



PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org

January 14, 2009

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: January 20, 2009 Board Meeting, Agenda Item #6: "Presentation of the California Water Code Section 13385 Enforcement Report"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), representing 12 Waterkeepers spanning the state from the Oregon border to San Diego,¹ we thank you for the opportunity to submit these comments on the 2008 13385(o) report. The issue of enforcement of environmental laws generally, and water quality laws in particular, has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for significant, specific improvements in enforcement at the State and Regional Water Board levels.² Enforcement is also a topic of great interest to the Waterkeepers generally.

We strongly support the State Board's continued efforts to improve enforcement reporting, which is essential to track progress in enforcement efforts and identify gaps that need to be addressed. The 2007 13385(o) report, for example, highlighted the severe backlog of mandatory minimum penalties (MMPs) that needed to be addressed. As the 2008 report indicates, significant progress has been made in this area this year based on the 2007 findings. We commend the State and Regional Boards for their efforts in this regard. We also particularly welcome the table of MMP violators in Appendix D, which provides the type of transparency and accountability needed to hold polluters accountable to the public for their actions. We look forward to the referenced "special MMP" report in 2009, which we hope will include recommendations for a more automatic form of payment (similar to a tax filing, as was discussed in at least one 2008 Board meeting), as well as a special process for addressing chronic, severe violators.

¹ Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and its Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.

² Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Cal/EPA Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

In addition, we also appreciate the renewed focus on federal facilities in 2009 mentioned in the report. These facilities are of critical importance in certain areas of the state with a high concentration of such dischargers. Finally, we welcome the announced switch to quarterly public reporting, which will better track enforcement efforts and impacts.

We understand that a significant amount of enforcement staff resources in 2008 went to reducing the MMP backlog, and expect that somewhat less resources will need to be expended in this area as the backlog disappears. We request that some of these freed-up resources be turned to additional, much-needed enforcement efforts identified in our prior (attached) letters, and that the Board, in either an updated 13385(o) policy, the revised draft Enforcement Policy, or elsewhere, identify when and how it will take on these unmet needs. Some of the more significant of these unmet needs are listed below, and are all discussed in more detail in the attached comment letters:

- The 13385(o) report is not in fact an “Enforcement Report,” as titled; rather, it is an “NPDES Enforcement Report.” As we have noted for years, all water quality violations – both for state and federal law, both WDRs and waivers, and both surface water and groundwater – should be collected and reported. Such reporting is essential not only to the success of the enforcement program, but is also essential to the success of other initiatives, such as the TMDL program. The 2007 13385(o) report briefly mentioned including groundwater and non-stormwater runoff violations in the future, but included no timetable or plan of action identified. The 2008 report does not even appear to do that (*see, e.g.*, Response #7 on page 39, which refers only to NPDES program violations). **We ask that either the 2008 report be updated in the next quarterly review to include a specific process and timetable for addressing enforcement reporting for non-NPDES permit violations, or that the State Water Board take this up at a Board workshop in the near future to receive public input on how such a report would be structured.**
- The 13385(o) report also fails to address the “gap issue” of discharges that are currently not being enforced against because there is no formal regulatory program in place for them. Enforcement and enforcement reporting must include any water quality violations, including violations of Water Code Section 13260, which 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. **If the regional boards fail to act on whole categories of discharges, which is and has been the case as described in detail in our prior comment letters, then the State Water Board owes the public a description of which categories are being ignored, by region, to ensure transparency and accountability. We ask that the report be updated to reflect this information.** This information is also critical for the “gap” dischargers themselves, who are directly at risk for prosecution under Fish and Game Code Sec.s 5650 *et seq.* if they are not operating under an adopted waiver or WDR.
- With respect to Analysis section of the report, **we again strongly urge the State Board recommend that the report include a compiled table of data on fines and penalties by region** (*see, e.g.*, Water Code sec. 13225(k)); specifically: (a) the total amount of fines and penalties assessed by region over the last five years, (b) the amount of the fines that were kept in-region, including through SEPs and other funds, (c) the amount that went to the State

Board (and into which funds), and (d) the amount reallocated out of Sacramento to Regional Boards, and where reallocated. If this information is located elsewhere, such as on regional board websites, it should be relatively easy to compile in one place for the public in the 13385(o) report updates.

