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Humboldt  
Baykeeper

April 20, 2009

Inland Empire  
Waterkeeper

Mike Chrisman, Chair and Members  
California Ocean Protection Council  
1416 Ninth Street, Suite 1311  
Sacramento, CA 95814

Klamath  
Riverkeeper

Monterey  
Coastkeeper

**VIA ELECTRONIC MAIL:** [COPCpublic@resources.ca.gov](mailto:COPCpublic@resources.ca.gov)

Orange County  
Coastkeeper

**Re: OPC Meeting, April 23, 2009, Item #5: SWRCB, "Report to the Ocean Protection Council on Storm Water Management Programs Implementing the Council's Five-Year Strategic Plan" (Dec. 2008)**

Russian  
Riverkeeper

Dear Chair Chrisman and Council Members:

San Diego  
Coastkeeper

The California Coastkeeper Alliance (Alliance) represents 12 member Waterkeepers spanning the California coast from the Oregon border to San Diego. On behalf of the Alliance, we welcome the opportunity to comment on the State Water Resources Control Board's (Board) "Report to the Ocean Protection Council on Storm Water Management Programs Implementing the Council's Five-Year Strategic Plan" (Report), mandated by AB 739 (Laird) at Water Code § 13383.8(b). The Board's Report provides a relatively detailed list of regulatory, management, grant and education programs related to the Strategic Plan's Ocean and Coastal Water Quality Objectives, and a brief note with regard to its MLPA work pursuant to the Strategic Plan's Ocean and Coastal Ecosystems goal. The Alliance appreciates the Board's efforts to catalogue its existing water quality activities as they relate to the Ocean Protection Council's (OPC) Strategic Plan. This summary information will be helpful in later coordinating activities across agencies, which is one of the goals of the OPC.

San Francisco  
Baykeeper

San Luis Obispo  
Coastkeeper

Santa Barbara  
Channelkeeper

Santa Monica  
Baykeeper

Ventura  
Coastkeeper

However, the California Ocean Protection Act (COPA) calls on the state to not only provide information on activities undertaken to protect the coast and ocean, but also to move forward beyond the status quo to *integrate* those activities, and to track their overall *effectiveness* and make changes in strategy as needed. In accordance with the mandates and intent of COPA, we ask that the OPC request the Board to add to its Report, and/or otherwise formally relay the status of, the following items for the next OPC meeting:

- Information on the *effectiveness* of the activities described in the Report, including the extent to which the activities' impacts are being tracked and evaluated, and
- Information with regard to the State and regional boards' activities related to the Strategic Plan's more cross-cutting Governance goals, including a discussion of applicable water rights activities, in order to begin to *integrate* ocean and coastal protection efforts to the overall benefit of the environment.

These points are discussed in more detail below.

**THE REPORT SHOULD DISCUSS HOW THE STATE WATER BOARD WILL *IMPROVE THE EFFECTIVENESS* OF ITS EFFORTS TO PROTECT THE HEALTH OF COASTAL WATERSHEDS AND THE OCEAN**

AB 739 (Laird) established the mandate for the State Water Board Report before the OPC today. Though AB 739 overall focused primarily on storm water control, the Report provision itself is fairly broad, requiring that:

The state board shall submit a report, *including, but not limited to*, stormwater and other polluted runoff control information, to the Ocean Protection Council no later than January 1, 2009, *on the way in which the state board is implementing the priority goals and objectives of the council's strategic plan.*

Water Code § 13383.8(b). (Emphasis added.)

As noted above, the Report does a commendable job in outlining the State and regional boards' activities in protecting the health of the coast and ocean. In addition to simply reporting on activities that might aid in agency coordination, however, COPA pushes the state, and in particular the OPC, to take the next step, stating that the OPC "shall" coordinate activities in order to "*improve the effectiveness* of state efforts to protect ocean resources ...." (Public Resources Code § 35615(a) (emphasis added)). COPA similarly sets as a "goal of all state actions" to "*continually improve efforts* to protect, conserve, restore, and manage coastal waters and ocean ecosystems." (Public Resources Code § 35510(b)(4) (emphasis added)).

