October 18, 2016

Felicia Marcus, Chair
Members of the State Water Resources Control Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Submitted via commentletters@waterboards.ca.gov

Subject: **Comments on Proposed Changes to Water Quality Enforcement Policy**

Dear Chair Marcus and Members of the Board:

The California Association of Sanitation Agencies (CASA), Bay Area Clean Water Association (BACWA), and California Water Environment Association (CWEA), appreciate the opportunity to comment on the proposed amendments to the State Water Board's Water Quality Enforcement Policy (Policy). For 60 years, CASA has been the leading voice for public wastewater agencies on regulatory, legislative and legal issues. We are an association of local agencies, engaged in advancing the recycling of wastewater into high quality, multi-use water, the generation of renewable energy, and promoting other valuable resources. Through these efforts, we help create a clean and sustainable environment for Californians. CASA appreciates the Board granting an extension of the original comment deadline for the proposed amendments to the Policy. We have used this time to engage publicly owned treatment works (POTWs) and members of the wastewater community on this issue and to develop specific comments on the proposed changes as discussed below.

Though we have developed comments responsive to the proposed amendments, we feel that it would be preferable to give stakeholders a greater opportunity to engage in the Policy update by providing alternative proposals, comments and suggestions on the Policy, including some provisions that are not addressed by the proposed amendments. There is no fixed deadline to revise the Policy, and opening up the Policy again soon after these amendments to address a broader suite of issues would be inefficient. We believe it would be beneficial to both the Water Board and the regulated community to take the time to ensure that there is robust communication as the Policy revisions are being developed, and to revisit some of the more fundamental approaches embodied in the Policy.

The Policy plays a significant role in determining how the regulated community is addressed in enforcement proceedings, and any changes have the potential to fundamentally alter how enforcement and liability for dischargers occurs in the future. As a general matter, there are several positive changes proposed in the Policy, and we agree that the civil liability calculator makes any enforcement approach taken today far more

transparent and consistent than before the original Policy was developed. However, we are concerned that despite the stated goal of these amendments-- to promote fair, firm, consistent and transparent enforcement-- many of the changes actually run counter to that objective. Most notably, many of the amendments remove Boards staff flexibility in implementing the Policy as appropriate to individual circumstances, and decrease the predictability for some dischargers. This serves only to discourage efficient settlement of these actions in a number of cases, which is contrary to the interests of both the regulated and enforcement communities. We also have concerns about several changes to the Policy that could, taken as a whole, significantly increase enforcement liability for POTWs and others in the regulated community. Below are more specific comments and concerns on these provisions.

Proposed Amendments Drastically Redefine "High Volume Discharge" and Related Per Gallon Assessments

The proposed changes to the Policy seek to narrowly define which spills are considered "high volume discharges," the result of which will be higher penalties for truly high volume discharges, contrary to the intent of the Policy when it was initially developed (See Policy, p. 19).[1] The existing language in the Policy establishes a maximum per gallon assessment of $2.00 for certain types of discharges as follows: "Since the volume of sewage spills and releases of stormwater from construction sites and municipalities can be very large for sewage spills and releases of municipal stormwater or stormwater from construction sites, a maximum amount of $2.00 per gallon should be used with the above factor to determine the per gallon amount for sewage spills and stormwater." The proposed Policy removes the specificity of the types of discharges to which any per gallon recommendation applies. (See Policy, p. 19). The proposed language would now only apply a $2.00 per gallon assessment for releases between 100,000 gallons and 2,000,000 gallons, and, more problematically, the proposed language removes the $2.00 reference as a "cap," and provides only for *voluntary* consideration by Water Boards' staff of a per gallon assessment *between* $2.00 and $10.00 for those releases (See Policy, p. 19). Thus, the proposed Policy essentially reverses the existing presumption that high-volume releases will be assessed with a $2.00 per gallon figure unless there are circumstances justifying a higher figure, and subjects any discharge that qualifies for "high volume" as newly defined to the sliding scale of $2.00 to $10.00 per gallon. This approach affords almost no guidance beyond what the statute currently prescribes (a statutory maximum of up to $10.00 per gallon) and appears inconsistent with the remaining portions of the Policy and the Initial Statement of Reasons that provide for a specific application of a $1.00 per gallon assessment for those same releases that exceed 2,000,000 gallons (See Policy, p. 19 and Initial Statement of Reasons, p. 4).