We also ask that the Analysis section include specific recommendations on the timetable and process to **establish the performance measures needed to evaluate the impacts of enforcement on water quality** (*see* pages 34 and 40). A specific process to develop these much-needed performance measures is essential to track the ultimate effectiveness of all enforcement initiatives and target staff time appropriately.

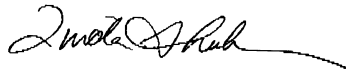
It would be quite helpful to the public and decisionmakers to include a **description of Supplemental Environmental Projects by region** as an appendix to the report, to show the public and decisionmakers how and where these enforcement options are being used.

Finally, **closer ties between the 13385(o) report results and the updates to the Enforcement Policy would benefit both documents and ensure that staff energy is spent on the most effective enforcement efforts to ensure clean water throughout the state.** For example, the Enforcement Policy should respond directly to relevant pieces of the Analysis and Recommendations section in the 13385(o) report. Conversely, the 13385(o) report should provide the compiled data (or reference specific links online to compiled data) collected in response to the legislatively mandated enforcement reporting, which could then be referenced in the Enforcement Policy (*see* list on page 36 of the December 2008 Draft Enforcement Policy). It is unclear right now how the Board addresses, or plans to address, many of these requirements. Page 36 of the 13385(o) report in particular would benefit significantly from specific links to the data collected and/or data summaries required by Water Code sections 13323 and 13225. Simply referencing “each of the regional water boards’ web sites,” or an unnamed “interim process,” or links to the CIWQS database do not provide the level of transparency called for by the reporting requirements. We look forward to continuing to work with Board staff to make this information directly accessible to the public and decisionmakers.

* * *

Accountability and transparency in enforcement are essential to ensure that good actors are rewarded, problems are identified and fixed, and the public enjoys healthy waterways. We appreciate the improvements that the State Board has made in enforcement and enforcement reporting in 2008, and look forward to working with you in 2009 to improve upon the State and Regional Water Boards’ enforcement efforts further. Thank you.

Regards,



Linda Sheehan
Executive Director

attachments

ATTACHMENT 1:
COMMENT LETTER ON 13385(o) REPORT FOR 2007,
OCTOBER 31, 2007



PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org

January 24, 2008

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: February 5, 2008 Board Meeting, Agenda Item #6: "Consideration and Discussion of the California Water Code Section 13385 Enforcement Report"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), representing 12 Waterkeepers spanning the state from the Oregon border to San Diego,³ we thank you for the opportunity to submit these comments on enforcement and enforcement reporting. As was discussed in more detail in our enforcement letters to the State Water Resources Control Board (State Board) dated June 2007 and November 2007 (attached and incorporated by reference), the issue of enforcement of environmental laws generally, and water quality laws in particular, has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for significant, specific improvements in enforcement at the State and Regional Water Board levels.⁴

We support the State Board's continued efforts to improve enforcement reporting, which is essential to improving enforcement overall. The data collection, compilation and reporting efforts undertaken to date, while still ongoing, have already shed light on a number of substantive enforcement concerns and questions that can be addressed while the reporting process continues to be refined. The 2007 13385(o) report raises a number of such issues, some of which are described in more detail below. We and the other Waterkeepers look forward to working with the State and Regional Boards to address these issues in the coming months, particularly with respect to the development of enforceable stormwater permits.

Our comments below are focused on three key areas: additional categories of enforcement information that should be included in the 13385(o) and baseline enforcement reports; continued issues with data quality and comprehensiveness; and development of specific recommendations for action based on the data that is available.

³ Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.

