

Construction Industry Coalition on Water Quality

October 18, 2016

Ms. Felicia Marcus, Chair
c/o: Jeanine Townsend, Clerk to the Board
California State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Via Email: commentletters@waterboards.ca.gov

RE: Comments on Water Quality Enforcement Policy

Dear Ms. Marcus:

Construction Industry Coalition on Water Quality (CICWQ), Building Industry Legal Defense Foundation (BILD), and California Building Industry Association (CBIA), are submitting comments concerning the DRAFT Water Quality Enforcement Policy (Draft Policy) released for public review by the State Water Resources Control Board (SWRCB). We appreciate this opportunity, and below make suggestions for Draft Policy improvements based upon our members' years of building and construction industry experience complying with NPDES permits for the discharge of stormwater runoff, and navigating the complex water quality regulatory process and structure that exists within the State of California.

CICWQ is an advocacy, education, and research 501(c)(6) non-profit group of trade associations representing builders and trade contractors, home builders, labor unions, landowners, and project developers. CICWQ membership is comprised of members of four construction and building industry trade associations in southern California: The Associated General Contractors of California, Building Industry Association of Southern California, Engineering Contractors Association, and Southern California Contractors Association, as well as the United Contractors located in San Ramon. Collectively, members of these associations build a significant portion of the transportation, public and private infrastructure, and commercial and residential land development projects in California.

BILD is the premier legal advocate for the building and construction industry in California. BILD is a non-profit mutual benefit corporation and a wholly-controlled affiliate of the Building Industry Association of Southern California, Inc. ("BIASC"). BIASC represents approximately 1,200 member companies across Southern California that are active in all aspects of the building industry, including land development; builders of housing, commercial, and infrastructure; and related entities including architects, engineers, planners, contractors, suppliers, and property owners. The purposes of BILD are, in part, to initiate or support litigation or agency action designed to improve

the business climate for the building industry and to monitor and involve itself in government regulation critical to the industry.

The California Building Industry Association (CBIA) is a non-profit trade association comprised of approximately 6,500 member companies that are engaged in all aspects of planning, designing, financing, constructing and selling approximately 80% of all new homes built in California each year.

In reviewing the Draft Policy and the proposed changes in light of the existing Water Quality Enforcement Policy, we note several areas where proposed changes create new and extensive webs of liability for dischargers, and eliminate or change existing definitions so as to create more liability for dischargers and create conflict with existing regulatory programs. Our specific observations and suggestions for changes includes:

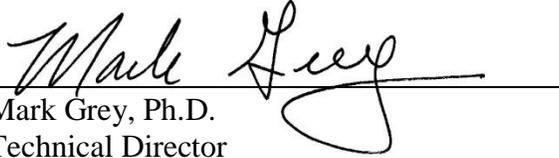
1. The Draft Policy proposes to make contractors and subcontractors liable for violations of the Construction General Permit (CGP) along with property owners and jurisdictions. Having multiple parties effectively jointly and severally liable under the CGP could lead to confusion in the field and unnecessary overlapping of efforts in the BMP and monitoring context. There is no logical reason for this proposal, and we recommend elimination. (Draft Policy, Page 2)
2. The Draft Policy places less emphasis on “fair” and “consistent” enforcement actions, choosing instead to rely on the penalty calculator formula. We believe such emphasis will allow the Regional Boards to make inequitable decisions that could easily lead to abuse of power. We recommend that the Draft Policy be revised to allow the enforcing agency to consider similar enforcement actions when assigning adjustment factors and calculating penalty amounts. (Draft Policy, Page 3)
3. Although the Draft Policy seeks to "achieve consistency in enforcement," it specifically does not require a Regional Water Board "to compare a proposed penalty to other actions that it or another Regional Water Board has taken or make findings about why the assessed or proposed amounts differ." But without reference to other applications of the Draft Policy, there is no consistency. While it may be that the Policy should not require that the various Regional Water Boards seek out other decisions when applying the Policy, the Policy should require that a Regional Water Board provide evidence of conflicting applications of the Policy and assess why its application of the Policy does not violate the SWRCB's professed goal that the Policy be applied consistently throughout the state. (Draft Policy, Page 3)
4. We oppose and suggest eliminating any changes to Class I priority violations as anything that has the “potential” to “individually or cumulatively” cause significant detrimental impacts to human health or the environment. Class I priority violations were previously left to violations that posed immediate and substantial real threats to water quality and (not and/or) had the potential to actually cause significant harm to human health or the environment. As currently worded, even discharges that pose a

low threat to the environmental or would have no actual adverse consequences in receiving waters would be considered Class I priority violations. (Draft Policy, Page 6)

5. Classifying the “unpermitted fill of wetlands over .5 acres” as a Class I priority violation is problematic because of the SWRCB’s draft (not final) “procedures” related to dredge and fill (Draft Policy, Page 6). Neither the Draft Policy nor the SWRCB’s draft dredge and fill procedures define the term “wetlands” making it impossible for the regulated community to determine when discharges may be subject to enforcement. This problem is magnified when considering that these discharges are nearly always governed by a permit or water quality certification issued by the U.S. Army Corps of Engineers (ACOE) or the Regional Water Board or both. Moreover, the state authorities do not appear to have sufficient jurisdiction to regulate wetlands in this manner. (See for example, the comment letter submitted by the ACOE to the SWRCB related to the draft dredge and fill procedures.
6. Classifying ANY discharge of “construction materials” into receiving waters with beneficial uses of COLD WARM or WILD is too far reaching, and we suggest no changes to this section (Draft Policy, Page 6). The existing CGP has requirements—BMPs meeting the BAT and BCT standards—that if met allow for discharges from construction sites. As worded, the Draft Policy would subject any discharges from construction sites to enforcement as Class I violations regardless of compliance with the CGP and regardless of any real concern for downstream water quality. Moreover, because “construction materials” can include “soil or dirt” the Draft Policy’s making discharges of construction materials subject to enforcement sets a de facto limit for soil/dirt at zero. The SWRCB has shown no authority or justification for a zero limit on dirt or soil discharged from a construction site and the provision must be removed.
7. Similarly, the Draft Policy’s making any discharges with the potential to individually or cumulatively “cause or contribute” to turbidity in receiving waters over 100 NTU is problematic (Draft Policy, Page 6). First, background conditions during ambient and wet weather periods may be in excess of 100 NTU. Secondly, a permitted entity discharging in full compliance with its permit should be immune from enforcement under this provision. We suggest modifying the last bullet in the list on page 6 to read: “Discharges causing or contributing to in-stream turbidity in excess of 100 nephelometric turbidity units (NTU) in receiving waters with beneficial uses of COLD, WARM, and/or WILD, except during or after storm events or in the event that background conditions exceed 100 NTU, and except when discharged in compliance with any applicable permit.”

Should you or your staff have any questions or want to discuss the content of our comment letter, please feel free to contact me at (951) 781-7310, ext. 210, (909) 525-0623, cell phone, or mgrey@biasc.org.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mark Grey", is written over a horizontal line. The signature is fluid and cursive.

Mark Grey, Ph.D.

Technical Director

Construction Industry Coalition on Water Quality

cc. CJ Croys-Schooley, State Water Resources Control Board