensure compliance. In the event of noncompliance, a RWQCB could rescind a waiver, or terminate its applicability to individual dischargers, and issue WDRs in its place. If the waiver leaves significant discretion with the discharger to determine how to comply with the waiver’s conditions, the RWQCB could adopt a new waiver that is more directive in terms of the actions that the dischargers must take in order to comply with the waiver. In order to be enforceable, waiver conditions should be clearly specified.

Potential enforcement actions include issuance of a notice of violation (NOV), an informal enforcement action which notifies the discharger of the violation of the waiver condition and the reasonably expeditious time within which compliance must be achieved to avoid proposed adoption of WDRs. Other formal enforcement actions that may be taken include CAOs, CDOs, notices to comply (NTC), and time schedule orders.

## **3. Prohibitions**

Pursuant to CWC section 13243, RWQCBs may prohibit discharges of waste or types of waste either through WDRs or through waste discharge prohibitions specified in a

basin plan. A RWQCB may amend a basin plan to prohibit a particular discharge or a particular type of discharge or to conditionally prohibit a discharge. A conditional prohibition may include specific conditions under which application or enforcement of the prohibition for a particular discharge or particular type of discharge may be waived. In some cases, RWQCBs may waive application of the prohibition for the planning and permitting period of projects or activities. RWQCBs may also use conditional basin plan prohibitions as the primary administrative tool for implementation programs - for example, in cases where a RWQCB desires to prohibit discharges unless certain procedural or substantive conditions are met. Basin plan prohibitions are extremely useful because, once adopted, they allow a RWQCB to take direct and immediate enforcement action by issuing CAOs or CDOs, or assessing civil liabilities, even in the absence of WDRs. Therefore, they allow RWQCBs to respond in a timely manner where NPS pollution generated by certain activities is creating an emergency or a problem that is not otherwise being remedied in an adequate or timely manner.

#### **D. Porter-Cologne Act Enforcement Options**

Just as the RWQCBs are obligated to address all NPS discharges of waste through one or more of the available administrative tools, they also are obligated to take steps to ensure that their NPS pollution control requirements are met. The SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. These options range from informal NOV's to formal actions defined in the Porter Cologne Act. Formal actions range from NTCs to civil administrative remedies, and can include referrals for criminal penalties. Both the Enforcement Policy and common RWQCB practice recognize the merit of progressive enforcement---that is, initially taking whatever level of enforcement is appropriate, considering the RWQCB workload and the circumstances of the case, and applying increasingly severe remedies where necessary to correct a problem.

### **III. DEVELOPING THE STATE'S NPS POLLUTION CONTROL PROGRAM**

The State's NPS Program has been developed in conformance with the CWA, CZARA, and the Porter-Cologne Act. The CWA requires the SWRCB to develop and implement an NPS pollution control program and provides funding for this purpose. The NPS Program Plan was the State's response to this requirement, as well as to additional federal requirements for the inclusion of management measures (MMs) consistent with the *CZARA Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution to Coastal Waters* (USEPA, 1993). As described above, the Porter-Cologne Act provides the SWRCB and RWQCBs with the authority and administrative tools to implement the CWA and CZARA requirements.

The Porter-Cologne Act also provides the definition of "waste" that is integral to understanding the SWRCB's and RWQCBs' NPS pollution control authorities and responsibilities. "Waste" is broadly defined to include sewage and "any and all other waste substances, liquid, solid, gaseous, or radioactive, associated with human habitation, or of

human or animal origin, or from any producing, manufacturing, or processing operation”.<sup>xxviii</sup> This definition includes all Attorney General interpretations of the terms “sewage”, “industrial waste”, and “other wastes” under the Porter-Cologne Act’s predecessor legislation.<sup>xxix</sup> The Attorney General has interpreted the latter terms to include wastes from a wide variety of activities. As a result, it is clear that “discharges of waste” are not limited to discharges resulting from waste disposal activities, but also include releases of pollutants as part of other activities, including all nonpoint sources of waste.<sup>xxx</sup>