⁴ Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Cal/EPA Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

Categories of Enforcement Data That Should Be Added to the Report

There continue to be some significant omissions from the 13385(o) report that should be addressed in both the baseline enforcement report that the State Board is preparing as well as future 13385(o) reports. Specifically, as noted in our November 2007 letter, all water quality violations – both of state and federal law – should be collected and reported. Such reporting is essential to the success of other initiatives, such as the TMDL program. We support the report’s reference to including groundwater and non-stormwater runoff violations in the future, but no timetable or plan of action is mentioned; these need to be specified.

Related to this issue is the definition of “enforcement,” and what is left out of an enforcement report (or an enforcement program, for that matter) depending on the definition that is selected. For example, page 27 of the 13385(o) report states that the Water Boards plan to issue an annual enforcement report that “includes an analysis of . . . violation and enforcement data *for all of our regulatory programs . . .*” (Emphasis added.) Yet in a number of cases, whole categories of pollution are being completely ignored by the Regional Boards (*i.e.* there is no “regulatory program” for these categories). This is an issue we have raised repeatedly over the years, and last year in particular.⁵ If enforcement is limited to “enforcement where there is a regulatory program,” rather than “enforcement where there is a violation of Porter-Cologne,” such gaps will continue to be ignored. Enforcement, and enforcement reporting, must by law include any water quality violations, such as violations of Water Code Section 13260, which 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 discharges that occur without required reporting and without associated, necessary waste discharge requirements violate the law. Those violations should be captured in the baseline enforcement report and any subsequent enforcement reports, to identify the problems that need to be addressed. If they are not being acted on, then that is something that must be noted publicly to ensure transparency and accountability.

Similarly, the enforcement reports should include federal facilities. The argument that they should not be reported because enforcement is difficult against the federal government flies in the face of the fact that full disclosure on enforcement is essential to making changes that will make our waters cleaner. If the information somehow “skews” other statistics where the law (or the current

⁵ As just one example, there is abundant evidence that E. coli O157:H7 is a grazing-related problem that affects waters and growing areas in Region 3 – and that has killed several people and seriously injured hundreds. A June 2006 report prepared by that Regional Board found that numerous water bodies contaminated by O157:H7, where “any presence is considered exceedance of the water quality objective.” (Emphasis added; *see* http://www.waterboards.ca.gov/centralcoast/TMDL/documents/SalRivFecColPrelimProjRptJuly06_000.pdf, pp. 26-27.) The report found that the “most frequent occurrence of E. coli O157:H7 occurs at sites flanking areas used for grazing purposes.”⁵ The report added that cattle (which abut a number of affected growing areas) are significant sources of O157:H7, that the strain can persist in the soil for 10-11 months after livestock have been removed, and that O157:H7 has been found near and downstream of livestock areas.⁵ The Board concluded that “what is certain is that livestock are a source of . . . O157:H7” in the Central Coast region, and the “livestock have been observed roaming in surface waters as well as along riparian areas” of the area. Yet there continues to be no regulation of, and so no enforcement against, grazing activities, in violation of Porter-Cologne.

interpretation of the law) may be different from other sources, then federal facilities could be reported on in a separate section. As we have commented to the State Board before, it is extremely powerful to say to the public that its federal government is allowed to pollute local waters essentially with impunity, and provide facts to back that up. That is the kind of information that the public can then take and use to change the law. Hiding the fact that federal facilities pollute will not make our waters any cleaner.

Another way in which the report impedes improvements in water quality is by not specifying which Regional Boards are doing well on data collection and reporting and on enforcement generally, and which need more improvement. Because of the problems with the quality of the data, it is unclear from the charts provided whether the Regions have a data problem, an enforcement problem, both, or neither. Concealing the fact that some Boards are performing better than others fails to reward those that are doing well and reduces the incentives on poorly performing Boards to do better. It also prevents those Regions that need help, financial or otherwise, from getting the help they need. To improve transparency and accountability overall, the baseline enforcement report and future versions of 13385(o) should include region-by-region enforcement analyses.