Further, while we understand and appreciate that the State Water Board seeks to expand the types of discharges to which a per gallon assessment less than the statutory maximum should apply, removing all specific references to the applicable types of discharges, in favor of the proposed, very general, "certain discharges" language, could create uncertainty and

[1] All page references are to the redline/strikeout version of the Policy as provided by the Water Boards.

unnecessary confrontation over whether discharges of sewage, recycled water, and/or storm water qualify for a lower per gallon assessment.

We request that the State Water Board specify these types of qualifying discharges in an "at a minimum" or "including, but not limited to," approach, for both the $2.00 per gallon (discharges between 100,000 and 2,000,000 gallons) and $1.00 per gallon (discharges above 2,000,000 gallons) references. Recycled water, sewage, and storm water spills that can be large in volume, may not have significant impacts on local waterbodies. As such, without specificity as to the types of discharges to which the recommended approach applies, the proposed Policy could create a drastic increase in potential liability over the existing policy's more focused implementation. As you know, the volume of discharge is the key factor that drives the amount of a proposed penalty; one of the reasons the existing Policy includes the lower per gallon monetary reference is due to concern that if subject to the statutory maximum per gallon, municipalities and public agencies would face severe penalties disproportionate to any environmental consequence.

For these reasons, we request that: (1) a more specific $2.00 per gallon figure be applied to high volume discharges, rather than the currently enunciated sliding scale of $2.00 - $10.00 per gallon; (2) the Policy reaffirm the original intent of this section, which was to apply the $2.00 per gallon figure to, at a minimum, all sewage and storm water releases; and (3) the Policy lower the initial volume threshold from 100,000 gallons to 50,000 gallons if high volume discharges will continue to be defined volumetrically.

Mandating Economic Benefit Recovery For All Monetary Enforcement Actions Is Not Recommended, Especially As Applied to POTWs

The proposed Policy appears to require that "economic benefit" be recovered in all monetary enforcement proceedings, including those involving non-NPDES orders (See Policy, p. 12, fn.1, p. 14, and pp. 27-29). This approach represents a change from the existing language of the Policy and is inconsistent with the clear statutory requirements of the Water Code, where only those ACLs issued pursuant to Water Code section 13385 (enforcement of NPDES related requirements) require recovery of economic benefit. Such recovery is a discretionary factor under other Water Code provisions, where enforcement involves non-NPDES waste discharge requirements or other orders issued pursuant solely to the Porter-Cologne Act (i.e., Water Code sections 13323, 13327, and 13350). This point is acknowledged in the proposed Policy, but under the "principles of fairness," the State Water Board nonetheless proposes to extend the recoupment requirement to the non-NPDES setting (See Policy, p. 12, fn. 1). So as to be consistent with State law, we request that the State Water Board remove its statements in the proposed Policy that require recoupment of economic benefit "to all discretionary ACL actions" and instead, ensure the proposed Policy recognizes that economic benefit recoupment is simply a factor for consideration in the non-NPDES setting.

For public agencies handling the state's wastewater (cities, counties, sanitation districts, special districts), the cost of large scale capital projects that may be necessary to achieve and/or maintain compliance can be significant, and in many cases, in the tens of millions of

dollars. As such, the requirement to recover economic benefit, as prescribed, could lead to disproportionate and devastating consequences to local agencies, which cannot simply shut down or stop providing public health and safety services. Further, any economic benefit-based penalties must be passed along to ratepayers, who may be unable to shoulder both the cost of compliance activities along with economic benefit recoupment. Should the State Water Board continue to insist, as a policy matter, that economic benefit be recouped in every instance, then we would suggest including an exception or safety valve for circumstances involving municipal agencies facing significant compliance costs, or, at a minimum, an alternative set of criteria for determining economic benefit applicable to municipal wastewater dischargers.

Clarification is Needed on the Recommendation Favoring Per Day Assessments for Effluent Violations

The following statement has been deleted from the existing policy under the proposed modifications: "Generally, it is intended that effluent limit violations be addressed on a per day basis." (See Policy, pp. 19-20) Now, in a different location of the proposed Policy, the phrase reads as follows: "Generally, NPDES permit effluent limit violations should be addressed on a per day basis only. However, where deemed appropriate, some NPDES permit effluent limits 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" (See Policy, p. 18). While we appreciate maintaining the reference for a general preference of per day assessments for violations related to NPDES permit effluent limits, we are concerned that the Policy, as currently drafted, does not provide clear guidance as to how exceedance of effluent limitations in a non-NPDES setting should be handled. We do not believe it was the intent of the State Water Board to limit application of the per-day preference to only those entities operating under NPDES permits, especially given state law expressly states that in a non-NPDES permit enforcement setting, a per day penalty, or a per gallon penalty, can be recouped, but not both. (See Water Code section 13350(e)).

