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Humboldt
Baykeeper

April 15, 2009

Inland Empire
Waterkeeper

Charles Hoppin, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Klamath
Riverkeeper

Monterey
Coastkeeper

VIA ELECTRONIC MAIL: commentletters@waterboards.ca.gov

Orange County
Coastkeeper

**Re: Comment Letter – Draft Annual Enforcement Report, 2007-08 (April 2009)
4/21/09 Board Meeting, Agenda Item #10**

Russian
Riverkeeper

Dear Chair Hoppin and Board Members:

San Diego
Coastkeeper

The California Coastkeeper Alliance (Alliance) represents 12 Waterkeepers spanning the coast from the Oregon border to San Diego, all of whom are active in the enforcement of water quality laws. The Alliance is pleased to provide these comments on the State Water Resources Control Board's (Board) draft Annual Enforcement Report (Report) for FY 2007-08.¹ The Alliance commends Board staff on their hard work compiling the Report, which will be invaluable in tracking enforcement efforts over time and making adjustments as needed. We particularly commend Board staff on their exceptional efforts in reducing the backlog of mandatory minimum penalties, which sends a message to violators that enforcement is a heightened priority and which hopefully will deter future violations. We also appreciate the Report's attention to presenting fines and other data by region, which will help the public to better understand how their regional water boards are serving them in achieving clean water.

San Luis Obispo
Coastkeeper

Santa Barbara
Channelkeeper

Santa Monica
Baykeeper

Ventura
Coastkeeper

The Alliance has four primary comments related to the Report:

- The Report should include all enforcement activities for all violations. Categories of excluded potential violations should be included; if there are no enforcement activities for those categories, that fact should be noted.
- The Report must address the "gap issue" of discharges that are currently not being enforced against because there is no formal regulatory program in place for them.
- The methodology used to calculate the "percentage of violations receiving enforcement" should be revised to account for the level of enforcement and thereby provide a more complete picture of overall enforcement effort.
- The relatively weak enforcement data for certain waste discharge requirements (WDRs), such sanitary sewer overflows (SSOs) and Central Valley dairy CAFOs, reinforce a call for a re-evaluation of decisions to make such discharges subject to WDRs only, rather than (more appropriately) a combined NPDES/WDR permit.

¹ http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/annual_enf_rpt_032609.pdf.

Further discussion of these issues is provided below. Two additional brief points that we would like to make here are the following: first, some of the numbers in corresponding tables did not appear to be consistent. For example, the total number of “NPDES wastewater major facilities” enforcement actions reported in Table 10 is 141, while the number of violations receiving enforcement for “major NPDES dischargers” in Table 7 ranged from 491 (for priority violations) to 1,196 (for all violations). We suggest that these tables be reviewed to maximize clear presentation. Second, some of the Figures (*e.g.* Figures 4, 15, 18, 19, 22, 23) display an overall downturn in enforcement activity over the years. Explanation of the reasons for such downturns would be extremely helpful to understanding how to correct such trends as needed.

ALL ENFORCEMENT ACTIVITY FOR ALL CATEGORIES OF VIOLATIONS SHOULD BE INCLUDED IN THE ENFORCEMENT REPORT

Waivers and Prohibitions Should Not Be Excluded from the Report

As noted in multiple past CCKA comments to the Board, a document entitled “Enforcement Report” should include all enforcement activities for all water quality violations – state and federal law, WDRs and waivers, permits and prohibitions, surface water and groundwater. While we commend the Board highly on the level of detail provided to the public in the current Report as compared to years past, we feel the Board can do even better.

Excluding whole categories of enforcement activities – such as those related to waivers and prohibitions, for example – from the Report prevents the state from an honest assessment of whether such regulatory tools are working to protect water quality. Comprehensive reporting is essential to ensure that the waters of the state – which cannot distinguish among different permitting and enforcement options – are protected, and that state resources are used most efficiently and effectively in that effort.

We ask that the Board revise the Report to include summaries of enforcement activities for waivers, prohibitions, and any other missing categories of regulatory activity. If there are enforcement activities in these categories, but no staff resources to compile the results of such activities, then the category could serve to reserve the spot for data to be collected in the coming months, and a recommendation could be made in the Report accordingly. If there are no enforcement activities in these categories (or if there is enforcement activity in some regions but not others), then those facts should be noted along with a clear statement as to the lack of enforcement activity, and a description of the state’s plans to develop that enforcement activity. In other words, if there is no enforcement action in a regulated area, the Report should say so, in order to make the gap clear and allow the state to develop a plan to address it.

The Enforcement Report Should Develop a Method for Tracking Currently Unregulated Discharges to Waters of the State

Again as noted in multiple past CCKA comments to the Board, the Report continues to fail to address the “gap issue” of wastewater discharges that are currently not being enforced against because there is no formal regulatory program in place for them. This is an enforcement issue because dischargers are continuing to release wastes without providing reports of waste discharge

that are required by law and necessary to determine whether controls are needed on such releases. Categories of unregulated discharges have been provided to the Board by CCKA in several public comment letters. Examples include but are not limited to: irrigated agriculture in Region 2, grazing in most regions, and confined animal facilities in Region 6.