The Regional Boards should not be alone in being singled out for enforcement and reporting scrutiny. SB 729 provided the State Board with its own enforcement tools, to be used “after consulting with the regional board” to ensure that State Board action “will not duplicate the efforts of the regional board.” The enforcement reports should include a section on State Board-initiated enforcement actions, which should include an explanation of the State Board’s enforcement authority and when it has and will be used. If there are no State Board-initiated enforcement efforts, that figure should be reported so it can be tracked over time.

Issues with Data Quality and Comprehensiveness

Much has been said about the State and Regional Boards’ ongoing struggles with enforcement data quality and comprehensiveness, and we support the fact that the report makes it clear that there are ongoing concerns that are being acted on. We also applaud the ongoing external review of the CIWQS data system and are active in that process. Because of concerns about the adequacy of the data, we will say little here about the actual results presented.⁶ Our ongoing points are that: (a) the State and Regional Boards must institute as soon as possible a clear, quality-controlled process for entering enforcement data electronically, and (b) must complete and implement a basic online database that can generate quality reports that the public and decisionmakers can use to take action where there are identified enforcement problems. The current system does not yet allow such actions to be taken with full confidence in the data.

Moreover, there are continuing concerns about the long-term sustainability of the database. U.S. EPA, which had provided some database funding in the past, has been clear in public testimony that they have serious concerns about California’s management of its NPDES data. U.S. EPA is moving to a new web-based data system known as the Integrated Compliance Information System-NPDES (ICIS-NPDES). Assessment should be made of the relative merits of both CIWQS

⁶ However, even with data quality questions, some results beg for comment. For example, in Table 6: why are there only two NPDES stormwater violations in Region 2 recorded for 2007 and three in all of 2006? Or Table 12: two-thirds to 90% of facilities that require mandatory minimum penalties (MMPs) still have pending MMPs, eight years after the MMP program began? Such issues can and should be highlighted and investigated further.

and ICIS-NPDES for reporting on NPDES violations, including assessment of funding streams for maintaining the systems over time, to ensure that staff time and other resources are best spent.

Analysis: Recommendations on Lessons Learned from Data

We appreciate and welcome changes to the 13385(o) report that begin to reflect some of the comments raised in our November 2007 letter on the 2006 report, particularly with regard to analyzing the data and providing some general recommendations for future action. The report would benefit, however, from additional, more specific recommendations in terms of action based on lessons learned, along with timetables, so that there is clear follow-through from the information collection and reporting process.

For example, there are numerous references in this report to relatively low enforcement rates resulting from a lack of staff. Many readers would wonder why increased enforcement and fines would not bring in more money for more staff to do more enforcement (after an initial investment in staff). In fact, CCKA and individual Waterkeepers researched this issue, and were told by a number of Regional Water Boards that since much of the fine and penalty money is re-routed to the State Board, there is a disincentive to increase costly enforcement that does not pay out with fines paid in-Region. When SB 729 (Simitian, Perata 2006) was first introduced in 2005, there was a provision to keep more fines in-Region, to increase this incentive for enforcement. However, this provision was removed as a result of State Board concerns that some of these fines needed to be deposited centrally and redistributed to support regions that had less of an opportunity to collect penalty money. Unfortunately, to date there has been no clear accounting of these funds to determine the extent to which the fines/penalties processing structure actually creates incentives or disincentives for enforcement. Given the serious state of the 2008-09 California budget, and the equally significant need for increased enforcement, a clear answer to this question is critical at the current time. We would ask the State Board, as a recommendation resulting from the findings of this 13385(o) report, to investigate and report on: (a) the total amount of fines and penalties assessed by Region over the last five years, (b) the amount of the fines that were kept in-Region, including through SEPs and other funds (and specifically addressing funds available to pay for enforcement staff), (c) the amount that went to the State Board (and into which funds), and (d) the amount reallocated out of Sacramento to Regional Boards (and where, how much, etc.). Tracking fines assessed with enforcement effort, as represented by the data in the 13385(o) report, would also be quite useful.