An evaluation and feedback mechanism, currently missing from the Report, is essential to ensure that the activities listed in the Report are *effective* in protecting the health of the coast and ocean. Page 8 states that the Report focuses on the Ocean and Coastal Water Quality goal of the Strategic Plan because "that is where the Water Boards have the most impact." But without an effectiveness assessment (which in some cases can be done relatively quickly), the Boards' actual impact on environmental health is uncertain. And, as noted below, it is debatable whether the Boards might have more ecosystem impact if more work were done in an *integrated* way with other agencies as called for in COPA and the Strategic Plan, rather than working relatively alone.

As noted in the Report on page 7, some programs are still in their "infancy" and have yet to be developed, let alone tracked. Even where programs are well-developed, "long term monitoring is still needed to determine the efficacy of the program." However, sometimes the problems are sufficiently clear to know that additional action needs to be taken even if a program is new; and yet often delays continue to mount and exacerbate environmental harm. These are particularly important opportunities for intervention by the OPC. One such example described in the Report is the Sanitary Sewer Overflow (SSO) program.

Pages 8 to 9 of the Report describe how "[s]ewage spills pollute beaches and threaten public health throughout the state," and that "over 3,600 SSOs occur each year which threaten public health and impair surface waters." The Board also notes that "over 9,000 certified spill reports...[show] nearly 26 million gallons of sewage having reached surface waters in the state." (Emphasis added.) While the program for regulating SSOs is comparatively new, these alarming

statistics call for a frank and immediate evaluation of the effectiveness of the program, and a course correction as needed. The attached comments submitted by CCKA to the Board<sup>1</sup> last week highlight that out of 1,067 sewage collection systems regulated statewide, only six inspections took place in FY 2007-08, which found 182 violations. Projecting that SSO violation rate out over 1,067 facilities yields *over 32,000* potential violations, only 27 of which were acted on (less than 0.1%). Ironically, the Board cut out an invaluable ally in enforcement of these violations – the public – by refusing to regulate the discharges under the Federal Clean Water Act, as is required for discharges to surface waters. As described in more detail in the attached comment letter, we have requested that the Board re-evaluate that decision in light of currently poor discharge and enforcement records, and we seek the OPC’s support in this effort.

Action by member agencies under the OPC umbrella is not the only opportunity for assessing program effectiveness and making changes as needed. The OPC itself has initiated programs and positions that merit effectiveness review. One such effort is related to the OPC’s model Resolution on once-through cooling, an antiquated power plant cooling system that devastates coastal ecosystems, including ecosystems home to threatened and endangered fish. Three years after the OPC’s Resolution, the public has yet to review a final draft Board policy that would implement the OPC’s guidance and phase out once through cooling consistent with the Clean Water Act and Porter-Cologne. Moreover, the regional boards continue to wait for the Board’s policy before reviewing and modernizing the power plants’ NPDES permits, *almost 80% of which are now long expired*.

We ask that the OPC vigorously track the implementation of its Resolution and ensure that the member agencies, including the State Board and regional boards, implement policies and the law fully and expeditiously to phase out this destructive “technology.” We also urge the OPC to integrate desalination into these discussions. Tying desalination facilities to once-through cooling intakes eviscerates the intent and directives of OPC’s Resolution. Modern and effective alternatives for ocean desalination intakes are available and used around the world. We ask that the OPC seek a halt to further permitting of desalination facilities tied to once through cooling intakes and support further study of less harmful, alternative desalination intake systems.