In the Porter Cologne Act, the term “discharge of waste” includes all discharges, point and nonpoint, including agricultural return flows and storm water discharges. The CWA, however, distinguishes between point and nonpoint sources of pollution. Under the CWA, a point source is identified as a discernible, confined, and discrete conveyance, such as a pipe, ditch, or channel. Irrigated agricultural return flows and agricultural storm water runoff are excluded. Nonpoint pollution sources generally are sources of water pollution that do not meet the definition of a point source as defined by the CWA and the CWA requires the State to control nonpoint sources of pollution.

NPS pollution typically results from contact between pollutants and land runoff, precipitation, atmospheric deposition, drainage, seepage, or hydrologic modification. Consequently, the most successful control of nonpoint sources is achieved by prevention or by minimizing the generation of NPS discharges. Most NPS management programs typically depend, at least in part, upon discharger implementation of management practices (MPs) to control nonpoint sources of pollution. As originally used in the CWA and its implementing regulations, the term “BMP” officially referred only to practices that had been formally adopted by the SWRCB through its continuing planning program. However, informally, prior to adoption of the NPS Program Plan, the term became used generally to refer to any type of practice for NPS control, whether formally approved or not. To prevent further misunderstanding, in this policy, the term “MP” has replaced the formerly used term “BMP” when referencing practices that have not been formally adopted by the SWRCB.

MPs may include, but are not limited to, structural and non-structural (operational) controls. They may be applied before, during and after pollution producing activities to eliminate or reduce the generation of NPS discharges and the introduction of pollutants into receiving waters. Successful MP implementation typically requires: (1) adaptation to site-specific or regional-specific conditions; (2) monitoring to assure that practices are properly applied and are effective in attaining and maintaining water quality standards; (3) immediate mitigation of a problem where the practices are not effective; and (4) improvement of MP implementation or implementation of additional MPs when needed to resolve a deficiency. MP implementation, however, may not be substituted for actual compliance with water quality requirements. The U.S. Court of Appeals for the Ninth Circuit, in *Northwest Indian Cemetery Protective Ass’n v. Peterson*, held that BMPs [MPs] in a certified water quality management plan were not “...standards in and of themselves. Adherence to the BMPs [MPs] does not automatically assure compliance ...the federal statute [CWA] contemplates that any activity conducted pursuant to a BMP [MP] can be terminated or modified if the conducted activity resulted in a violation of water quality standards.”<sup>xxxii</sup>

There are many programs provided by state and federal agencies, as well as NGOs, to assist dischargers. These programs can help dischargers understand how their operations can cause NPS pollution and help them choose and implement MPs to prevent or control NPS pollution. In addition, many of the programs provide financial as well as technical assistance.

Since the early 1990s, using CWA § 319(h) funds, the SWRCB and RWQCBs have reached out to dischargers with technical and educational information and financial support to assist with MP implementation. Other informal RWQCB programs have encouraged development of watershed groups to facilitate NPS pollution control efforts. Additional technical expertise and/or financial assistance are provided through the grant and loan sources of other state and federal agencies. These include resource conservation districts (RCDs), University of California Cooperative Extension and the Natural Resources Conservation Service. In addition, there are State agencies, other than the SWRCB and RWQCBs, with programs and authorities related to NPS control that help implement the NPS Program Plan by coordinating their programs and activities. Under the leadership of the SWRCB and the California Coastal Commission (CCC), an Interagency Coordinating Committee (IACC) meets regularly to actively promote and coordinate inter-agency NPS pollution control activities.<sup>xxxii</sup>