Another example of a finding that would benefit from a specific recommendation for follow-up is the oft-repeated fact that “staff is not routinely aware of violations for several months after they occur.” This creates a lag in reporting, but more importantly it can reduce the effectiveness of enforcement taken months after the actual pollution incident. Ideally enforcement should occur as close as possible to the infraction, to maximize the disincentive to repeat the action in the future. The enforcement report accordingly should include a specific recommendation on how the Boards will work to expedite a greater number of the enforcement actions taken.

Finally, the finding on page 16 with regard to stormwater versus other NPDES permits calls out particularly strongly for specific follow-up. This finding states that, unlike the numeric effluent limitations in the “vast majority” of wastewater NPDES permits, which are self-monitored and self-reported by the discharger,

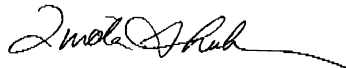
stormwater NPDES permits currently contain no numeric effluent limitations and instead rely upon a suite of general narrative effluent limitations, made specific by a plan that is only kept at the site. Compliance determination these effluent limitations at stormwater facilities therefore depends heavily on site visits

In other words, tracking enforcement of permits with numeric limits is far less staff intensive (and so less costly) than tracking enforcement with narrative limits, which need site visits. As articulated in the two Cal-EPA enforcement memos referenced above, this clearly points to a recommendation to increase use of numeric limits in stormwater permits in order to streamline both compliance and enforcement. Instead, the report on page 16 finds only that “[e]nsuring compliance with stormwater NPDES permit effluent limitations . . . requires a large field presence,” a recommendation that seems unlikely to be implemented in the current budget climate. We ask that the report include a recommendation for numeric limits in stormwater permits to address this issue.

* * *

The development and distribution of enforcement reports is an essential, ongoing check on the California’s progress in taking action to achieve cleaner water. Transparency in enforcement will ensure that good actors are rewarded, problems are identified and fixed, and the public enjoys healthy waterways. Thank you for the opportunity to comment on the 2007 report of enforcement efforts.

Regards,



Linda Sheehan
Executive Director

attachment

ATTACHMENT 2:
COMMENT LETTER ON 13385(o) REPORT FOR 2006,
OCTOBER 31, 2007



PO Box 3156, Fremont, CA 94539
(510) 770 9764 www.cacoastkeeper.org

October 31, 2007

Ms. Tam Doduc, Chair and Board Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814
Via Email: commentletters@waterboards.ca.gov

Re: November 6, 2007 Board Meeting, Agenda Item #4: "Consideration and Discussion of the Water Code Section 13385 Enforcement Report"

Dear Chair Doduc and Board Members:

On behalf of the California Coastkeeper Alliance (CCKA), representing 12 Waterkeepers spanning the state from the Oregon border to San Diego,⁷ we thank you for the opportunity to submit these initial comments pertaining to the above-described item on enforcement and enforcement reporting. As was discussed in more detail in our letter to the State Water Resources Control Board (State Board) dated June 2007 (attached), the issue of enforcement of environmental laws generally, and water quality laws in particular, has been the subject of at least two Cal/EPA directives in recent years, both of which highlighted the need for significant, specific improvements in enforcement at the State and Regional Water Board levels.⁸

Comprehensive, accurate enforcement reporting is a critical tool in both tracking and improving compliance with state and federal water laws. The Legislature recognized this in requiring the annual Section 13385 enforcement report that is the focus of this agenda item, and in enacting additional reporting requirements in SB 729 (Simitian and Perata, 2006). Full implementation of these reporting mandates should support regular, thoughtful, and complete examination of enforcement efforts annually, and prompt changes in enforcement focus and resources as needed to improve water quality throughout the state. However, as indicated by the Draft 2007 13385(o) Enforcement Report, California has a significant amount of work to do to meet these mandates. We request that the Board: (a) review and reassess the information and analysis presented in the Draft Report, (b) make improvements as possible now, (c) identify the gaps that would need to be filled to comply fully with Section 13385 and SB 729 and to establish a sound foundation against which future enforcement progress can be assessed, and (d) describe how those gaps will be filled and how the necessary resources will be identified and sought.