For permitted discharges, per day assessments for exceedance of an effluent limitation, whether NPDES or non-NPDES permit based, is a reasonable method of enforcement. Discharge permits have become exceedingly complex, with many overlapping provisions. Exceedance of one effluent limitation can lead to allegations that multiple provisions of a permit were violated. Further, the effect of calculating per gallon liability in the same manner as for an unauthorized discharge could yield astronomically high calculations of liability, given the volume of municipal wastewater that may be handled in a day. In addition, effluent violations can take time to identify and rectify, and, in some cases, have minimal impact on receiving waters.

For these reasons, we request that the State Water Board simply strike "NPDES permit" from the proposed language on page 18 of the proposed Policy, in order to retain the flexibility to apply the per day penalty under all permitting circumstances.

Changes to Conduct Factors Remove Dischargers' Credit for Positive Compliance History and Mandate Use of Higher Multipliers for Dischargers With Any Past Violations

The proposed Policy modifies the "violator's conduct factors" section (See Policy, p. 23, Table 4) as well as raising some per gallon factors for discharges (See Policy, p. 18, Table 1). Our primary concern is that these factors are changing simply to increase the base amount of discretionary penalties that are sought in enforcement proceedings, without further consideration of whether doing so is reasonable in all circumstances. For example, the "Degree of Culpability" factor in the existing policy ranges between 0.5 and 1.5, and this has been revised in the proposed Policy to a range between 1 and 1.5. This removes any credit for an entity's positive compliance history and reduces the flexibility of staff undertaking enforcement actions to account for such compliance. The proposed Policy should, wherever appropriate and feasible, take steps to encourage compliance and ensure that such efforts are recognized, even if a near term item results in enforcement. This includes retaining the "Degree of Culpability" factor as a range from 0.5 to 1.5.

Similarly, the "History of Violations" factor in the existing Policy is given as a multiplier of 1.1 when there is a "history of repeat violations." (See Policy, p. 23) The proposed Policy states that a discharger should get a neutral multiplier on this factor only "where the discharger has no prior history of any violations" and that "[w]here the discharger has **any** history of prior violations, a minimum multiplier of 1.1 should be used." The provision goes further and actually encourages the Water Boards to "consider adopting a multiplier above 1.1" under specified circumstances. This change punishes the regulated community in the present for what may be completely disparate compliance circumstances in the past, reduces the flexibility of enforcement staff to look at a discharger's individual compliance history, fails to recognize the slight variability well-operated municipal treatment plants can experience from time to time, and has an unduly harsh effect on dischargers who may have experienced many years without a discharge violation, but may have minor past exceedances on occasion.

We request that this language be restored to its original scale (with enforcement staff having discretion to apply a multiplier of .75 to 1.5), or only slightly modified to allow for more flexibility in use of this factor and recognition of an entity's positive compliance history. Most importantly, the proposed Policy must be modified to place a clear cap on the multiplier if enforcement staff seek to elevate above a 1.1 (the existing policy places a cap of 1.5, yet no such cap exists in the proposed Policy).

The Term "Potential Harm" in the Amended Policy Must be Adequately Scoped

The proposed Policy presents a major shift in how "harm" from an event is evaluated in an enforcement setting. The proposed Policy now includes the term "potential harm" when referencing how "harm" should be evaluated in a discretionary enforcement action, for the stated reason that: "Because actual harm is not always quantifiable due to untimely reporting, inadequate monitoring, and/or other practical limitations, potential harm can be

used under this factor." (See Policy, p. 14, along with other references through p. 16) We understand that actual harm may be difficult to quantify in many circumstances, and that requiring the Water Boards to demonstrate actual harm in all circumstances may be infeasible. Nonetheless, we are concerned that the vague, undefined notion of "potential harm" as used in the proposed Policy is going to prove problematic in many cases, as that term is theoretical and subject to multiple, and potentially unreasonable, interpretations. The term "potential harm" as used in the proposed Policy should, at a minimum, be grounded in potential harm that could actually occur under the relevant factual setting, and must be supported by peer-reviewed literature, or other supportable scientific basis. Further, if evidence of actual harm (or lack thereof) is available and presented to the Water Boards, the Policy should state that such evidence should be utilized in favor of more speculative "potential" harm. Finally, more guidance is needed to distinguish between the differences of minor, moderate, and major "potential" harm.