#### **IV. STRUCTURING AN NPS POLLUTION CONTROL IMPLEMENTATION PROGRAM TO ACHIEVE WATER QUALITY OBJECTIVES**

An NPS pollution control implementation program is a program developed to comply with SWRCB or RWQCB WDRs, waivers of WDRs, or basin plan prohibitions. Implementation programs for NPS pollution control may be developed by a RWQCB, the SWRCB, an individual discharger or by or for a coalition of dischargers in cooperation with a third-party representative, organization, or government agency. The latter programs are collectively known as “third-party” programs and the third-party role is restricted to entities that are not actual dischargers under RWQCB/SWRCB permitting and enforcement jurisdiction. These may include NGOs, citizen groups, industry groups, including discharger groups, watershed coalitions, government agencies, or any mix of the above. Although a third-party program may be comprised solely of dischargers, the reason it is a third-party program is because the entity that represents the dischargers is not an actual discharger.

##### **A. Challenges of Statewide NPS Pollution Control**

The challenges to implementing statewide prevention and control of NPS pollution discharges are significant. The RWQCBs have primary responsibility for ensuring that appropriate NPS control implementation programs are in place throughout the State. RWQCB responsibilities include, but are not limited to, issuing WDRs or a waiver of WDRs for individual discharges or a category of NPS discharges, or adopting a basin plan amendment that addresses NPS discharges.

Given the extent and diversity of NPS pollution discharges, the RWQCBs need to be as creative and efficient as possible in devising approaches to prevent or control NPS pollution. This policy provides guidelines for development of third-party NPS control programs. A primary advantage of the development of third-party programs is their ability to reach multiple numbers of dischargers who individually may be unknown to the RWQCB.

A RWQCB may use whatever mix of organizational approaches it deems appropriate. Coalitions of dischargers may differentiate themselves in many ways: regionally, sub-regionally, by watershed, discharge characteristics, discharger community type, or through participation in some other publicly or privately developed program. Though dischargers participate in third-party programs, organizationally, the programs must be managed by someone other than a discharger. For example, there are organizations or entities already involved in NPS management programs. RWQCBs have had experience working with industry groups, both formally and informally, to develop education and self-regulation within a particular industry. Other organizations have become active in NPS pollution prevention and land restoration efforts through CWA §319(h) grants, State bond grants, or the State Revolving Fund loan program. Many of the partnerships formed to take advantage of these financial resources have developed into self-sustaining third-party organizations. Some are affiliated with RCDs or have developed as part of the Coordinated Resource Management Planning approach; others are watershed groups or have developed their own organizational structure based on other geographic or industry-specific factors. In some situations, the organizations accomplish their goals through a mix of public and private partnership efforts.

RWQCBs are not required to endorse or approve any specific program or type of program. Each program brought before a RWQCB or SWRCB must be individually judged on its merits. The scale against which it will be measured will assess its potential to result in the implementation of actions to successfully prevent or control discharges of nonpoint sources of pollution. The ultimate goal of any NPS control implementation program must be to protect the beneficial uses of the State's waters.

#### **B. Third-Party Programs Administered by State Agencies Other than the SWRCB or RWQCBs**

There are agencies, in addition to the SWRCB and RWQCBs, with the authority to implement programs to meet water quality objectives and protect beneficial uses. Several of these agencies are formally linked to the RWQCBs and SWRCB through memoranda of understanding (MOUs) or management agency agreements (MAAs). MOUs and MAAs are important for NPS regulation because they delineate the roles and responsibilities of individual agencies in the State's efforts to control NPS pollution sources. In all cases, agencies with regulatory power act in accordance with their own authorities and processes.

There are two general types of MOUs: (1) cooperative agreements made with other agencies or organizations that are able to provide information or technical or financial assistance to further the State's goal of preventing or controlling nonpoint sources of pollution; and (2) cooperative agreements made with land management agencies with authority to control NPS discharges through inclusion of MPs in their land lease agreements.

With an MAA, the SWRCB may designate another agency as a management agency to take the lead in implementing NPS pollution control. The actions taken by these agencies are taken under their own authorities and using their own regulatory processes. The fundamental purpose of the SWRCB/RWQCBs, when using the management agency approach, is to achieve, through the capabilities of a management agency, at least the same degree of control over NPS pollution as could be attained through direct regulation under SWRCB/RWQCB authority, but to do so more efficiently.

