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October 18, 2016

Public Comment
Water Quality Enforcement Policy
Deadline: 10/18/16 12:00 noon

ELECTRONIC MAIL

Submitted via e-mail: commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th floor
Sacramento, CA 95814



Dear Ms. Townsend:

COMMENTS ON THE PROPOSED AMENDMENTS TO THE WATER QUALITY ENFORCEMENT POLICY

The City of Los Angeles (City) Bureau of Sanitation (LASAN) appreciates the opportunity to submit comments on the Proposed Amendments to the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy. The City commits vast resources to protect water quality as it strives to ensure that pollutant sources within its control do not contribute to exceedances of water quality standards. The City operates four water reclamation plants (WRPs) that serve over four million people within two service areas covering 600 square miles. These WRPs effectively remove pollutants from sewage to produce recycled water, protecting our river and marine environments as well as public health. Together, they have a combined capacity of 580 million gallons of recycled water per day. The water can be used in place of potable water for industrial, landscape and recreational purposes in addition to other beneficial uses. Additionally, the City is home to hundreds of miles of river and beaches which are protected through our watershed protection program. The WRPs and our watershed protection program are permitted under National Pollutant Discharge Elimination System (NPDES) permits issued by the State and are subject to the Water Quality Enforcement Policy. As such, it is important that the Water Quality Enforcement Policy is consistent, clear, and provides consideration for the long-term good faith efforts made by the City to meet our NPDES requirements. To that end, we are providing the technical comments in the attached matrix.

zero waste • one water

AN EQUAL EMPLOYMENT OPPORTUNITY - AFFIRMATIVE ACTION EMPLOYER

Recyclable and made from recycled waste



Jeanine Townsend
Clerk to the Board
October 18, 2106
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Thank you for your consideration of our comments. If you have any questions about the LASAN's comments, please email me at Shahram.Kharaghani@lacity.org or call me at (213) 485-0587, or Vivian Marquez, of my staff, at (213) 485-3928.

Sincerely,


SHAHRAM KHARAGHANI, PhD, PE, BCEE
Program Manager

VM:SK:vm
WPDCR9318

Attachment: Technical Comment Matrix on the Proposed State Water Resources Control Board Water Quality Enforcement Policy (Effective July 2016)

cc: cj.croyts-schooley@waterboards.ca.gov

Renee Purdy, RWQCB
Ivar Ridgeway, RWQCB
Enrique Zaldivar, LASAN
Adel Hagekhalil, LASAN
Vivian Marquez, LASAN

Technical Comment Matrix on the Proposed State Water Resources Control Board Water Quality Enforcement Policy (Effective July 2016)

| Comment Number | Document Reference (Section, Pg.#) | Topic | Comment |
|----------------|--------------------------------------|---|--|
| 1 | I.C. Consistent Enforcement (Page 3) | Consistent enforcement should include reviewing penalties that have been assessed for similar types of discharges or waterbodies or discharges with similar impacts | <p>The proposed policy defines "consistent enforcement" as using the penalty calculator in Section VI. The Regional Water Quality Control Boards (Regional Boards) are not required to compare a proposed penalty to other actions taken across the state. "Consistent and Fair" enforcement should include reviewing penalties assessed for similar discharge events/violations to make sure they are comparable.</p> <p>Possible Revision:</p> <p><i>"The Water Boards achieve consistency in enforcement by applying the penalty calculator in Section VI. The policy does not require a Water Board to compare a proposed penalty to other actions that it or another Water Board has taken or make findings about why the assessment or proposed amounts differ. However, at their discretion, the Water Boards may consider penalties assessed for similar types of discharges, similar impacts, and similar types of receiving waters when assigning penalty and adjustment factors."</i></p> |
| 2 | I.E. Progressive Enforcement | Consideration for previous actions to address similar issues | <p>The progressive enforcement policy should also consider historical mitigation actions performed by the permittees and the compliance attainability due to natural or unidentifiable sources such as bacterial regrowth. In certain such cases, permittees may have historically implemented measures to reduce polluted discharges or are implementing ongoing studies and actions.</p> <p>Possible Revisions:</p> <p><i>"Progressive Enforcement contemplates an escalating series of actions beginning with notification of violations and compliance assistance followed by enforcement orders compelling compliance, culminating in a complaint for civil liabilities where compliance is not attained within a reasonable time. Consideration may be given to previous efforts to address similar and/or challenging issues..."</i></p> |
| 3 | I.F. Transparency | | <p>The City of Los Angeles supports the policy of transparency as the City has been closely working with co-permittees and regulatory agencies to mitigate pollution from discharges.</p> |
| 4 | II.A. Ranking Violations (Pages 5-6) | Some of the examples listed for high priority (Class I) violations should be edited or removed. | <p>Exceedance of an acute toxicity effluent limitation should not be a Class I violation because the test results are not reliable. Exceedance of a primary Maximum Contaminant Level (MCL) when discharging to a MUN designated waterbody should not be a Class I violation because there are many waterbodies with this designation that are not used as a drinking water source. The example should be applied only to those waterbodies that are known to be utilized for drinking water. The selection of 100% as a bench mark for CTR priority pollutant violations is not based on risks to the environment. Priority pollutant standards were developed by evaluating toxicity to sensitive organisms and cancer risks to humans. The impact of each constituent is different and doubling a</p> |