### **THE REPORT SHOULD DISCUSS HOW THE STATE WATER BOARD WILL INTEGRATE ITS EFFORTS WITH THOSE OF OTHER AGENCIES TO PROTECT THE HEALTH OF COASTAL WATERSHEDS AND THE OCEAN**

The Legislature and Governor were clear that the “purpose of [COPA]” is to “*integrate and coordinate the state’s laws and institutions* responsible for protecting and conserving ocean resources” (Public Resources Code § 35515 (emphasis added)). The OPC’s website notes that “[t]he OPC is guided by principles included in COPA,” which include:

- The “recognition of the interconnectedness between land and ocean” (Public Resources Code § 35505(c)); and
- The establishment of a “state’s policy *to incorporate ecosystem perspectives* into the management of coastal and ocean resources . . . rather than managing on a single species or single resource basis” (Public Resources Code § 35510(b)(3)).

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<sup>1</sup> Letter from Linda Sheehan, CCKA to Chair Charles Hoppin, SWRCB (April 15, 2009) (attached).

The OPC is approximately midway through its first Strategic Plan, and the coming year will be key in setting the tone and path for the OPC to both complete its commendable goals and to settle into a culture as an strong advocate for our coast and ocean, one that truly reflects the organic nature of the ecosystems for which it is a steward. California's OPC has led the nation in taking on the challenge of establishing integrated governance systems that reflect the integrated nature of coastal and ocean habitats. Because the OPC is a pioneer, however, its evolution in building these new "institutional ecosystems" is ongoing, particularly in the face of continuing and sometimes unexpected governance challenges (such as the budget crisis facing California).

To advance its goals as articulated in the Strategic Plan, OPC must increase its focus on advancing a level of "collective accountability" on the part of its member agencies. This is true both with respect to the agencies' specific deliverables, but also with respect to ensuring that the agencies work together to determine where to *integrate* – not merely coordinate or collaborate – their overall efforts for the good of the environmental bottom line. A culture of collective accountability is essential to the success of the ecosystem-based management model that the OPC correctly espouses.

The OPC, in both its Strategic Plan and its proposed Program Priorities, has set several goals and objectives that will improve both integration and coordination among agency governance programs. The Strategic Plan's chief Governance Performance Measure, by which success will be determined, states:

*By 2011, ecosystem-based management approaches guide government policies and programs that affect ocean and coastal ecosystems.*

(Emphasis in original.)

The State Water Board's Report unfortunately fails to describe its progress in meeting either the Strategic Plan's Governance goals and objectives, or the Plan's Governance performance measures. Given that 2011 is imminent in "governance time," we ask that the OPC pursue additional information now to determine how the Board – and the other agencies that the OPC encompasses – is implementing "*ecosystem-based management approaches [that] guide government policies and programs.*" We expect that that exercise will yield a conclusion that additional focused effort needs to be made swiftly to attain the desired integrated governance objective – an effort that can begin now.

Several of the Strategic Plan objectives on which the Board could report and provide a roadmap for focused action over the next two years, consistent with COPA's focus on integrated governance, are the following:

- *Objective 1: Funding*
  - Maximize the effectiveness of funds spent to protect and conserve coastal resources.
- *Objective 2: Interagency Collaboration*
  - Maximize the effectiveness of state agency efforts to protect and conserve ocean and coastal resources.

- *Objective 3: Enforcement*
  - Improve the enforcement efforts of California's state agencies concerning ocean and coastal protection laws.
- *Objective 4: Ecosystem-based Management*
  - Develop practical approaches to implementing ecosystem-based management and encourage their implementation throughout the State.

Accordingly, we ask the OPC request the Board to: (a) provide a summary update on its progress in these areas, as the Board did for its Ocean and Coastal Water Quality discussion in the current Report, and (b) come back to the OPC with additional, specific recommendations for integrated action that will demonstrate collective agency accountability in at least one or two areas and will implement the above objectives.