The SWRCB and RWQCBs may not delegate their NPS authorities and responsibilities to another agency, and may not indefinitely defer taking necessary action if another agency is not properly addressing a NPS problem. However, where another agency is constructively involved in NPS efforts, the SWRCB and RWQCB should seek to take those efforts into account and, where appropriate, take advantage of these third-party efforts. Not only does this avoid unnecessary duplication of effort, it can leverage the SWRCB's and RWQCBs' limited staffing and financial resources. Another agency's actions pursuant to an MOU or MAA do not fulfill the RWQCBs' obligation to use its administrative tools to address the relevant NPS discharges. However, another agency's actions can serve, for example, as the basis, in part or in whole, for a RWQCB waiver of WDRs for the activities covered in these agreements.

If water quality problems persist, the RWQCBs may not indefinitely defer enforcement action to other agencies. While the RWQCBs cannot directly enforce another agency's requirements against a discharger who is out of compliance, the RWQCB can ask the agency to enforce its own requirements. In addition, a RWQCB can enforce the conditions or requirements contained in the waiver, WDR, or prohibition that addresses the underlying discharge of waste. Consistent with a particular MAA, the lead agency under an MAA may be given an opportunity to achieve compliance before the RWQCBs take necessary action.

The RWQCBs also have developed partnerships with other agencies that are in a position to take quick and decisive enforcement action. The California Department of Fish and Game, for instance, may take action against a problem discharger under its own laws and regulations, working with either the local county district attorney's office or the attorney general's office.

The RWQCBs have broad flexibility and discretion in using their administrative tools to fashion NPS management programs, and are encouraged to be as innovative and creative as possible, and, as appropriate, to build upon Third-Party Programs. The State Board, in

turn, is encouraged to establish a program that recognizes and honors successful and outstanding third-party efforts.

### **C. The Key Elements of an NPS Pollution Control Implementation Program**

Before approving or endorsing a specific NPS pollution control implementation program, a RWQCB must determine that there is a high likelihood the implementation program will attain the RWQCB's stated water quality objectives. This includes consideration of the MPs to be used and the process for ensuring their proper implementation, as well as assessment of MP effectiveness. Depending on the program, it also may include other factors such as the level of discharger participation. NPS dischargers have had and will continue to have many opportunities to take advantage of the available technical and financial assistance programs administered through the SWRCB, in addition to the assistance offered by other programs. A first step in the education process offered by these programs often consists of discharger assessment of their lands or operations to determine NPS problems, followed by development of a plan to correct those problems. It is important to recognize that development of a plan is only the first step in developing an implementation program that addresses a discharger's NPS pollution discharges. Implementation of the plan, including any necessary iterative steps to adjust and improve the plan and/or implementation must follow the planning stage.

Prior to developing an NPS control implementation program or recognizing an implementation program developed by dischargers or third-parties as sufficient to meet RWQCB obligations to protect water quality, a RWQCB shall ensure that the program meets the requirements of the five key structural elements described below. While the RWQCBs are free to use the administrative tool(s) that they determine to be most appropriate for a particular implementation program, all implementation programs will have the five structural elements in common. Development of Elements 1 and 2 are the primary responsibility of those who are developing the implementation program. Elements 3 and 4 may require consultation with the appropriate RWQCB. Element 5 shall be developed by the RWQCB

For implementation programs developed by non-regulatory parties, factors such as availability of funding, a demonstrated track record or commitment to NPS control implementation, and a level of organization and group cohesion that facilitates NPS control implementation are among the critical factors that must be taken into account. For regulatory programs, the availability of staff resources to administer the implementation may be a major concern.