⁷ Klamath Riverkeeper, Humboldt Baykeeper, Russian Riverkeeper, San Francisco Baykeeper, Monterey Coastkeeper, San Luis Obispo Coastkeeper, Santa Barbara Channelkeeper, Ventura Coastkeeper, Santa Monica Baykeeper, Orange County Coastkeeper and Inland Empire Waterkeeper chapter, and San Diego Coastkeeper.

⁸ Memorandum from Terry Tamminen, Secretary, Cal/EPA to BDOs, (November 30, 2004) ("Cal/EPA Enforcement Initiative"); Memorandum from Alan Lloyd, Secretary, Cal/EPA to Art Baggett, Chair, SWRCB, (March 23, 2005) (Lloyd Memo).

As noted in the Draft Enforcement Report, Water Code Section 13385(o) requires the State Board to “continuously report and update information on its Internet Web site, but at a minimum, annually on or before January 1, regarding its enforcement activities. The information shall include all of the following:

- (1) A compilation of the number of violations of waste discharge requirements in the previous calendar year, including stormwater enforcement violations.
- (2) A record of the formal and informal compliance and enforcement actions taken for each violation, including stormwater enforcement actions.
- (3) An analysis of the effectiveness of current enforcement policies, including mandatory minimum penalties.”

In addition, SB 729 requires the Regional Boards to:

- “Report rates of compliance with the requirements of [Porter-Cologne].”⁹
- “In consultation with the state board, identify and post on the Internet a summary list of all enforcement actions undertaken by that regional board and the dispositions of those actions, including any fines assessed. This list shall be updated quarterly.”¹⁰
- “Ma[k]e available to the public by means of the Internet” any “[i]nformation relating to [administrative civil liability] hearing waivers and the imposition of administrative civil liability, as proposed to be imposed and as finally imposed.”¹¹

The Legislature’s continued focus on enforcement reporting reflects a larger concern about the deteriorating quality of the state’s waters despite billions in bond funds spent to restore them, and a desire for increased transparency in efforts to redress this problem. The Draft Enforcement Report and the State Board’s enforcement reporting efforts overall do make strides toward meeting the above requirements. However, the State and Regional Boards have yet to meet the SB 729 requirements, and there is no discussion in the Draft Enforcement Report of when or how they will be addressed. Moreover, the Draft Enforcement Report lacks the thoughtful analysis of the actual “effectiveness of current enforcement policies” called for by Section 13385(o), analysis that is essential to making sure that the regulated community improves its compliance with water laws.

These are not academic observations. The State and Regional Boards cannot analyze the success of enforcement efforts in achieving clean water, as is required in Section 13385(o), without a hard look at the goals of enforcement reporting, as well as the opportunities and limitations provided by the current data collection systems. The Draft Enforcement Report does not take this hard look. Rather, it raises many new questions that should be addressed if the State and Regional Boards are to effectively improve their enforcement – and enforcement reporting – programs.

Just a few of the questions raised by the Draft Report that should be answered in a subsequent version are the following:

⁹ Water Code § 13225(e).

¹⁰ Water Code § 13225(k).

¹¹ Water Code § 13323(e).