The Policy Should Promote Fairness, Consistency and Equity by Continuing to Allow Dischargers to Compare Similarly Situated Enforcement Actions

A fundamental principle of transparent enforcement, and indeed, an essential component of a policy promoting fairness and consistency, is the idea that two similarly situated dischargers facing similar violations should be treated equitably in the enforcement arena. Unfortunately, the proposed Policy contains language that appears to eliminate this concept of comparative justice and consistency. In several places, the proposed Policy makes clear that "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" and "fairness does not require the Water Boards to compare an adopted or proposed penalty to other actions." (See pp. 3, 12) We understand precise accounting may not be required, and that not all circumstances are comparable, but eliminating the opportunity for valid comparison runs counter to the stated purpose of the policy: fairness and consistency. Like circumstances should be treated equitably under the Policy, and dischargers facing violations must be allowed to demonstrate if they are not being treated equitably using other comparable enforcement actions as examples.

We also understand the Water Boards must retain the discretion to differentiate between circumstances when undertaking enforcement, and that prior penalty assessments may not be "binding" on future action. However, in the spirit of actual statewide fairness and consistency, Water Boards should be encouraged, and dischargers must be allowed, to compare like circumstances; just as the State Water Board has supported recoupment of economic benefit to ensure a level playing field, consistency in enforcement supports the same effort. Thus, we suggest revisions to the proposed Policy that provide a more nuanced approach to this issue:

> The Regional Water Boards are not required to make specific findings comparing a proposed penalty to other actions that it or another Water Board has taken or why the proposed amounts differ. However, the Water Boards should consider penalties for similar violations under similar circumstances, particularly those within the same Region, when proposing penalties and taking enforcement action.

Clarifications are Needed in the "Ability to Pay" Analysis as Applied to POTWs and Collection Systems

The proposed Policy strikes out portions of the "ability to pay" analysis that have applicability to public agencies (See, e.g., Policy, p. 26, which includes the strike out of the following language: "…would result in widespread hardship to the service population or undue hardship to the discharger."). In fact, the entire "ability to pay" section (pp. 25 – 26) appears solely focused on businesses and "for profit" entities, and excludes the unique analysis relevant to public agencies. When examining the ability to pay in the context of a public entity providing collection and treatment services, considering the hardship that might befall the service population as a result of an enforcement action remains important. We understand from meeting with enforcement staff the intention of the proposed Policy was not to eliminate the "ability to pay" argument for public agencies engaged in wastewater collection, treatment, disposal, and reuse afforded by the Water Code. However, the only remaining discussion of this topic exists on page 4 of the proposed Policy, under the heading of "Disadvantaged Communities." While we appreciate the State Water Board's recognition of the difficulties faced by "disadvantaged communities," we want to ensure that the undefined term, as used in this section, is not unduly restrictive of a public entity's opportunity to make an "ability to pay" argument.

For this reason, we request that the State Water Board define the term "disadvantaged community" to mean a publicly owned treatment works with financial restrictions where enforcement results in undue burden on its service population based on (a) median income of the residents, (b) rates of unemployment, or (c) low population density in the service area. It should also be made clear that not all three factors (median income, unemployment, low population density) are necessary to qualify as a disadvantaged community, these are simply factors to be considered. We also request that the State Water Board clarify that a "disadvantaged community," as used in the Policy, is not the same as a "publicly owned treatment works serving a small community" as defined in Water Code section 13385(k)(2), so as to avoid the overly narrow definition that limits applicability of that designation to those POTWs whose population is 10,000 or less persons. Finally, we request that the proposed Policy specifically note in the "Ability to Pay" section on pages 25 and 26 that staff can consider a Disadvantaged Community and/or a Small Community's (as discussed on pages 4-5 of the proposed Policy) "ability to pay," and to cross reference page 4 of the Policy in the "Ability to Pay" section.