For example, CCKA has suggested in the past that the OPC and relevant agencies work to develop a cross-cut Budget Change Proposal for enforcement as one tool for establishing a new model of integrated governance. The State Water Board's Report briefly mentions the pilot program in the Los Angeles area that will enhance surveillance and enforcement of water quality violations where DFG wardens in the field detect violations, but does not indicate whether that pilot has any early results. Such information would be particularly useful in developing a more integrated enforcement system, which can certainly be furthered along significantly given DFG's enforcement authority over water quality issues and the State Water Board's relative lack of field presence and potentially available fee funds for support. A cross-cut budget specifically intended to bring the State and Regional Boards together with DFG in a joint enforcement effort in coastal watersheds would advance the OPC's integrated governance goal and increase collective accountability not just for completing program tasks, but for actually improving environmental health.

This example of integrated action would implement the above-described Strategic Plan's Governance objectives by: (1) maximizing the utility of *funding*, (2) across agencies in an *integrated* (3) *enforcement* effort that will focus on (4) the health of the *ecosystem*, rather than the specific elements of each agencies' individual programs. The OPC is the entity that can and must seek action to implement such integrated programs; we encourage the OPC to do so in an expedited manner in order to implement the policy, intent and mandates of COPA and to have measureable results by 2011.

As one other example of a potential integrated management effort, water supply is becoming an increasingly topical area of much-needed reform, one that is directly related to the health of our ocean and coastal ecosystems. However, due to funding and other pressures, the Board's enforcement activities for water rights trail those for water quality significantly. As noted in the attached CCKA comments provided recently to the Senate Natural Resources and Water Committee,<sup>2</sup> representatives of the Board and the Department of Water Resources spoke at the Committee's March water rights hearing and confirmed that implementation of many

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<sup>2</sup> Letter from Linda Sheehan, CCKA to Chair Fran Pavley, Senate Natural Resources and Water Committee (March 18, 2009) (attached).

existing water supply and water flows requirements is slow to non-existent. Among other things, they confirmed that:

- The face value of water rights in the state exceeds the amount of actual water by a minimum of six times, a figure that is likely significantly higher given the dearth of information on riparian and pre-1914 appropriative rights.
- California's state water agencies cannot report on how much water is actually being used, where it is being used, where it is being diverted to, how much is being diverted, or how many diversions are illegal.
- Where it does have such data, the Board estimates that the number of *illegal* diversions is over 40% of the number of active permits and licenses, the use of which also fails to comply with the law in many cases. Enforcement authority and resources are extremely limited, and violations rarely if ever receive a meaningful state response.
- The state has no information on the status of many water rights; *i.e.*, whether they are active or may have expired due to lack of use.
- Implementation of the state mandate to prevent "waste and unreasonable use" of water (Water Code Section 275 and Article X, Section 2 of the California Constitution) have been sparse to virtually nonexistent, leaving California's water management to be driven down an unsustainable path by "first in time" and "use it or lose it" conventions.

Significant integration of funding and effort among the Board, DWR, the Department of Fish and Game (whose wardens often are first to identify illegal diversions) is essential to begin to rectify the ongoing devastation caused by a lack of water in rivers and streams important to coastal and ocean life and ecosystems. We ask the OPC to request that these agencies integrate their efforts to ensure that water is diverted in accordance with the law and with attention to environmental protection, including through full implementation of the public trust doctrine.

\* \* \*

COPA set sweeping goals for California – and indeed the nation – in calling for a new, integrated, results-oriented model of managing ourselves for the health of our coastal and marine environment. As we celebrate Earth Day this week, we ask the OPC to focus its efforts on ensuring the full implementation of its commendable Strategic Plan, which will help meet the mandates and intent of COPA to support effective, integrated environmental protection programs.

Thank you again for your continued support for protecting the health of our coastal watersheds and ocean.

Best regards,



Linda Sheehan  
Executive Director

Attachments

# **ATTACHMENT 1**

**COMMENTS FROM CALIFORNIA COASTKEEPER ALLIANCE TO  
THE STATE WATER RESOURCES CONTROL BOARD ON THE  
DRAFT ANNUAL ENFORCEMENT REPORT, 2007-08 (APRIL 15, 2009)**



PO Box 3156, Fremont, CA 94539  
(510) 770 9764 [www.cacoastkeeper.org](http://www.cacoastkeeper.org)

April 15, 2009

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

**VIA ELECTRONIC MAIL: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)**

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

Dear Chair Hoppin and Board Members:

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.<sup>3</sup> 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.<sup>4</sup> 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.