NPS control implementation programs shall include the following five key elements:

KEY ELEMENT 1: An NPS control implementation program's ultimate purpose shall be explicitly stated. Implementation programs must, at a minimum, address NPS

pollution in a manner that achieves and maintains water quality objectives and beneficial uses, including any applicable antidegradation requirements.

Existing and potential beneficial uses of the waters of the State are identified through a public process. RWQCBs establish water quality objectives to protect those uses, and a program to implement the objectives. The State also is required to adopt and implement an antidegradation policy designed to protect water quality that is higher than that necessary to protect the designated beneficial uses. For purposes of this policy, the term “water quality requirements” is used to include water quality objectives established to protect beneficial uses and any higher level of water quality needed to comply with the State’s antidegradation policy.

An NPS control implementation program must be specific as to the water quality requirements it is designed to meet. For example, if the program relies upon dischargers’ use of MPs, there should be a strong correlation between the specific MPs implemented and the relevant water quality requirements. The program also should provide other information as required by the RWQCB, including but not limited to the identification of participant dischargers. The RWQCB must be able to ensure that all the significant sources of the NPS discharges of concern are addressed.

KEY ELEMENT 2: An NPS control implementation program shall include a description of the MPs and other program elements that are expected to be implemented to ensure attainment of the implementation program’s stated purpose(s), the process to be used to select or develop MPs, and the process to be used to ensure and verify proper MP implementation.

A RWQCB must be able to determine that there is a high likelihood that the program will attain water quality requirements. This will include consideration of the MPs to be used and the process for ensuring their proper implementation. It also will include other factors such as the level of discharger participation and the effectiveness of the MPs implemented.

MPs must be tailored to a specific site and circumstances, and justification for the use of a particular category or type of MP must show that the MP has been successfully used in comparable circumstances. If an MP has not previously been used, documentation to substantiate its efficacy must be provided by the discharger. A RWQCB must be convinced there is a high likelihood the MP will be successful. A schedule assuring MP implementation and assessment, as well as adaptive management provisions must be provided. We recognize that in the earlier stages of some pollution control programs, water quality changes may not be immediately apparent, even with the implementation of pollution control actions. Although MP implementation never may be a substitute for meeting water quality requirements, MP implementation assessment may, in some cases, be used to measure nonpoint source control progress.

KEY ELEMENT 3: Where a RWQCB determines it is necessary to allow time to achieve water quality requirements, the NPS control implementation program shall include a specific time schedule, and corresponding quantifiable milestones designed to measure progress toward reaching the specified requirements.

The Porter-Cologne Act (CWC §13242[b] and § 13263[c]), the NPS Program Plan, and the NPS Implementation and Enforcement Policy recognize that there are instances where it will take time to achieve water quality requirements. The effort may involve all or some of various processes, including: identification of measurable long term and interim water quality goals; a timeline for achieving these goals; identification and implementation of pollution control MPs; provision for maintenance of the implementation actions; provision for additional actions if initial actions are inadequate; and, in the case of third-party organizations, identification of a responsible third-party to lead the efforts.

In considering approval of specific interim goals and the time necessary to achieve those goals, a RWQCB may consider such factors as the necessity of providing for significant capital outlays for MP implementation, the presence of a severely degraded waterbody, and whether or not an NPS control implementation program is a component of a larger TMDL implementation program. The time schedule may not be longer than that which is reasonably necessary to achieve an NPS implementation program's water quality objectives. Preliminary development of the time schedule shall be undertaken by the party responsible for developing the NPS control implementation program. The RWQCB may amend and must approve the time schedule. If the RWQCB later determines that additional time is necessary to complete the program, it may make further amendments to the time schedule or issue an enforcement order that contains a compliance schedule.

KEY ELEMENT 4: An NPS control implementation program shall include sufficient feedback mechanisms so that the RWQCB, dischargers, and the public can determine whether the program is achieving its stated purpose(s), or whether additional or different MPs or other actions are required.