Water Code Section 13260 requires “[a]ny person discharging waste, or proposing to discharge waste, within any region that could affect the quality of the waters of the state” (including groundwater) to “file with the appropriate regional board a report of the discharge, containing the information which may be required by the regional board.” Regardless of the lack of a formally-adopted program to oversee pollution, Water Code Sections 13260 *et seq.* make it clear that dischargers *must* file necessary reports and make their pollution discharges known to the public. **The Water Code does not allow the State and Regional Boards to ignore these reporting violations because there is no regulatory program for the discharges at issue.** Enforcement actions must be taken; and if they are not taken, the Enforcement Report must clearly state that fact, and discuss how the state will move to redress the oversight. We ask that the Report be updated to reflect this information.

CALCULATION OF THE “PERCENTAGE OF VIOLATIONS RECEIVING ENFORCEMENT ACTIONS” SHOULD BETTER REFLECT ACTUAL ENFORCEMENT EFFORT

While we greatly appreciate the level of detail provided in the Report’s numerous tables, we have concerns that the results for “percentage of violations receiving enforcement” are artificially skewed high, sometimes quite significantly. The methodology used does not account for the overall level of enforcement effort, and so does not paint an accurate picture of the work that is left to be done to improve enforcement around the state. This is particularly the case for certain WDRs and 401 certifications.

To explain, the “percent of violations receiving enforcement,” which appears in many of the tables, is based on the actual enforcement performed. Where the actual enforcement level is fairly limited, this baseline assumption would present a falsely optimistic picture of overall enforcement results. This assumption needs to be corrected as warranted, because these percentage figures are prominently placed and so may be the only numbers that people look at for those tables.

As just one example, Table 22 (“401 Certification Compliance and Enforcement Outputs”) states that the percentage of 401 certification violations “receiving enforcement” is 90%. However, the Table also states that only 42 of 959 regulated facilities were inspected, and at those 42 facilities, 30 violations were discovered.² Accordingly, the 90% enforcement rate is based on the results of inspections done at just 4% of the facilities regulated. In reporting that 90% of violations received enforcement, then, the Table ignores the other 96% of the facilities that received no inspections. A better assumption, one based on the available data, would have been

² In fact, there may have been a few more inspections and enforcement actions, but the Report states that since 401 certification data is not tracked in CIWQS, the information provided is current for only “some” regional boards. We would suggest that with the relatively small number of facilities at issue for this category, the data could be collected in an Excel spreadsheet or other database tool until CIWQS can be populated with this category of information. *See also* page 57, declining to provide 401 certification enforcement data.

that the uninspected facilities would have had a similar rate of violations found (*i.e.*, 30 violations across 42 facilities inspected, or 71%). It is thus more accurate without other information to spread the 71% violation rate across the 96% of facilities that were not inspected – bringing the likely total number of violations in FY 06-07 to 681, not 30. Since only 27 violations of those discovered *actually* received enforcement, only 27 enforcement actions out of 681 likely violations occurred. In other words, only 4% of likely 401 certification violations received enforcement, not 90% - a significant difference.

As another example, the Stormwater tables (Tables 16 through 18) report that 86-97% of violations received enforcement, when in fact most stormwater violations are found through site inspections³ and only a very small fraction (4-6%) of such facilities are inspected. If the same procedures used above were applied to these tables to determine overall levels of enforcement, the figures of 86-97% of “violations receiving enforcement” would decrease dramatically. The methodology used thus is vastly important in presenting an accurate picture of how well the state is doing in enforcing water quality laws.

We ask that the tables be reviewed and revised accordingly to ensure that the public is aware not only of how often the state enforced against those violations that staff discovered, but also how well the state is doing *overall* in enforcing against *all likely* violations – that is, including the facilities it did *not* inspect or review, based on the best available data. As needed, an additional column, perhaps entitled “% of total estimated violations receiving enforcement” could be used to reflect this information. The column currently entitled “percentage of violations receiving enforcement” then should be clarified to read “% of discovered violations receiving enforcement,” or something similar that reflects those instances in which the percentage figure does not reflect all potential violations that would have received enforcement if additional inspections or report reviews had been conducted.

THE REPORT SHOULD ADDRESS THE IMPACTS OF DECISIONS TO REGULATE DISCHARGES TO WATERS OF THE U.S. WITH WDRS ONLY, RATHER THAN A COMBINED NPDES/WDR PERMIT

CCKA and individual Waterkeepers have contended in several significant occasions that certain categories of discharges should be regulated under a combined NPDES/WDR permit, rather than solely a WDR, because the discharges at issue reach surface waters.⁴ Such occasions include the statewide WDR for Sanitary Sewer Overflows (SSOs) and the Central Valley Regional Board WDR for dairy CAFOs. In fact, San Francisco Baykeeper and others, represented by Lawyers for Clean Water, sued three Central Valley dairies for not having necessary NPDES permits and settled the cases successfully. However, even though the dairies then applied for the necessary NPDES permits almost two years ago and revised their applications as per staff’s request, the regional board still has not provided them with even draft NPDES permits.

