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Patrick Pulupa
Executive Officer
Central Valley Regional Water Quality Control Board
11020 Sun Center Drive #200
Rancho Cordova, CA 95670

**Re: Amador County Comments - Settlement Agreement and Stipulation
for Entry of Administrative Civil Liability Order R5-2020-XXXX**

Dear Mr. Pulupa:

The County of Amador (“County”) appreciates the opportunity to submit these comments on the *Settlement Agreement and Stipulation for Entry of Administrative Civil Liability Order*, Central Valley Regional Water Quality Control Board Order No. R5-2020-XXXX (“Draft Order”). The County is encouraged that the Central Valley Regional Water Quality Control Board (“Regional Board”) is considering an action to address the specific and limited dry weather violations covered by the Draft Order. In May of this year, the County provided the California Department of Corrections and Rehabilitation (“CDCR”) and the Regional Board with notice of CDCR’s violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.* (“Clean Water Act”) and the County’s intent to sue the CDCR under the Clean Water Act’s citizen suit provision (“Notice”). The Notice alleges illegal discharges of pollutants from Mule Creek State Prison (“Prison”) to Mule Creek, a water of the United States, without a permit and in violation of Clean Water Act permit provisions.

The County is generally supportive of an administrative enforcement action to address the specific and limited dry weather discharges covered by the Draft Order. The County provides this comment letter, however, because it believes that the Draft Order does not require these discharges to stop or properly assess culpability related to these specific discharges. In addition, the Draft Order does not address multiple sources of ongoing illegal discharges identified in the County’s Notice. As a result, the County intends to continue to pursue CDCR related to these additional multiple sources and violations.

Comments

1. The Violations Covered by the Draft Order are Limited.

The Draft Order imposes penalties for dry weather violations occurring over 79 days between January 23, 2018 and April 5, 2019. As set forth in more detail in the following comments, the Draft Order does not address liability for commingled discharges of storm water and non-stormwater, discharges from spray fields, or discharges from industrial activities. In addition, the Draft Order does not require the identified dry weather discharges to cease. Thus, the ongoing dry weather discharges, discharges from spray fields, and discharges from industrial activities that continue to occur without a permit and in violation of existing permits are excluded from the scope of the Draft Order.

Because the Draft Order's limited scope does not address many of the violations, including the ongoing violations, at issue in the County's Notice, the County will need to continue pursuing its claims in the Notice.

2. The Draft Order Does Not Properly Assess Culpability and Responsibility for the Limited Violations

Attachment A to the Draft Order contains the Regional Board's assessment of the factors set out in Water Code section 13327 for establishing a penalty for the violations alleged in the Draft Order. The County believes these factors have been applied inconsistently with the Enforcement Policy and have resulted in a lower penalty than the Enforcement Policy requires.

a. The Calculation in Step 1, *Actual or Potential for Harm for Discharge Violations*, Should Be Revised.

The County believes the score of "2" under Step 1, Factor 2, *Actual Harm or Potential Harm to Beneficial Uses*, of the penalty calculation is too low. The beneficial uses of the Sacramento-San Joaquin Delta and its tributaries includes municipal and domestic water supply. CDCR's sampling data from both wet and dry weather shown the presence of waste constituents normally found in domestic and industrial wastewater, including coliform organisms, total suspended solids, biochemical oxygen demand, chemical oxygen demand, nutrients, surfactants, metals, volatile organic compounds, and semi-volatile organic compounds. The Draft Order also recognizes that the discharges result in the municipal and domestic drinking water supplies being contaminated with untreated sewage.

Although the discharges specifically identified in the Draft Order occurred on 79 specific days, the period of time covered by these discharges is more than one year. The Draft Order recognizes that these discharges have been occurring since at least 2017 and that they are continuing to the present. The impacts of contaminated drinking water supplies over multiple years means that there are acute partial or temporary impairments of the municipal water supply beneficial use and possible chronic effects.

The 2017 Enforcement Policy provides that where there are observed or reasonably expected potential significant impacts, and involves potential for actual partial or temporary restrictions on, or impairment of, beneficial uses, a score of “4” is appropriate.

Based on the facts above, which are already reflected in the Draft Order, the County requests that Factor 2, *Actual Harm or Potential Harm to Beneficial Uses* under Step 1, be revised to a score of 4.

b. The Calculations of the *Degree of Culpability, History of Violations, and Cleanup and Cooperation* in Step 4, *Adjustment Factors*, Should Be Revised

The 2017 Enforcement Policy requires the degree of culpability factor to be increased above 1, and up to 1.5, for intentional misconduct and gross negligence. The Draft Order recognizes that CDCR intentionally increased their inmate population, intentionally ignored warnings that the wastewater system was “severely undersized,” and intentionally changed their policy in order to intentionally “discharge ... comingled wastewater and stormwater to Mule Creek during all significant rain events in clear contradiction with Central Valley Water Board staff’s instruction.” (Draft Order, Attachment A, Step 4.)

The 2017 Enforcement Policy also requires a multiplier higher than 1.1 where prior violations occurred within the last five years. Despite years of known discharge violations, a prior order 2018 order from the Regional Board under Water Code section 13267, and CDCR’s refusal to implement changes directed by the Regional Board, a multiplier of 1.0 was assigned. This score is inconsistent with the Enforcement Policy and should be increased to at least 1.1 but should likely be much higher.

