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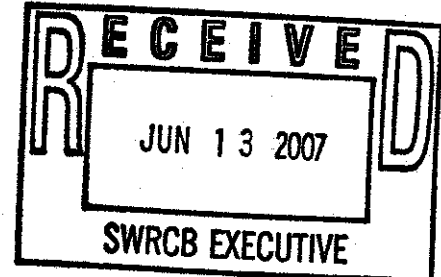
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June 12, 2007

6/28/07 Workshop  
WQ Enforcement  
Deadline: 6/14/07 Noon

Song Her, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814



Members of the State Water Resources Control Board:

The Regional Council of Rural Counties (RCRC) welcomes the opportunity to submit preliminary comments to the State Water Resources Control Board (State Board) on the State Board's Water Quality Enforcement Policy dated February 19, 2002. Additional comments may be made at the upcoming workshop on June 28, 2007.

RCRC appreciates that it is the State Boards policy that ".....the Boards shall strive to be fair, firm and consistent in taking enforcement actions throughout the State, while recognizing the individual facts of each case.(emphasis added)" RCRC is particularly interested in the potential for changes to the Water Quality Enforcement Policy that could assist small rural communities that operate wastewater treatment plants or may be required to enter into the Municipal Storm Water Permitting program.

In the introduction, the Water Quality Enforcement Policy discusses the purposes of enforcement, including that it "creates an even playing field, ensuring that discharges who comply with the law are not placed at a competitive disadvantage by those who do not." In the discussion of monetary remedies, it is stated that these "ensure that polluters do not gain an economic advantage from violations of water quality laws." RCRC believes that small communities, by virtue of their small populations/number of hookups find themselves at a decided disadvantage as water quality requirements become stricter, compliance projects/infrastructure costs increase dramatically, and the availability of state and federal financial assistance (grants and loans) decline. Given this fact RCRC urges consideration of changes to the Water Quality Enforcement Policy that, where possible, assist small communities to overcome these disadvantages.

RCRC suggests that the Water Quality Enforcement Policy should focus the attention of enforcement efforts on violations that significantly threaten and/or impact water quality over administrative violations. As to administrative violations, priority should be given, for example, to willful violations of the law.

Various bills have been enacted since this version of the Water Quality Enforcement Policy was finalized. For example, RCRC supported passage of SB 1733 (Chapter 404, Statutes of 2006). AB 1752 (Chapter 725, Statutes of 2006), a bill that modified the provisions of SB 1733, was also enacted. SB 1733 makes some minor though important changes to the mandatory minimum penalty (MMP) law with the intent that the added flexibility provided to the State Board will allow more small

communities to be determined to have a financial hardship, thus allowing for a portion of their MMP to be applied towards compliance. Specifically, SB 1733 modifies the definition of "small community" to mean "a publicly owned treatment works serving a population of 10,000 persons or less or a rural county, with a financial hardship as determined by the state board after considering such factors as median income of the residents, rate of unemployment, or low population density in the service area of the publicly owned treatment works."

AB 1752 specifies that the provisions of SB 1733 shall become effective on July 1, 2007, and additionally provides that the publicly owned treatment works shall demonstrate to the satisfaction of the State Board that the required financing plan is designed to generate sufficient funding to complete the compliance project within the time period specified. The timelines required to meet State permit requirements (e.g., schedule dates for starting construction, completing construction, or attaining final compliance) is another area where additional flexibility for small communities would be helpful in instances where the delay is beyond the control of the publicly owned treatment works. Under these circumstances, time extensions should be allowed without fines being imposed.

Small communities have limited budgets, and are especially hard hit by MMPs if there has been a delay between the violation and the assessment of the penalties. RCRC urges that the Water Quality Enforcement Policy be amended to require, as a matter of policy, that a Notice of Violation, and if required a MMP complaint, be issued within one year of the date of the violation.

Water Code Section 13385 (i)(1)(A) reads as follows:

(i) (1) Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations:

(A) Violates a (emphasis added) waste discharge requirement effluent limitation.

(B) Fails to file a report pursuant to Section 13260.

(C) Files an incomplete report pursuant to Section 13260.

(D) Violates a toxicity effluent limitation contained in the applicable waste discharge requirements where the waste discharge requirements do not contain pollutant-specific effluent limitations for toxic pollutants.

RCRC urges that the current interpretation of Section 13385 (i)(1)(A) be reviewed by the State Board. Currently, any combination of effluent limitation violations triggers a MMP. RCRC urges that the Water Quality Enforcement Policy be amended to specify that a repeat violation of the same pollutant is necessary to trigger a MMP. RCRC believes that this is a logical interpretation of the law, as the fourth violation triggers the MMP. The delay in assessment of the penalty can be reasonably interpreted as intended to provide time for the discharger to correct the problem for the pollutant violating the effluent limitation.

