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To: Marcus_Felicia@Waterboards; [commentletters](#)
Cc: Moore_Steven@Waterboards
Subject: Fwd: COMMENTS: Enforcement Policy
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December 27, 2016

Felicia Marcus, Chair
State Water Resources Control Board
(1001 I Street)
Post Office Box 100
Sacramento, CA 95812-0100

Re: Comments on the Water Quality Enforcement Policy

Dear Chair Marcus:

As you evaluate the impacts to which our shared waterways are being subjected and the abilities of the state agencies to protect these important systems, please consider the comments below . Your effort to revisit ENFORCEMENT of state and federal policies and regulations is critically important and greatly appreciated. Fortunately, the actions of the Board can remedy many of the challenges and loop holes that have found their way into the process over the years.

Standard of Proof

Raising the standards for compliance is very important. Just as important, however is changing the standard for bringing an enforcement claim or concern forward for action. For example, where a stream is impacted by dirt, sediment, or from runoff of fertilizers such and nitrogen and phosphorous, it may difficult if not impossible, in a meaningful time frame, for staff to pin point which properties (permitted or unpermitted) are responsible.

In order to effectively address this widespread problem (see pictures attached), it will mean in some cases necessarily throwing a wide net. It may mean making contact and even inspecting lands that normally do not receive actual in-person inspections, until the pollution problem is solved. Staff is very competent at analyzing pollution, however their reach is limited. They need access to the discharge points, the devices, the on-site drop inlets year round, and with little if any Notice. It is not an intrusion on a discharger's land if there is a cognizable need to inspect sites in a degraded watershed or watersheds listed as critical habitat. A standard that requires staff to prove something akin to "beyond a reasonable doubt" undermines all enforcement activities. Water and our watersheds must be better protected and a low standard for threats needs to be set above which some action is triggered. The threshold for staff action could be where staff has a "reasonable concern" for water quality. I strongly encourage the resource agencies to work together to this end. This is fundamental and reasonable.

One example of a pollution source that evades enforcement is agriculture. This is due in part to inaccessible and large land holdings, the demand that large amounts of data gathering and research be brought to the Boards as evidence, and pollution that evades monitoring or is co-minled with the pollutionof others is agriculture. Although known for decades - that agriculture is the biggest source of pollution to our waterways, the agricultural community's vast land holdings remain virtually uninspected and unregulated.

"Animal manure, excess fertilizer applied to crops and fields, and discing and ripping the land make agriculture one of the largest sources of nitrogen and phosphorus pollution in the country." (USEPA <https://www.epa.gov/nutrientpollution/sources-and-solutions>).



Although federally listed as critical habitat for endangered species, local land use policies in Sonoma County have permitted the on-going destruction of this cold fresh water habitat due to polluted runoff, dewatering, and sediment - Green Valley Creek.

Staff must be given the tools to look at a whole waterway and fix it without unreasonable restrictions placed upon them by the regulated community.

The agricultural community has had decades and decades to clean up their discharges. On going pollution is, however occurring in part due to the high standard of proof land owners demand and regulators have had to meet. Privacy and secrecy concerns of industry also unnecessarily limit staff's efforts to gain compliance. And the lack of sufficient reasons for some to internalize the costs of protecting California's waters also contribute to the ongoing pollution. The dischargers

must no longer be granted leniencies at the expense of public trust resources, and staff must be able to do what is necessary to investigate and stop pollution.

Permits Inexplicably Contain loop holes and are Difficult to Enforce

Because they are creatures of the permit, some practices hampering compliance can be easily changed.

For example, drop inlets and other on-site drains that direct water off site, are currently allowed in permits. Dischargers are allowed to direct polluted storm water underground out of sight into storm drains. These of course, in many cases, direct polluted water to a stream or river. This practice is inexplicably allowed in permits and is occurring on vast and very industrialized and disturbed sites. If the discharge is regulated at all, it is by "requiring" BMPs or an annual sample or some such minimum "peek-a-boo" event. This practice of allowing on-site drains linked to creeks without any monitoring, or minimal BMPs, greatly impairs compliance efforts.