- Other than statutory mandates, what is the purpose of gathering enforcement data? For example, the Draft Enforcement Report states that the regions stopped reporting violation data for federal facilities “because of their inability to enforce” many of the violations. Is enforcement data only reported for those violations that can be enforced? If so, what of those regions that assert a lack of sufficient PYs for meaningful enforcement – would that assertion support a cessation of enforcement data collection? And if not, then what is the purpose of collecting the data? Couldn’t an argument be made that a comprehensive database of federal violations would be critical in supporting a change in any current exemptions for federal facilities, thereby improving water quality in the future?
- What are the sources of the violation information (self-reporting, inspections, etc.)? How certain is the State Board that the total number of violations reported approximates the actual total number of violations? For example, the extremely low number of reported stormwater violations (*e.g.*, one violation reported in Region 2 for all of 2006) begs the question of what the actual total number of violations is, and how the regions will determine that number. What would need to be done to gain more certainty in this respect and ensure that all violations are captured, or at least estimated with some level of accuracy (*e.g.*, through intensive inspection efforts in randomly selected locations)?
- Is the violation information primarily from self-reporting, as seems to be the case, or does it include a meaningful amount of inspection data? What is the breakdown of self-reported data versus inspection data? Do inspections capture proportionately more violations than self-reporting? If so, would that information allow the reported violation figure to be adjusted upwards to reflect a more accurate estimate of actual violations? Also, does this data (if available) inform the weight that the agencies should give to self-reporting versus inspections in improving enforcement?
- How does the State Board capture and report violations that are known through avenues other than self-reporting or inspections – *e.g.*, discharges into Areas of Special Biological Significance, which are prohibited without a special, approved exemption that should be on file?
- How do Regional Board differences in permit writing processes impact the number of violations reported for each region? As one example, some Regional Board permit writers draft long compliance schedules into NPDES permits that allow for enforcement to be avoided altogether (*see* CCKA’s comments on this issue to the State Board dated October 19, 2006). How can enforcement data shed light on this problem and ensure that permit writers do not conduct actions that avoid needed enforcement, a reform that was called for by both Secretary Tamminen and Secretary Lloyd?
- How does compliance vary with the clarity of the permit requirements? How can this information be best captured and reported?
- How and where are the State Board’s enforcement actions (as established by SB 729) recorded?
- What levels of fines and penalties are assessed by region (something also called for by SB 729)? Is there some enforcement direction that can be ascertained by the amount of fines versus the level of compliance?
- Do fines and penalties capture the economic benefit of noncompliance? How will this be determined?

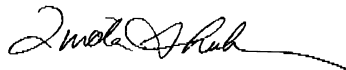
- Do some regions assign monetary assessments primarily for SEPs? If so, how does compliance differ as compared with those regions that assess fines that do not go to SEPs?
- What exactly is the process for addressing the data accuracy problems identified by the CIWQS panel? What are the timelines and milestones for ensuring that the data being put up online are accurate?
- What exactly is the process for identifying and addressing the asserted lack of PYs for full enforcement? What is the need, and what are the suggestions on how that need might be addressed? *E.g.*, increased fees on dischargers? Higher penalties? How can better enforcement data by region support a BCP request for additional PYs, and how will that data be collected and presented in a meaningful way?

Additional questions can and should be asked as this Report is finalized, and as the State Board responds to the recommendations of the CIWQS review panel and better establishes the direction of its data collection and reporting effort.

Finally, we strongly support the Report's recommendation that all water quality violations – both of state and federal law – should be collected and reported. Such reporting is essential to the success of other initiatives, such as the TMDL program. More broadly, and is critical to achieving clean water throughout the state by ensuring that all pollution – regardless of how characterized – is addressed. This reporting must include violations of Section 13260, which 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.” Many discharges of polluted runoff and discharges to groundwater in the state occur completely without regulation or oversight by the State or Regional Boards. Regardless of the lack of a formally adopted program to oversee such pollution, Sections 13260 *et seq.* make it clear that discharges that occur without required reporting and without necessary waste discharge requirements violate the law. Those violations should be reflected clearly, online, to identify the problems that need to be addressed.

Transparency in enforcement processes, in enforcement direction, and in desired versus actual results will ensure that needed changes are made over time. Such transparency also will provide the certainty to the regulated community that is needed for higher levels of compliance – and, most importantly, cleaner water. We look forward to working with you to achieving clean water through comprehensive and transparent enforcement of state and federal water quality laws. Thank you.

Regards,



Linda Sheehan
Executive Director

attachment