October 18, 2016

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

RE: SWRCB's Proposed Revisions to the Enforcement Policy

Dear Ms. Townsend:

On behalf of the signatories to this letter, we are pleased to provide comments in response to the proposed revisions to the State Water Resources Control Board's (SWRCB or Board) Enforcement Policy (Policy). While we greatly appreciates a number of the changes incorporated into the document, we are highly concerned that many of the revisions to result in a more complex, confusing and subjective Policy.

We appreciate the revisions throughout the Policy that convey the SWRCB's strong support for eliminating the ability for non-compliant entities to realize a competitive economic advantage over compliant entities.

Additionally, we appreciate the intent of the Policy to reaffirm the Board's principle of progressive enforcement on the whole such that an escalating series of actions would be enlisted beginning with notification of violations, ramping up to a complaint for civil liabilities where compliance cannot/is not achieved in a reasonable time or compliance is refused. Such revisions and clarity could help ensure regional boards consistently approach enforcement such that those that are striving to be in compliance be given the opportunity to

correct at the notification stage rather than the boards seeking immediate civil penalties (except in the more egregious situations or willful noncompliance situations).

Unfortunately, however, the review of the Policy revisions overall have been daunting due to the multitude of moving parts, most of which rely upon a great deal of subjectivity on the part of the staff person preparing the enforcement action. This is contrary to the revisions supporting progressive enforcement that could help ensure consistent regional board application of enforcement and associated penalties.

Indeed, as further detailed below, the Policy notes that "[f]airness does not require the Water Boards to compare an adopted or proposed penalty to other actions," explaining that the use of the penalty calculator is not a panacea to the ever-present concerns over inconsistent enforcement. In fact, the Policy retains much of the same indefinite language that has triggered the emphasis on greater transparency and consistency. At the same time, the Policy further muddles the analysis but creating a ten-step analysis, with several steps having numerous and indistinct tiers.

Additionally, Section I provides new language indicating that the contractor, in addition to the legally responsible person (LRP), may be subject to enforcement action. We urge, however, that the Policy should instead provide that the party or parties that took the action that caused the alleged violation should be the entity against which the enforcement is taken. For example, when a contractor acts outside the scope of its contract by conducting its activities in an illegal fashion, it would be unreasonable to also take enforcement action against the LRP. In this regard, we suggest the Board direct staff to revise the proposed policy to clarify that enforcement action is to be taken against the entity that took the action that caused the alleged violation.

In Section II, the Policy seeks to simplify the prioritization of violations by consolidating several types of violations. In doing so, the Policy deems discharges "causing or contributing to exceedances of primary maximum contaminant levels" as Class I violations, justifying immediate enforcement action. The addition of the maximum contaminant level (MCL) language unnecessarily muddles the analysis, particularly given the fact that many scientific studies have noted that MCL exceedances have a variety of sources. This fact is particularly true in the urban areas where many industries are located. By allowing MCL exceedances alone to justify the commencement of immediate enforcement action – despite the presence of intervening dischargers – the Policy grants the regulators the ability to target any discharger in dense areas. This result is contrary to the Policy's emphasis on transparency and fairness.

The Policy's ten-step determination of a "final liability amount" is also flawed. Each of those steps includes multiple factors to be considered or analyses to be conducted. This approach is not only complex, but confusing as well. The steps provide categories (e.g., 0 – 5; negligible – major; minor – major) upon which the factors are ranked in order to determine the penalty; however, these categories lack clarity as they do not use consistent language. As an example, Factor 2 in Step 1 includes the following categories:

> 0 = Discharged material poses a negligible risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material are benign and would not impact potential receptors).

1 = Discharged material poses only minor risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material are relatively benign and would not likely cause harm to potential receptors).

2 = Discharged material poses a moderate risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material have some level of toxicity or pose a moderate level of threat to potential receptors).

3 = Discharged material poses an above-moderate risk or a direct threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material exceed known risk factors or there is substantial threat to potential receptors).

4 = Discharged material poses a significant risk or threat to potential receptors (i.e., the chemical and/or physical characteristics of the discharged material far exceed risk factors and pose a significant threat to potential receptor uses).

As illustrated in this example, these categories lack clarity as they do not use consistent language within a continuum for the benchmarks. The language highlighted in yellow varies from "impact" to "harm" to three separate levels of "threat." This verbiage and the nuances between them will undoubtedly result in confusion in assigning a violation to one category or another. In essence, without clarification and consistency in the use of these terms and the continuum built around them decisions made by staff will be inherently subjective. And this subjectivity will lead to inconsistency in application of this Policy, mitigating the goal the Board through the revisions is seeking to solidify.