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.

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<sup>3</sup> 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.

<sup>4</sup> [http://www.swrcb.ca.gov/water\\_issues/programs/enforcement/docs/annual\\_enf\\_rpt\\_032609.pdf](http://www.swrcb.ca.gov/water_issues/programs/enforcement/docs/annual_enf_rpt_032609.pdf).

- 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 as 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.

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.<sup>5</sup> 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 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 07-08 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 inspections<sup>6</sup> 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.<sup>7</sup> 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,

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<sup>5</sup> 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.

<sup>6</sup> 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.

<sup>7</sup> 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.

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 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."<sup>8</sup> 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."<sup>9</sup> 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,<sup>10</sup> 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.<sup>11</sup>

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<sup>8</sup> 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](http://www.swrcb.ca.gov/board_decisions/adopted_orders/water_quality/2006/wqo/wqo2006_0003.pdf).

<sup>9</sup> 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](http://www.waterboards.ca.gov/centralvalley/board_decisions/adopted_orders/general_orders/r5-2007-0035.pdf).

<sup>10</sup> *See* [http://www.waterboards.ca.gov/water\\_issues/programs/tmdl/docs/303dlists2006/epa/r5\\_06\\_303d\\_reqtmlds.pdf](http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/303dlists2006/epa/r5_06_303d_reqtmlds.pdf).

<sup>11</sup> 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

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.

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.

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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,



Linda Sheehan  
Executive Director

## **ATTACHMENT 2**

**COMMENTS FROM CALIFORNIA COASTKEEPER ALLIANCE TO  
THE SENATE NATURAL RESOURCES AND WATER COMMITTEE ON THE  
MARCH 10, 2009 HEARING:  
“OVERVIEW OF CALIFORNIA WATER RIGHTS LAWS” (MARCH 18, 2009)**



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March 18, 2009

The Honorable Fran Pavley, Chair and Members  
Senate Natural Resources and Water Committee  
State Capitol, Room 4035  
Sacramento, CA 95814

Re: Comments on March 10, 2009 Hearing: "Overview of California Water Rights Laws"

Dear Chair Pavley and Committee Members:

On behalf of the California Coastkeeper Alliance (CCKA), which represents 12 Waterkeepers from the Oregon border to San Diego,<sup>12</sup> I welcome the opportunity to submit these comments arising from your March 10<sup>th</sup> hearing. I was pleased to attend this extremely informative hearing and speak in public comment. These written remarks expand upon those comments and offer suggestions for future examinations of California water law that we ask this Committee to explore. In brief, we respectfully request the Committee to further address:

- full implementation of existing laws and policies related to water rights;
- development of additional laws and policies as recommended by the hearing panelists;
- development of laws and policies for "new" water sources that, among other things, ensure that such sources are sustainable from a climate change perspective; and
- development of formal water rights for ecosystems generally, and for fish populations immediately.

We touch on each of these issues below, and we look forward to expanding upon them further with you to develop – as one panelist described – "laws to match our rivers."

### **THE STATE MUST FULLY IMPLEMENT EXISTING WATER LAWS**

As the Committee members discovered through the presentations and subsequent questions at the hearing, California faces uniquely complex and difficult challenges in ensuring a sustainable supply of clean, abundant water throughout the state. These challenges are not

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<sup>12</sup> 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.

insurmountable, though they cannot be met without first reconciling California's "water management" governance façade with the reality of how little we truly know about how water is used and moved in the state. As was admitted repeatedly during the hearing, implementation of *existing* water law is impeded severely by the following facts, among others:

- The face value of water rights in the state exceeds the amount of actual water by a minimum of six times, a figure that is likely significantly higher given the dearth of information on riparian and pre-1914 appropriative rights.
- California's state water agencies cannot report on how much water is actually being used, where it is being used, where it is being diverted to, how much is being diverted, or how many diversions are illegal.
- Where it does have such data, the State Water Board estimates that the number of illegal diversions is over 40% of the number of active permits and licenses, the use of which also fails to comply with the law in many cases. Enforcement authority and resources are extremely limited, and violations rarely if ever receive a meaningful state response.
- The state has no information on the status of many water rights; *i.e.*, whether they are active or may have expired due to lack of use.
- Implementation of the state mandate to prevent "waste and unreasonable use" of water (Water Code Section 275<sup>13</sup> and Article X, Section 2 of the California Constitution<sup>14</sup>) have been sparse to virtually nonexistent, leaving California's water management to be driven down an unsustainable path by "first in time" and "use it or lose it" conventions.

Full implementation of existing law is essential if California is to responsibly address the water challenges before us. We cannot solve our water problems without defining the scope of them and gathering the information needed to identify the most productive solutions. We also cannot solve them without enforcing the law rigorously and immediately against violators who illegally take the public's water. This is true for both water supply and water quality, which go hand-in-hand in protecting this critical resource. These common-sense conclusions nonetheless have been vociferously opposed by some who reap the benefits from the current, flawed system at the expense of other users, including the state's collapsing salmon populations. Opposition to basic, responsible water management functions, however, will lose the stranglehold it has had on California water policy as our collective, substantial water bill becomes due and payable. We urge the Committee to take action to remedy these significant data and enforcement gaps as

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<sup>13</sup> Water Code Section 275: "The department [of water resources] and [the state water resources control] board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."

<sup>14</sup> California Constitution Article X, Sec. 2: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained."

quickly as possible, so that we may take prompt, effective action in the face of growing water shortages.

## **ADDITIONAL REFORMS ARE NEEDED TO CLOSE GAPS IN THE LAW THAT PREVENT CALIFORNIA FROM ACHIEVING SUSTAINABLE, LOW-ENERGY WATER USE**

### Key Recommendations from the Hearing Panelists Will Advance Sustainable Water Use Significantly

In addition to seeking full implementation of existing water laws, suggest to this Committee that we as a state also must re-think “business as usual” and consider new, core water law reforms that will allow us to successfully plan for sustainable, low-energy water use for ourselves and our environment. Several such reforms were suggested by some of the panelists at the March 10<sup>th</sup> hearing. We ask the Committee to investigate the following sound proposals at greater length:

- Mandate, with enforcement tools, the reporting needed to determine the scope, rate and method of all surface water and groundwater diversion and use statewide;
- Actively review water use in the state through the lens of Water Code Section 275 and Article X, Section 2 of the California Constitution, and amend water law, regulations and policy as needed to ensure that the mandates of these provisions are met;
- Develop and implement an effective, mandatory process to regulate the use of groundwater throughout the state;
- Implement a sustainable funding stream for state oversight of water diversion and use;
- Enact the public trust doctrine in the state Constitution; and
- Consider “bundling” permits (flow, storage, water quality) to ensure that the use of water protects water quality as well. Water should be as clean, or cleaner, when returned to the public after its use than before its diversion.

These reforms share a foundational assumption that the *correlative rights doctrine*, currently associated with riparian surface water and overlying groundwater rights, should be considered as extending to all of California water law. As noted by the panelists, the rights of all water users (including ecosystem use) in California are in reality correlative, or linked, particularly as water available for use grows scarcer. As demands grow and supply shrinks in the face of climate change and other challenges, we will all need to better share the water regardless of the source of our rights, which is consistent with this doctrine. The call for “statewide sharing” made by some of the panelists is also consistent with Water Code Section 275, Article X, Section 2, and the mandates of the public trust doctrine.