Verification measures to determine whether an NPS control implementation program is meeting its stated purpose is a key element of all NPS control implementation programs. In addition to verification of proper MP implementation (Key Element 2), feedback mechanisms are needed to clearly indicate whether and when additional or different MPs or MP implementation measures must be used, or other actions taken. Designing the appropriate types and frequency of verification and feedback measures (e.g. reporting, inspection, monitoring, etc.) is an integral part of implementation program development and success.

In all cases the NPS control implementation program should describe the measures, protocols, and associated frequencies that will be used to verify the degree to which the MPs are being properly implemented and are achieving the program's objectives, and/or to provide feedback for use in adaptive management. These efforts are

necessary to determine whether the program is on time and on track in achieving its goals.

Depending on the water quality problem, the cause, the beneficial uses at risk, and the purpose for which the monitoring will be used (e.g. adaptive management or regulatory purposes) the appropriate type(s) of monitoring should be used. Some monitoring approaches include photo monitoring; assessing residual dry matter on rangelands; various indicators of healthy instream habitat; riparian and wetland habitat structure, density and cover; and bioassessment. Some programs may involve collecting and reporting ambient water quality monitoring data. Those programs should be consistent with the SWRCB Surface Water Ambient Monitoring Program (SWAMP) Data Quality Management Plan (DQM), which provides for more than one level of data quality. The DQM approach to data quality recognizes that the rigor needed to monitor for regulatory purposes may not be necessary for other purposes. Consequently, the SWAMP DQM provides data quality and reporting objectives for both regulatory and screening studies. Regardless of which approach is used, all monitoring programs should be reproducible, provide a permanent/documented record and be available to the public.

KEY ELEMENT 5: Each RWQCB shall make clear, in advance, the potential consequences for failure to achieve an NPS control implementation program's stated purposes.

A RWQCB action to approve or endorse an NPS control implementation program shall contain a general description of the course of action or actions to be taken if verification/feedback mechanisms indicate or demonstrate that the program is failing to achieve its stated objectives. Although not binding on the RWQCB, this element should be written with the objective of creating clear expectations and reinforcing the obligations that dischargers, third parties, and other agencies, in addition to the RWQCBs, have accepted in agreeing to implement an NPS control implementation program. This element also has the advantage of requiring the examination of proposed programs with respect to options for enforcement should the program not proceed as well as expected.

Clear expectations regarding potential RWQCB responses to inadequate or ineffective programs, including but not limited to adopting a revised program or the taking of an enforcement action, provides dischargers and the public with greater certainty regarding the process. RWQCB options will vary significantly, depending on the structure of the program. (e.g., which administrative tool or tools are being utilized, whether third-party regulatory or land use agencies, or private entities are coordinating the dischargers' efforts, etc.) While not all programs need be directly enforceable, any enforcement limitations that might be encountered should be well understood by the RWQCB prior to approving or endorsing an NPS control implementation program.

In cases of individual noncompliance, selective enforcement actions may be taken. In cases of third-party noncompliance, an effort to revise the third-party program is an alternative. Generally, prior to initiating major revisions to a program, informal contact with dischargers, group representatives, or other third parties, if any, will be attempted in order to redirect unsuccessful efforts. However, although the direction and efforts of a particular third-party program are being undertaken as a group effort, with group designated or accepted leadership, if the group or third-party fails to follow through on their commitments, any RWQCB enforcement action taken will be against individual dischargers, not the third-party.