With regard to the individual penalty decisions derived from the changes to this Policy, it is clear that some of the changes and additions will result in higher proposed monetary penalties. We are concerned this can be in-part attributed to the fact that the steps in the Policy use a conservative method that seemingly compounds the factors that would lead to higher penalties.

As an example, a factor is obtained from Table 1 which is based on an assessment of Actual or Potential for Harm for Discharge Violations in Step 1 and the Deviation from Requirement analysis in Step 2. The calculation in Step 1 includes factors for both the "Degree of Toxicity of the Discharge" and the "Actual Harm or Potential Harm to Beneficial Uses." These two factors would most likely always be correlated (i.e., they measure the same effect) and, since these results are added together, they will result in higher Step 1 scores and, in turn, higher penalty assessments.

Further, in Step 2, It states that the penalty should be adjusted upward based on the case prioritization process outlined in Section II. Additionally, it indicates that in some cases the penalties based on both "per day" and "per gallon" can be combined; and that penalties are to be based on the extent of the violation in terms of its adverse impact on the effectiveness of the "most significant requirement", when a requirement has more than one part. Step 4 includes "adjustment factors" and Step 8 requires other factors to be considered as "Justice May Require".

While it could be argued the last bullet may allow for a reduction or increase in the penalty, application of the other factors would result in making the penalties higher. The subjectivity

that has been incorporated as part of some of these changes will undoubtedly compromise the goal of increased consistency in application of the Policy and the penalties assessed for similar enforcement actions brought forth by the SWRCB. To help minimize such subjectivity and provide clarity to the regulated community and the public, the Board may wish to consider providing supplemental examples of implementation of the steps. Additionally, the Board may wish to institute a pilot test of the steps by providing several cases to each of the regional boards so as to evaluate their results against the intended consistency within the proposed Policy.

Just as troublingly, the Policy – under the "Consistent Enforcement" heading, no less – expressly disclaims the consideration of penalties imposed on similarly-situated parties:

> *"This 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 assessed or proposed amounts differ."*

The Policy would relieve the government from explaining why penalties on two substantively-identical parties may be drastically different, despite similar impacts on the environment or identical gains to competitive advantage. The state and federal Constitutional guarantees of the equal protection of the law cannot be so summarily dismissed.

We also have concerns regarding the public participation provisions associated with enforcement matters, environmental justice and human right to water considerations. More specifically, the revised language (Section II.C) provides:

> *It is recommended that, on an annual basis, enforcement staff for each Regional Water Board seek input at a regularly noticed public meeting of the Regional Water Board and consider identifying general enforcement priorities based on input from members of the public and Regional Water Board members within thirty (30) days thereafter.*

This approach is concerning in that advocacy organizations can use such public forums to target a specific site or company for issues unrelated to issues under regional board authority. Further, such a forum may be used to pressure enforcement staff to make commitments on prioritizing enforcement actions against a company that they normally would not consider of significant concern based on a subjective evaluation associated with the revised Policy.

Additional concerns include removing the cap on the multiplier for the "History of Violations" category and the revisions to the Culpability factor range. Previously, the multiplier for the "History of Violations" factor was capped at 1.5. Now, however, the proposal is to "consider adopting a multiplier above 1.1. This could result in much higher multipliers that would significantly increase the proposed calculated penalty. Additionally, modification of the Culpability factor range from 0.5-1.5 to 1.0-1.5 would remove any "credit" in the proposed penalty calculation for unavoidable, non-negligent, non-intentional violations as allowed under the current Policy. We urge the Board to retain both the cap on the multiplier for the history of violations and credit opportunity under the culpability factor range.

On behalf of the signatories to this letter, we appreciate your consideration of these comments. If you have questions regarding the points raised in this letter, please contact Dawn Koepke with McHugh, Koepke & Associates at (916) 930-1993. Thank you.

Sincerely,

Agricultural Council of California
California Independent Oil Marketers Association
California Building Industry Association
CalChamber
California Business Properties Association
California League of Food Processors
California Manufacturers & Technology Association
California Metals Coalition
Chemical Industry Council of California
Industrial Environmental Association
West Coast Lumber & Building Material Association
Western Growers
Western Mining Alliance
Western States Petroleum Association

cc: CJ Croyts-Schooley, SWRCB