Like wise, permitting dischargers to "average" results, perform infrequent monitoring, perform reduced monitoring, carrying out infrequent inspections, no random inspections by staff, sampling only every five years in some instances, reliance on weak BMPs, a hands off approach to ministerial activities, and the like are voluntarily placed in permits by the Board and staff which in turn limits their abilities to protect water quality for wildlife and the public health.

Are Best Management Practices the Equivalent of Compliance





Piner Road, relatively flat vineyard. Sonoma County. Pollution heading to the Russian River.

Although known to be inadequate to maintain water quality, permits are still issued with the proviso that the permittee use best management practices (BMPs). When these fail, the discharger then enters the world of enforcement of water quality standards. Up front investment in effective technologies, permit requirements based on numeric limits, and management of an enterprise in a proper manner serves the goal of compliance and minimizes need for enforcement.

Still being incorporated in permits as if they are effective, BMPs are widely known to be difficult to enforce and heavily reliant on land owner discretion. In order to off set these "built in" enforcement challenges, staff must have the additional discretion and responsibility to act on any "concern" of potential or suspected threats of pollution without the burden of precise, expensive, and time consuming presentations. Just as dischargers seek efficiencies, so must staff receive these courtesies in order to fulfill a common need.

If allowed at all, BMPs must achieve zero discharge of pollutants all year round. State permits and enforcement must require this and incentivize this. So called BMPs like straw wattles that get over topped or simply direct polluted storm water to another off site location, detention ponds that regularly over flow and provide no settling time, inadequate buffer strips that are overwhelmed by runoff, ranch roads that are supposedly not significant sources, drop inlets that simply convey polluted stormwater off site where it will enter a watercourse - are just some of the practices referred to as BMPs. These continue to stay on the list as options for landowners to employ in exchange for the right to rip, dig, plow, spray, and clear land for development. Compliance would be greatly enhanced if BMPs were "sun setted" and numeric limits and frequent inspections and monitoring put in their place.

Enforcement Benefits from Deterrence

Deterrence is an effective enforcement tool. Some effective measures that can act as constructive deterrence include: placing communities on Notice of possible inspection when turbidity is high, robust protection of critical habitat and of listed species, numerous random inspections, increasing staffing for winter inspections, setting numeric limits, issuing strong and broad warnings, levying adequate fines, recommending reduction of operations where indicated, increasing setbacks, increasing transparency, requiring remotely accessible data loggers in impaired and listed streams in order to properly address pollution in a timely manner, and following up with adequate fines and required environmental projects to avoid polluted discharges.

Enforcement will Benefit from Best Available Practices and Technology

To the extent pollution sources are often difficult to pin point, staff must be granted broad authorities to identify pollution sources and evaluate practices. Although there is some data already being gathered, it is inadequate to avoid the need for staff to conduct more inspections. Many sites are large and complex and pollution exits these sites in numerous areas.

In addition, technology exists to monitor much more effectively and inexpensively than ever before. If they are given a permit to discharge to state and federal waters, permittees must be required to incorporate the latest technologies in order to properly allow monitoring and enforcement. Any landowner that engages in activities that threaten water quality must be engaging in effective and protective practices. This can only be verified through frequent testing, monitoring, and inspections.

Staff must have access to all lands where discharges threaten beneficial uses. On-site drop inlets, or the like, must have remotely accessible data loggers or other effective monitoring to ensure pollution does not leave a site and enter waterways. This will enable staff to properly do their jobs.



Upper Green Valley Creek....



Lower Green Valley Creek.



March rain in Green Valley Creek - very polluted critical habitat. This watershed is hilly and many properties that previously had trees have been cleared and ripped for many acres of lightly regulated (ministerial permits) vineyards.

CONCLUSION

In conclusion, all land disturbing activities in the state that have the potential to threaten water quality must be within the purview of the Regional Boards. Local authorities are not primarily concerned with water quality and have broad discretionary and other powers that affect water quality. The practice of Water Boards stepping aside where a local agency or other state agency is acting but whose actions nevertheless implicate water quality, must be discontinued. In other words, water quality is a state concern and the state has on-going interests and duties to protect it despite the narrower interests of the other agencies.

The state has the authority to monitor and enforce for health, safety, the environment, and the public trust. The state should move expeditiously to exercise that authority now.

Thank you for your kind consideration of the above.

Kimberly Burr
Green Valley Creek, volunteer