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| 5 | VI.A. Penalty Calculation Methodology | Existing obligations should be considered. | <p>standard doesn't necessary double the impact. The Regional Boards should consider constituent-specific impacts when assessing violations.</p> <p>Possible Revisions:</p> <p><i>"Class I priority violations are those that pose an immediate and substantial threat to water quality and/or that have the optional to individually or cumulatively cause significant detrimental impacts to human health or the environment. Class I violations ordinarily include, but are not limited to, the following...</i></p> <p><i>Discharges violating acute toxicity effluent limitations, unless the Discharger has conducted a Toxicity Identification and Reduction Evaluation (TIER/E) consistent with their NPDES permit.</i></p> <p><i>Discharges causing or contributing to exceedances of primary maximum contaminant levels in receiving waters that are known to be utilized as a with-a-beneficial-use-of-municipal-or-domestic-supply-(AALIN);</i></p> <p><i>Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule, depending on the magnitude of the exceedance, which must be by 100 percent or more, and possible impacts to uses of the receiving waters."</i></p> <p>When considering the local compliance issues and penalty calculation, the overall size and obligations and resources of the dischargers' watershed(s) should be taken into consideration.</p> <p>Possible Revision (new bullet added to end of the bullet list on Page 9):</p> <ul style="list-style-type: none"> <i>Consider the overall size and obligations and resources of the dischargers' watershed(s).</i> |
| 6 | VI.A. Penalty Calculation Methodology Step 2 – Assessments for Discharge Violations (Page 13) | The revised policy eliminates language that supported penalty assessment on a per day basis only. | <p>The current Water Quality Enforcement Policy indicates the per day basis is the preferred penalty assessment approach for effluent limit violations. This language was modified in the revised Water Quality Enforcement Policy, but should be retained with clarifications.</p> <p>Possible Revision:</p> <p><i>"This step addresses per gallon and per day assessments for discharge violations. Generally, it is intended that NPDES permit effluent limit violations should be addressed on a per day basis only. However, where deemed appropriate, such as for a large scale spill or release, some NPDES permit effluent limit violations, and violations such as effluent spills or overflows, storm water discharges, or unauthorized discharges, the Water Boards should consider whether to assess both per gallon and per day penalties."</i></p> |

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| 7 | VI.A. Penalty Calculation Methodology Step 2 – Assessments for Discharge Violations, “High Volume Discharges” (Page 14) | Allow \$2/gallon penalty for discharges <100,000 gallons or discharges that don't pose threat to water quality. | <p>The proposed language gives Water Boards discretion to apply penalty of \$2 to \$10/gallon for discharges that are between 100,000 and 2,000,000 gallons. Examples of discharges that could be subject to the reduction include wet weather sewage spills, partially-treated sewage spills, and construction/municipal stormwater discharges. The lower boundary should be removed for determining high volume discharges. For example, in small municipalities, a discharge of 50,000 gallons is very large. Language should be added that will allow a \$2/gallon penalty for discharges that exceed turbidity requirements only (i.e., construction stormwater).</p> <p>Possible Revision:</p> <p><i>“However, recognizing that the volume of certain discharges can be very high and not have significant impacts on water quality, the Water Boards have the discretion to select a value between \$2.00 per gallon and \$10.00 per gallon with the above factor to determine the per gallon amount for discharges that are less than between 100,000 gallons and 2,000,000 gallons for each discharge event or exceed turbidity effluent limitations only, whether it occurs on one or more days. For discharges in excess of 2,000,000 gallons, or for discharges or recycled water that has been treated for reuse, the Water Boards may elect to use a maximum of \$1.00 per gallon with the above factor to determine the per gallon amount.”</i></p> |
| 8 | VI.A. Penalty Calculation Methodology Step 4 – Adjustment Factors, Table 4-Violator’s Conductor Factors (Page 17) | Allow credit for good compliance history and limit the History of Violations multiplier that can be applied for dischargers with past violations. | <p>The proposed language eliminates use of a multiplier < 1.0 for dischargers with good compliance history. If a discharger has had no violations in the past, a neutral multiplier of 1.0 is applied. Almost all dischargers have had some violations in the past, so the neutral multiplier may never be used. This language should be revised to allow Water Board’s discretion when deciding if a discharger has a good compliance history and dischargers with a good compliance history should be rewarded with a lower penalty based on use of a multiplier < 1.0.</p> <p>Possible Revisions:</p> <p><i>“Any prior history of violations: Where the discharger has a good compliance no prior history of any violations, this factor should be neutral, or 1.0-0.9. Where the discharger has any a history of prior violations, a minimum multiplier of 1.1 should be used. Where the discharger has a history of similar or numerous dissimilar violations, the Water Boards should consider adopting a multiplier above 1.1 of 1.2. Water Boards have the discretion to determine history of compliance.”</i></p> |
| 9 | VI.A. Penalty Calculation Methodology Step 4 – Adjustment Factors, | Allow use of lower multipliers and include “disastrous circumstances” as a consideration when | <p>The current Water Quality Enforcement Policy allows multipliers of 0.5 to 1.5 when assessing degree of culpability. The revised Water Quality Enforcement Policy should retain the option of applying lower multipliers. Language can be added to explain that lower multipliers can be used when a violation results from disastrous circumstances (e.g., floods, earthquakes, terrorism). The Regional Board’s should be allowed to use their discretion when deciding a discharger’s degree of</p> |