## **V. RWQCB Compliance Assurance**

Typically, the RWQCBs have regulated individual dischargers, rather than groups of dischargers who are represented by or coordinated through third parties. Individual dischargers, including both landowners and operators, continue to bear ultimate responsibility for complying with a RWQCB's water quality requirements and orders. Generally, under the Porter-Cologne Act, the RWQCBs cannot take enforcement actions directly against non-discharger third parties. As part of the fifth element described above, the RWQCBs will need to explain how significant non-compliance can be addressed in Third-Party Programs. This explanation should include information as to the criteria for measuring program success, what constitutes failure, and the actions that may be taken in response to failure. Individual dischargers need to be informed as to what individual discharger actions or inactions will lead to individual enforcement. This explanation is necessary so that participating dischargers understand the ramifications of non-compliance, even if that non-compliance is by a third party they have selected as their representative. Options short of individual enforcement actions could include RWQCB actions such as changing a program to remove some autonomy, or developing sequential enforcement phases related to triggering events built into the program. Ultimately, the ineffectiveness of a group through which a discharger participates in NPS control efforts cannot be used as an excuse for lack of individual discharger compliance.

The SWRCB Enforcement Policy clearly defines the enforcement options available to a RWQCB. Both the Enforcement Policy and common RWQCB practice also recognize the merit of progressive enforcement. With progressive enforcement, a RWQCB implements enforcement through an "...escalating series of actions that allows for the efficient and effective use of enforcement resources to: (1) assist cooperative dischargers in achieving compliance; (2) compel compliance for repeat violations and recalcitrant violators; and (3) provide a disincentive for noncompliance."

## **VI. IMPLEMENTATION SUCCESS AND FUTURE CONSIDERATIONS**

This policy provides a template for NPS pollution control in California. However, the ability of the SWRCB and RWQCB to aggressively implement and enforce the State's NPS Program in a reasonable timeframe is directly linked to the resources available—both staff and

budget—to carry out the program. The SWRCB recognizes that it needs to provide strong support for the RWQCBs' efforts through available technical and financial oversight and assistance. Statewide, a diverse array of parties participate in various ways to implement NPS pollution control measures. However, in most situations, the primary participants are the RWQCBs and NPS dischargers. The RWQCBs are expected to develop their own priorities and schedules for addressing the specific types of NPS pollution present within their regions. Successful implementation of the NPS Program largely depends on two factors: the ability of the RWQCBs to use their administrative authorities and limited resources in creative and efficient ways, and the willingness of dischargers to implement MPs and other strategies that effectively prevent or control NPS discharges. To help accomplish this goal, dischargers are urged to take advantage of the many technical and financial assistance programs available to assist them. These are described earlier in this document.

Current land use management practices that have resulted in NPS pollution have a long and complicated physical, economic and political history. In addition to the need for resources, forging a new history of pollution control will take time and commitment, as well as a willingness to examine the use of practices that have resulted in current NPS pollution discharges and the barriers to change. Therefore, it is expected that it will take a significant amount of time for the RWQCBs to approve or endorse NPS control implementation programs throughout their regions, and even longer for those programs to achieve their objectives.

A rigorous dedication to periodic evaluation of all aspects of the program and an adaptive management approach will facilitate the road to success. Statewide implementation of the NPS program is predicated not only on individual NPS discharger actions to adopt and adapt alternative MPs, but upon the development and adaptation of self-determined management structures that encourage and support these changes. Much is known about the MPs that most effectively prevent and control polluted runoff. Less is understood about the alternative alliances and management structures - the third-party programs - that most efficiently and effectively will result in the watershed or industry-wide actions needed to control NPS pollution statewide. In addition to the public and private financial resources dedicated to this purpose, this effort will require a conscious willingness to experiment, evaluate and adapt management approaches that will support and bring us closer to our ultimate goal -- controlling NPS pollution to protect the quality of waters of the State in accordance with the mandates of the Porter-Cologne Act.

## **REFERENCES**

SWRCB, 1988. Nonpoint Source Management Plan. State Water Resources Control Board, Division of Water Quality, Sacramento, CA. November 1988.

SWRCB, 1999. Plan for California's Nonpoint Source Pollution Control Program. Division of Water Quality, Sacramento, CA. December 1999.

SWRCB, 2002. Water Quality Enforcement Policy. Office of Statewide Initiatives, Sacramento, CA. February 2002.