Unfortunately, the Report does not provide reassurance that such WDRs are actually protecting water quality. Tables 26 and 31 address the SSO WDR, and Tables 27 and 32 the

³ By contrast, the “percentage of violations receiving enforcement” likely is closer to the actual level of enforcement for those discharges where most violations are discovered through comprehensive review of self-monitoring reports.

⁴ Even if the WDR at issue does not “authorize” discharges to surface waters, the fact remains that discharges do indeed reach surface waters regularly, pollution that will continue without appropriate regulation and enforcement.

Dairy/CAFO WDR. Table 27 reports that the total number of Dairy/CAFO WDR inspections in Region 5 for 2006-07 was 10, out of 1,500 Region 5 facilities regulated under the Dairy/CAFO WDR. Eleven violations were found (Table 32), leading to a scaled-up, potential 1,650 violations for all facilities, only eight of which were acted on (0.5%).

Similarly, Table 26 lists over 1,000 sewage collection systems regulated statewide, but just six inspections for the year. Table 31 lists 182 SSO violations from those six collection system inspections statewide. Projecting that SSO violation rate out over 1,067 facilities yields over 32,000 potential violations, only 27 of which were acted on in 2006-07 (less than 0.1%).

Page 47 of the Report asserts that “WDR discharges are to land and groundwater” (*i.e.*, as opposed to “NPDES discharges [which] are to surface waters”). Unfortunately, this is simply inaccurate in the case of more than one critical WDR. Numerous SSOs and discharges from WDR-regulated CAFOs do *in fact* reach surface waters on a regular basis. For example, the State Water Board itself admitted in its SSO WDR that “SSOs may cause a public nuisance, particularly when raw untreated wastewater is discharged to areas with high public exposure, such as streets or surface waters used for drinking, fishing, or body contact recreation.”⁵ The Central Valley Regional Board WDR similarly stated in its Dairy/CAFO WDR that “[t]he Central Valley Water Board has documented many discharges of waste from existing milk cow dairies to surface water.”⁶ Moreover, a number of water bodies in the Central Valley are already formally listed under Section 303(d) of the Clean Water Act as impaired by dairy waste,⁷ further attesting to the seriousness of this problem. Similar problems with contamination from sewage releases exist throughout the state.

It is clear from all of this information that: (a) compliance with the above-described WDRs is poor, (b) the State and regional boards conduct relatively little enforcement of the requirements of those WDRs, and (c) the water quality of the state is being impacted because of this. Inexplicably, by refusing to regulate these discharges to surface waters under NPDES permits, the state continues to illegally cut out the potential for citizens to assist with enforcement where appropriate pursuant to the citizen suit provision of the Clean Water Act.⁸ Citizens can only sue, as San Francisco Baykeeper and others did, to force permitting of the discharges under the federal Clean Water Act – not to enforce the provisions of the WDR. This is an extremely expensive, time consuming and unnecessary path to clean water.

⁵ State Water Resources Control Board, Order No. 2006-0003-DWQ, “Statewide General Waste Discharge Requirements for Sanitary Sewer Systems” (May 2, 2006), available at: http://www.swrcb.ca.gov/board_decisions/adopted_orders/water_quality/2006/wqo/wqo2006_0003.pdf.

⁶ Central Valley RWQCB, Waste Discharge Requirements General Order No. R5-2007-0035. “Waste Discharge Requirements General Order for Existing Milk Cow Dairies” (May 3, 2007), available at: http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf.

⁷ See http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/303dlists2006/epa/r5_06_303d_reqtmdls.pdf.

⁸ In evaluating the pros and cons of different dairy/CAFO regulatory structures, the staff report for a Board workshop on the matter specifically listed as one of the “disadvantages” of NPDES permits the fact that “[f]acilities are subject to legal challenges under the CWA (*i.e.* citizen lawsuits) to enforce NPDES permits.” Central Valley RWQCB, “Workshop Concerning Options for Regulating Discharges from Confined Animal Facilities,” Staff Report, p. 8 (Oct. 2002).

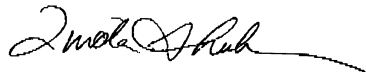
In sum, the Report's relatively poor enforcement record for some key WDRs reinforces the need for a citizen enforcement provision in Porter-Cologne to provide additional enforcement support to the state. But more immediately, **the enforcement reports call for a re-evaluation of inaccurate and illegal decisions to make discharges to surface waters subject to WDRs only, rather than (more appropriately) a combined NPDES/WDR permit**, which would allow for greater citizen enforcement opportunities of permit requirements.

* * *

We thank staff for compiling this detailed Annual Enforcement Report, which presents a range of important enforcement data in a usable way to the public and decisionmakers. We recognize and appreciate the time that has gone into this. These efforts will ultimately ensure the overall success of the state's enforcement efforts, and will help lead to clean water throughout California.

Thank you for the opportunity to provide these comments.

Best regards,

A handwritten signature in black ink, appearing to read "Linda Sheehan", with a long horizontal flourish extending to the right.

Linda Sheehan
Executive Director