The jurisprudence, or philosophy, of law behind all of these mandates and doctrines calls for the statewide, equitable, shared distribution of a scarce resource such that reasonable and beneficial uses thrive, and wasteful and unreasonable uses do not. This jurisprudence respects the inherent rights of all to exist, thrive and evolve, a goal that in application may allocate more or less water than users currently claim. It necessarily includes environmental uses, if only because it is the lack of attention to the limits of the natural environment that have brought us to the crossroads we now face. This foundational jurisprudence, discussed further below in the

context of water rights for ecosystems, and should underlie all of our deliberations on water reforms.

Laws and Policies for “New” Water Sources Should Address State Climate Change Initiatives to Ensure Uses and Sources Are Sustainable.

“New” water supplies, such as from recycling and local stormwater capture, were only briefly mentioned at the hearing, and merit more attention as the Committee’s work unfolds. The Governor’s Climate Action Team found that climate change could reduce California’s snowpack one-third by 2060. Developing sustainable, local water supplies and any associated rights now (and protecting the health of the waters we have) are essential to planning for adaption to the inevitable natural supply cuts.

As discussed further below, “new” water supplies create intriguing law and policy questions with regard to the rights assigned to such water, particularly if it is stored. These questions should be addressed in conjunction with an evaluation of the overall sustainability of the “new” water supplies, particularly in light of state mandates to avoid waste and unreasonable use. Our water supplies should be energy-efficient to avoid exacerbating the problems associated with climate change and to meet the state’s greenhouse gas reduction goals. The effects can be significant; for example, the California Energy Commission found that water management consumes 19% of the state’s electricity every year. If our water sources are not sustainable from an energy and climate change perspective, they will not be sustainable from water supply perspective.

In an August 2008 report,<sup>15</sup> the Los Angeles County Economic Development Corporation ranked conservation and “local stormwater capture” as the most cost-effective, energy efficient, relatively immediate water sources. By contrast, ocean desalination using current technology ranked lowest on the list of water supply strategies in terms of greenhouse gas emission impacts (“surface storage” ranked lowest overall). The state’s AB 32 Scoping Plan promotes several water strategies as energy-efficient alternatives that can create “new” water and that should be encouraged. However, it conversely does *not* discourage energy inefficient (*i.e.*, “unreasonable”) alternatives that can quickly use up and exceed the energy credits from new, energy-sustainable water sources.

California can and should focus its investments, and prioritize its water rights, on water supply solutions that advance the state’s critical climate change goals rather than impede them. Millions of acre-feet of water can be “created” swiftly and at relatively low cost through conservation, local stormwater capture and tailored recycling. Investigations also should be made into “green” desalination, such as of brackish groundwater using alternative energy sources. State law and policy, including water rights, should both encourage energy efficiency and discourage energy inefficiency in water investments, consistent with preventing the waste and unreasonable use of the water used in those investments.

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<sup>15</sup> LAEDC, *Where Will We Get the Water? Assessing Southern California’s Future Water Strategies* (Rev’d Aug. 14, 2008); available at: [http://www.laedc.org/sclc/studies/SCLC\\_SoCalWaterStrategies.pdf](http://www.laedc.org/sclc/studies/SCLC_SoCalWaterStrategies.pdf).

## Effective Water Planning Must Include Formal Water Rights for Ecosystems

Climate change, a growing population and other factors have increased demands on water and reduced supply. Our water ecosystems generally, and our fish populations in particular, have suffered as a result. Fishing and environmental groups have been forced to sue under the Endangered Species Act (ESA) on behalf of endangered and threatened fish such as Sacramento River winter and spring run chinook salmon and steelhead, delta smelt, and longfin smelt, who need more water than the state is providing in order to survive. The San Francisco Chronicle editorialized on March 16<sup>th</sup> that “[s]almon may live a hazardous life at sea where forage is scarce, but none of the young fish will ever get there if salmon-rearing conditions in the Sacramento and scores of other rivers and creeks aren't protected.” The editorial concluded that “[u]nless this commitment is found, an iconic fish - and the human industry built around it - could slowly die out. California can't allow its native salmon to be a memory.”