USEPA, 1993. Guidance Specifying Management Measures for Sources of Nonpoint Source Pollution in Coastal Waters. January 1993.

## END NOTES

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- i. CWC 13050[e], 13260[a], 13263[a], 13376, 13377. See also *Lake Madrone Water District v. State Water Resources Control Board* (1989) 209 Cal.App.3d 163, 171-175, 256 Cal.Rptr. 894 (Lake Madrone); *Tahoe-Sierra Preservation Council v. State Water Resources Control Board* (1989) 210 Cal.App.3d 1421, 1435, 259 Cal.Rptr. 132; 63 Ops.Cal.Atty.Gen. 51, 53-359 (1980) (Tahoe-Sierra).
  - ii. See Water Code section 13000
  - iii. See Water Code section 13000
  - iv. (CWC sections 13200, 13201)
  - v. (CWC section 13245)
  - vi. (CWC sections 13168, 186)
  - vii. (CWC sections 13263(i), 13377; 40 Code of Federal Regulations [CFR] section 122.28; Cal. Code of Regulations [CCR] Title 23, section 2235.2)
  - viii. (CWC section 13320; CCR, Title 23, sections 2050-2068)
  - ix. (CWC sections 13000, 13050(i), 13140, 13142, 13241)
  - x. See discussion in Chief Counsel's Statement for the State Nonpoint Source Management Program Administered by the State Water Board and the Regional Water Boards (October 1988), pp. C-1 through C-2. See also *Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program*, pp. 3-4 (1969).
  - xi. (CWC section 13050[j], 13241) The State Water Resources Control Board and the Regional Water Quality Control Board must consider the factors specified in CWC section 13241 when adopting or revising water quality objectives.
  - xii. The federal antidegradation policy is contained in 40 C.F.R. sec. 131.12. The state is required to adopt and implement an antidegradation policy consistent with the federal policy. The federal policy establishes three tiers of water quality protection. The first tier establishes a minimum requirement that existing instream uses and the level of water quality necessary to protect those uses be maintained and protected. The second tier is designed to protect high quality waters by establishing prerequisites for allowing degradation of these waters. The third tier addresses outstanding national resource waters.
  - xiii. (See 33 U.S.C. sec. 1313(c); 40 CFR sections 131.3[i], 131.6)
  - xiv. (CWC section 13242)
  - xv. (CWC section 13242)
  - xvi. CWC section 13263[g]
  - xvii. CWC section 13260
  - xviii. CWC section 13263[a]
  - xix. (CWC sections 13260, 13269)
  - xx. (CWC section 13264)
  - xxi. (CWC sections 13263, 13269)
  - xxii. (CWC section 13243)
  - xxiii. (CWC section 13263[a] and [i])
  - xxiv. (CWC section 13263[i])
  - xxv. CWC section 13269(a)(1)
  - xxvi. CWC section 13269 (a)(2)
  - xxvii. CWC section 13269(a)(4)(A)
  - xxviii. (CWC section 13050[d])
  - xxix. *Lake Madrone*, supra, fn. 1, 209 Cal.App. 3d at 169, 256 Cal.Rptr. 894; see *Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program* (1969) (Final Report), App. A, p. 23.
  - xxx. See e.g., *Lake Madrone*, supra, fn. 1 (release of accumulated sediment from a dam held a discharge of waste). See also discussion in *Sawyer, State Regulation of Groundwater Pollution Caused by Changes in Groundwater Quantity or Flow* (1988) Pacific L.J. 1267, 1273-1275.
  - xxxi. *Northwest Indian Cemetery Protective Association vs. Peterson*, (Ninth Circuit 1986) 795 F.2d688, 697, revised on other grounds (1988) *Lung vs. Northwest Indian Cemetery Protective Association* 485 U.S. 439 [108 S.Ct. 1319.99 L.Ed.2d.
  - xxxii. Statewide information about IACC agencies and their activities is currently available at <http://www.swrcb.ca.gov/nps/iacc.html>.