Multiple Permit Violations Resulting From the Same Act Should be Addressed with a Single Based Liability Amount

The existing policy prescribes that a single act that violates multiple requirements in the same permit, plan, or order may be addressed with a single base liability amount. This approach avoids an unduly harsh enforcement response in the event of a single act violating duplicative and/or connected requirements, which supports reasonable and fair assessment of penalties. The proposed Policy appears to to eliminate this approach. (See Policy, strike through subsection (e) on p. 24, under "Multiple Violations Resulting from the

Same Incident") Instead, the proposed Policy promotes a new subsection (e), which states, "[a] single act that violates similar requirements in *different* applicable permits or plans, but which are designed to address the same water quality issue." (Emphasis added). The proposed provision is too limiting as it does not afford the recommendation to circumstances where the duplicative provisions are in the *same* permit, rather than different permits. We request the existing subsection (e) be retained, and that the new subsection (e) be moved to new subsection (f).

Proposed Additions to the "Other Factors" Consideration are Vague and Run Counter to the Commitment of a Transparent and Consistent Enforcement Regime

Transparent and consistent enforcement requires that dischargers know in advance what enforcement liabilities they could be subject to in the event of a violation and subsequent enforcement action. Unfortunately, one of the proposed amendments undermines that goal. Specifically under the consideration of "other factors as justice may require", a subdivision was added that is vague and could open dischargers up to potentially broad and undefined liability.

Subdivision (b) in Step 8 ("Other Factors As Justice May Require") on page 29 of the proposed Policy states that adjustments might be warranted if "[a] consideration of environmental justice issues indicates that the amount would have a disproportionate impact on a particular disadvantaged group, or would be insufficient to provide substantial justice to a disadvantaged group." (See Policy, p. 29) This phrase is vague and unclear. Despite the detailed calculations and criteria for enforcement actions outlined in the proposed Policy, the Water Boards or other parties could claim that a particular enforcement penalty does not somehow provide "substantial justice to a disadvantaged group," and the resultant liability could be modified in an unknown and arbitrary manner. We request the State Water Board eliminate this provision in its entirety, or, in the alternative, better define what this means, how it might be used, and how it specifically could impact a penalty under the Policy.

The following subdivision (c) is also problematic, allowing the Water Boards to consider whether "[t]he calculated amount is entirely disproportionate to assessments for similar conduct made in the recent past using the same Enforcement Policy." It is not clear why this language was added, as it seems to be a much higher bar than merely comparing similar circumstances. As noted above, dischargers (and the Water Boards' enforcement staff) should be able to look to similar situations and similar conduct for guidance in enforcement proceedings, without them having to be "entirely disproportionate" to each other, or them having to be assessed under the proposed Policy (as that will significantly limit the ability to discuss similar enforcement precedent for a number of years, until enough enforcement has occurred under the proposed Policy). We request staff revise this step to state, "The calculated amount is not dissimilar to assessments for similar conduct."

Elements of the Restructured "Class I" Violations Category Are Problematic

The proposed amendments make several changes to the existing classification system, eliminating Class III entirely and adding several elements to Class I. (See Policy, pp. 5-8) Eliminating multiple classes may help the Water Boards better prioritize enforcement actions and focus on only those that may be deemed significant. However, the proposed Policy also specifies several specific new circumstances that would qualify as Class I, which may not be appropriate, including:

- Discharges causing or contributing to exceedances of primary maximum contaminant levels in receiving waters with a beneficial use of municipal and domestic supply (MUN).
- Unauthorized discharge of sewage, regardless of level of treatment, within 1,000 feet of a municipal water intake.
- Discharges exceeding water quality based effluent limitations for priority pollutants as defined in the California Toxics Rule by 100 percent or more.
- Discharges violating acute toxicity effluent limitations.

Each of these additions, without more context, is problematic.