Section IV. Enforcement Actions states "With specified exceptions California Water Code section 13360(a) prohibits the SWRCB or RWQCB from specifying the design, location, type of construction, or particular manner in which compliance may be had with a particular requirement." The code section specifically states that "No waste discharge requirement or other order of a regional board or the state board or decree of a court issued under this division shall specify.....and the person so ordered shall be permitted to comply with the order in any lawful manner." (emphasis added) While RCRC agrees that the state or regional boards should not include in a WDR, for

example, the specific manner in which an entity must comply, RCRC also does not believe this law should be interpreted to mean that state and regional board staff may not provide guidance or technical assistance as to potential ways an entity may be able to achieve compliance. Small communities would greatly benefit from guidance/technical assistance from the state or regional board staff. RCRC requests that the revised water quality enforcement policy clarify that state and regional board staff may provide technical assistance, if requested.

RCRC also recommends that enforcement consideration be given to small municipalities that are required to enter the Phase II storm water general permit program. Small MS4s face a disproportionately high cost to implement the Phase II program due to their small population base. For example, in December 2006, Calaveras County was informed by the Central Valley RWQCB that they were being designated under the municipal permit due to their projected population growth rates and increased Construction General Permit violations. Calaveras County staff projected that it would cost nearly \$125,000 just to initiate compliance with the permit. With the expected adoption of stricter standards and numeric effluent limits in both construction and industrial storm water general permits, the costs of complying with the municipal permit will increase even further. RCRC recommends that new MS4 permittees be given the opportunity to phase in their compliance efforts before enforcement actions are taken.

In response to an RCRC request for comments from member counties to the questions posed in the workshop notice the following comments were received:

1. MMPs should be assessed according to criteria such as size of the utility (e.g., rated plant capacity) and its customer base. Financial ability of the utility and its customer base to pay for MMPs while maintaining financial solvency should be a primary element when considering MMP assessments.
2. In some cases violations could be resolved by a basin plan modification, or a re-evaluation of the "tributary rule". Basin plan modifications are typically very protracted and expensive processes, and are therefore typically avoided despite the fact that significant future benefit could be obtained by these exercises. Further, performing such exercises is intrinsically discouraged by continued mounting MMPs while such reviews are being conducted with no guarantee that the desired outcome will be achieved. Such an endeavor is very risky with public funds, contributing to further avoidance of such processes. A suggested solution to the problem is that MMPs be "frozen" once it is agreed with a Regional Water Quality Control Board (RWQCB) that a basin plan review or similar study is to be performed to allow time and funding for the process to occur without penalty.
3. RWQCBs should be provided latitude to extend compliance dates where lack of financial capability inhibits progress toward compliance. Generally, if good-faith efforts are provided, but funding does not exist to provide for compliance measures, continued mounting penalties will obviously not improve compliance capability.
4. The Water Quality Enforcement Policy should clarify that RWQCBs cannot impose and/or enforce new standards prior to the renewal of a WDR permit, if applicable.
5. The tributary rule should be based on specific local conditions and local background water quality conditions. Generally, applying downstream tributary standards to watersheds located several waterways upstream appears very inefficient and ineffective, resulting in questionable, and sometimes expensive standards. RWQCBs should be provided the latitude to base decisions on local conditions without a protracted basin plan-type modification process, particularly in instances where discharged flows are perceived a virtually insignificant.

6. The State Board should explore the possibility of some sort of Alternative Dispute Resolution process to help landowners and agencies to work together cooperatively on water quality compliance. Currently, there is so much regulatory action coming at small landowners that they are overwhelmed and cannot deal emotionally, financially, or technically with the demands. Our county does not want to assume the burden of compliance and the agencies do not appear to be equipped, staffed or located to force compliance with hundreds of small entities. Alternative Dispute Resolution could assist in communicating and mediating between agencies and landowners and in finding common ground to move towards compliance.

In conclusion, RCRC appreciates the State Boards consideration of the issues raised as changes to the State Water Quality Enforcement Policy are developed. If discussions take place prior to the release of a revised version, RCRC requests that we be included in the discussions. Please feel free to contact me at (916) 447-4806 or [kmannion@rcrcnet.org](mailto:kmannion@rcrcnet.org) if you have any questions.

Sincerely,



Kathy Mannion  
Director of Water and Power