While ESA is an invaluable tool to try to save species on the brink, it is a poor proxy for sustainable water planning. Court-ordered reductions in water deliveries, which are disruptive at best to agriculture and municipalities and devastating at worst, will most certainly increase without meaningful reform, as more species become threatened and endangered. Unless California is willing to write off fish for our children and grandchildren, including the iconic salmon, we need a system that allows us to plan effectively for the water needs for *both* Californians and ecosystems. The current legal system does not do that.

Water rights – with the reforms touched on above – could potentially be an effective way to allocate water for human use. However, a major flaw in the current system is that there are no parallel water rights for ecosystems. This means that ecosystems do not have a seat at the table when adjudications or other water rights evaluations take place. The ecosystems’ needs are addressed only indirectly, through such methods as conditions in permits, requirements to prevent “waste and unreasonable use,” and the public trust doctrine. None of these otherwise important tools have been enforced in any meaningful way, in part because they are not on par with actual water rights. As a result, ecosystem water needs are consistently relegated to a tangential role in state water planning, until the ecosystems or their non-human inhabitants are at the brink of collapse. That is when the ESA hammer falls – abruptly, with little foresight, and often too late.

We suggest to this Committee that the dangerously well-trod path of “use, overuse, environmental decline, then hasty and unplanned reaction” can be broken by granting ecosystems, including fish, the right to be at the planning table from the beginning at a level equal with other users, rather than at the end when the damage is done. If water rights are to be the measure by which water is allocated in the state, then ecosystems also must be granted water rights, enforced as needed by independent guardians ad litem. Formalizing the rights of ecosystems in law on par with other uses will implement the desired jurisprudence of respect for the inherent rights of all to exist, thrive and evolve in this state.

There is growing precedent for this path. Communities around the United States already are passing local laws that create an “enforceable right of natural communities and ecosystems to exist and flourish” within the community’s boundaries. California can raise the bar, with state

water laws that grant enforceable water rights to ecosystems, allowing us to better plan our collective, chosen, sustainable water future.

The process for calculating ecosystem water rights could begin immediately with the needs of fish, which could act as a proxy for ecosystem health until the larger needs of our water ecosystems are determined. Rights could be accounted for through such options as reviewing unexercised rights, assessing rights associated with “new” water, making “waste and unreasonable use” determinations, conducting adjudications, and taking advantage of other available strategies. Finally, the state could develop a process for selecting and funding independent, accountable guardians and guardians ad litem to implement and enforce such ecosystem water rights, based on long experience with guardians in other legal contexts.

Climate change and other stressors have served as a wake-up call that “business as usual” cannot ensure a healthy California for long. Indeed, the current collapse of the Delta’s native fish populations may well portend the water “train wreck” that one panelist warned will come if we do not “get our house in order now.” Our existing water rights system is based on increasingly outdated assumptions about California’s natural water supply, which unfortunately is changing rapidly due to human inattention to our impacts on the larger environment. Let us not make that mistake again. We urge the Committee to recognize in law what exists in fact – that our state as a whole, including our water ecosystems and fish, cannot be healthy without formal recognition of the water rights and needs of all.

\* \* \*

Though there are numerous water challenges facing us as a state, we can choose to see challenge as opportunity, which Thomas Edison wryly noted is “missed by most because it is dressed in overalls and looks like work.” Spending more money without reform will not solve our water problems, as attested by the billions spent to date with little effect. A serious commitment to working for major reform, along with the will and funding to achieve it, are essential if we are to live within our natural water budget.

As we described in our comments to the Little Hoover Commission last year on their review of State Water Board governance, is relatively easy to get caught up in the minutiae of the state’s increasingly complex water problems and policies. We urge this Committee instead to see the larger picture – ensuring clean, abundant water for all reasonable and beneficial needs, including healthy flows that support living, thriving waterways.

We look forward to working with the Committee to take on this task and protect the water and waterways of California, for all the life that benefits from it. Thank you for the opportunity to provide these comments.

Best regards,



Linda Sheehan  
Executive Director