First, due in large part to the State Water Board's blanket MUN beneficial use designation via the Sources of Drinking Water Policy (State Water Board Resolution No. 88-63), a significant number of waters that are not actually drinking water sources are nonetheless designated MUN. Only recently have a small number of these blanket designations been appropriately de-designated through a somewhat unwieldy process, though there are many more that could undergo the same process in order for MUN designations to be accurate across the state. Until that time, exceedences of maximum contaminant levels ("MCL") in receiving waters that are designated MUN, but are clearly not drinking water sources, could still be considered "Class I" priority violations under the proposed Policy. Moreover, exceedance of a secondary MCL, that by its own definition does not pertain to human health (but rather addresses taste and odor), should not result in a Class I priority violation characterization. Finally, even where the MUN beneficial use may be appropriately designated, proximity to a drinking water source may have no bearing on a dischargers' culpability or ability to adequately remedy a violation. Making all violations in areas designated MUN Class I penalizes a discharger not for its behavior, nor for any other aspect of the violation aside from the sheer happenstance of the location of the discharge. This section should be removed from the Class I priority violations, or, at a minimum, modified to reflect the fact that the discharge must demonstrate an actual impact on an actual drinking water supply (not simply a receiving water designated with a blanket MUN beneficial use via Resolution No. 88-63) in order to be considered Class I.

Second, the bullet prioritizing "unauthorized discharge of sewage, regardless of level of treatment, within 1,000 feet of a municipal water intake" seems to characterize water that may have been treated (at least partially or almost fully) exactly the same as water that has undergone no treatment whatsoever. There is risk that this provision could be used to address the unauthorized discharge of even highly treated recycled water. This outcome is inappropriate, and likely not what was intended in practice. In addition, there is ambiguity around what constitutes a drinking water intake, which could be interpreted in an overly

broad manner without further clarity. Thus, we suggest that this bullet point be modified to add the word "untreated" before the word "sewage," and eliminate the phrase "regardless of level of treatment." We also request the State Water Board to clarify what constitutes a "municipal water intake" for purposes of this section (consistent with our understanding, that it is intended to apply only to those municipal water intakes regulated by the Water Boards, generally those serving more than 15 customers).

Third, identifying discharges violating acute toxicity effluent limitations as Class I in all circumstances is inappropriate. In the context of a discharge from a publicly owned treatment works, in nearly all cases, acute toxicity is determined to be from a source that is temporal in nature and may be outside the control of the discharger. Effluent toxicity is a characteristic, not a constituent of effluent discharge, and therefore toxicity exceedances are very dissimilar in their nature, causes, and mitigation measures than the other types of exceedances. Thus, exceedances of a single test acute effluent toxicity limitation not demonstrating any associated receiving water impact should not per se be considered a Class I violation. In addition, wastewater agencies administer pretreatment and monitoring programs in an attempt to address these issues, but cannot control all sources of influent at all times. Again, the presence of acute toxicity in a wastewater discharge typically has no relationship to the culpability or actions of the discharger. As such, this provision needs to be removed, or in the alternative appropriately scoped to more closely tie circumstances where this would be a Class I violations to the actual action of the discharger (i.e., consistently repeated discharges that violate acute toxicity effluent limitations without appropriate responses by the discharger). Replacing this bullet with language stating "Discharges repeatedly violating acute toxicity effluent limitations without an appropriate response action by the discharger" could address this concern.

Finally, we request modification of the bullet dealing with CTR exceedances. Although some short term, sporadic exceedances of CTR limits by 100% may potentially occur, such exceedances can frequently be attributed to sampling and laboratory issues and should not be considered to be Class I violations. Isolated exeedances of this type may not pose an immediate and substantial threat and should not be considered per se priorities for enforcement. Thus, we request the word "repeatedly" be inserted into the bullet point referencing the exceedance of CTR water quality-based effluent limitations by 100 percent or more as follows: "Discharges repeatedly exceeding water quality based effluent limitation …"

Opinions Regarding the Applicability of Statutes of Limitations and/or Laches Should be Removed from the Proposed Policy

Footnote 4 on page 31 of the proposed Policy sets forth a general legal opinion and conclusion regarding the applicability of statutes of limitations and/or the equitable defense of laches in administrative proceedings. Whether these defenses apply in any specific enforcement circumstance should be addressed during that enforcement action, based on the applicable law and precedent at that time. It is not appropriate to include such conclusory legal statements within the context of a generalized policy, which could

hamper a party's ability to appropriately raise such defenses in a site-specific enforcement setting. As such, we recommend removal of footnote 4.

As the above comments demonstrate, revisions to the proposed Policy are necessary to ensure it will help to advance the Board's goal of fair, firm, consistent and transparent water quality enforcement. We look forward to working with the State Water Board in the coming months to maximize the value of the Enforcement Policy for all parties.

Thank you for your consideration.

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