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| | Table 4-Violator's Conduct Factors (Page 17) | determining multipliers for the Degree of Culpability. "Disastrous Circumstance" could also be addressed under Step 8 - Other Factors as Justice May Require | culpability. Possible Revision: "Discharger's degree of culpability prior to the violation: Higher liabilities should result from intentional or negligent violations than for accidental, non-negligent violations and disastrous circumstances. A first step to identify any performance standards (or, in their absence, prevailing industry practices) in the context of the violation. The test for whether a discharger is negligent is what a reasonable and prudent person would have done or not done under similar circumstances. Adjustment should result in a multiplier of 0.5 to 1.0 and 1.5, with a higher multiplier for intentional misconduct and a gross negligence and a lower multiplier for more simple negligence or disastrous circumstances. A neutral assessment of 1.0 should be used when a discharger is determined to have acted as a reasonable and prudent person would have. Water Boards have the discretion to determine degree of culpability." |
| 10 | IV.A. Penalty Calculation Methodology Step 6 - Ability to Pay and Ability to Continue in Business (Page 19) | "Ability to Pay" is determined solely by income and net worth. | "Ability to Pay" should include impacts to ratepayers. Language regarding service area population was removed. Service area population and rates are important considerations for public agencies. This is especially relevant to smaller agencies. The current Water Quality Enforcement Policy includes language about possible hardships to the service population. This language should remain in the revised Water Quality Enforcement Policy. Possible Requests: "The ability of a discharger to pay an ACL is determined by its income (revenues minus expenses) and net worth (assets minus liabilities). For public agencies, the ability to pay may also consider service area population, current sewer rates, planned rate increases, and the costs, schedules, anticipated financial impacts to the community of other planned water and wastewater expenditures, and other relevant factors impacting the utility's rate base." In most cases, it is in the public interest for the discharger to continue in business and bring its operations into compliance. However, the Water Boards are not required to ensure that civil liabilities are set at levels that allow violators to continue in business. If there is strong evidence that an ACL would result in widespread hardship to the service population or undue hardship to the discharger, the amount of the assessment may be reduced on the grounds of ability to pay." |
| 11 | IV.A. Penalty Calculation Methodology Step 8 - Other Factors as | Revised and added new circumstances that warrant adjustments based on "Other | The revised Water Quality Enforcement Policy allows Regional Boards to consider if the penalty amount will be "insufficient to provide substantial justice to a disadvantaged group." This language appears to support increased penalties if the discharge harms a particular type of community and could be argued by "fringe groups" to extract additional funds from public agencies. The phase |

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| 12 | Justice may Require (Page 22) IV.A. Penalty Calculation Methodology Step 8 – Other Factors as Justice may Require (Page 22) | Factors” Other factors including existing regulations should be considered. | “substantial justice” language is vague and doesn’t meet State Water Board’s goals for clarity and consistency. The language should be revised or removed. Factors such as TMDL deadlines, future TMDL reopener elements and studies to improve scientific knowledge should also be taken into consideration. |
| 13 | IV.A. Penalty Calculation Methodology Step 8 – Other Factors as Justice may Require (Page 22) | Costs incurred to conduct investigations should be included. | The City supports including the costs of investigation into the penalty calculation methodology. In certain cases where investigations have included scientific studies due to unknown or natural sources, the cost of such studies and mitigation efforts should also be considered. |

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