The 2017 Enforcement Policy provides that a multiplier above 1.0 is required when a discharger’s activities to return to compliance through cooperation and cleanup are less than is reasonably expected. The penalty calculation notes that CDCR “ignored directives related to discharges to surface water[,]” defied the Regional Board to implement “direct discharge[s] to Mule Creek during rain events” of stormwater comingled with wastewater, and submitted a required report 124 days late. It also notes that CDCR did not clean up any discharges occurring over 79 days. The County believes these actions justify a multiplier of at least 1.3.

The discharges alleged in the Draft Order are the direct result of intentional decisions and grossly negligent actions of CDCR at the Prison. These intentional decisions and grossly negligent actions have resulted in years of illegal discharges that threaten the municipal and domestic drinking water supply despite prior orders from the Regional Board. For these reasons, the County believes the degree of culpability should be increased to 1.4, the History of Violations factor should be increased to at least 1.1, but should likely be much higher, and the Cleanup and Cooperation factor should be increased to at least 1.3.

3. The Draft Order Does Not Address Discharges from Spray Fields.

The Prison's wastewater system is regulated under Waste Discharge Requirements Order R5-2015-0129, which authorizes disposal of treated effluent via land application at spray fields. In 2016, the Prison constructed the Mule Creek Infill Complex ("MCIC"). Construction of MCIC resulted in increased inmate population and reduced the land available for the spraying of treated effluent from the wastewater treatment facility on the site.

Discharges from the Prison to Mule Creek occur when pollutants from the wastewater system at the Prison are discharged to spray fields that load directly to Mule Creek. For example, on July 25, 2019, after the time period at issue in the Draft Order, Mule Creek downstream of the Prison was full of stagnant water, even though there had been several months of hot, dry weather and even though Mule Creek was dry upstream of the Prison. This condition was a direct result of heavy hydraulic loading from oversaturated wastewater spraying fields, which resulted in either a direct discharge of pollutants to Mule Creek or the effective equivalent of a direct discharge.

The Draft Order does not impose a penalty for discharges from oversaturated spray fields, require such discharges to cease, or require any corrective actions related to these illegal discharges. Because the Draft Order does not address these violations, the County will continue to pursue its Notice related to these violations.

4. The Draft Order Does Not Address Wastewater Discharges Via the Storm Drain System.

The Draft Order recognizes that wastewater from the Prison's sanitary system is discharging via the storm drain system. It recognizes that the Prison's sanitary sewer system is known to have "defects [that] range from minor corrosion to broken/collapsed pipes, fully separated joints, deformations, compromised seals, failed previous repairs, and large holes, cracks, or breaks where soil is visible." (Draft Order ¶ 16.) The sanitary sewer system is constructed in close physical proximity to the stormwater system, with the "sanitary sewer system above the stormwater system in most areas." (*Ibid.*) Monitoring data also shows high levels of waste constituents in discharges from the stormwater system. (Draft Order ¶ 17.)

The Draft Order, however, does not require the Prison to cease these illegal discharges from the sanitary sewer system through the storm water system. It also fails to require the Prison to undertake any projects that will identify the sources of waste discharges from the sanitary sewer system or to remedy the known defects in the sanitary sewer system. As a result, the Draft Order allows the Prison to continue operating its faulty sanitary sewer system, with the known effect that illegal discharges from this system will continue to occur.

The Draft Order does not order these discharges to cease or require any corrective actions related to these illegal discharges. Because the Draft Order does not address these violations, the County will continue to pursue its Notice related to these violations.

5. The Draft Order Does Not Impose Penalties for Violations of NPDES Permits.

The Prison obtained permits or exemptions from complete coverage under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES") for stormwater discharges from industrial activities (May 2018), and the municipal separate storm sewer system (April 2019) (the "Industrial Permit" and "MS4 Permit," respectively).

The discharges described in the County's Notice and in this comment letter constitute violations of these NPDES permits. The Draft Order, however, does not impose penalties for violating these permits. For example, in areas where industrial activities take place, CDCR regularly conducts wash down activities over its storm drain facilities. This is prohibited under the Industrial Permit. The Prison also submitted reports of millions of gallons of commingled discharges from the storm drain system between May 2019 and May 2020. (See, e.g., OES Report Log Nos. 19-3340, 19-6029, 19-6066, 19-7881, 19-8203, 20-0213, 20-0347, 20-0558, 20-1384, 20-1562, 20-1954, 20-2694.) All of these discharges are violations of the MS4 Permit.

The Draft Order does not impose a penalty for these discharges in violation of the NPDES Permit, require these discharges to cease, or order any corrective actions related to these illegal discharges. Because the Draft Order does not address these violations, the County will continue to pursue its Notice related to these violations.

6. The Enhanced Compliance Actions Will Not Stop Illegal Discharges From the Sanitary Sewer System, Spray Fields, or Industrial Activities.

The Draft Order proposes to suspend half of the artificially low penalty amount on the condition that CDCR spends \$1,250,000 to complete an irrigation replacement project and to fund a study by the Southern California Coastal Water Research Project ("SCCWRP") as Enhanced Compliance Actions ("ECA"). The Draft Order recognizes that discharges, such as those alleged in the Notice and this letter, are not the result of the irrigation system.¹ (Draft Order ¶ 17 ("Water Board staff does not believe that the identified non-stormwater sources of irrigation and groundwater are likely sources of waste constituents.") The Draft Order does not require the Prison to cease its illegal discharges, and the SCCWRP study will not identify or require any corrective measures necessary to prevent illegal discharges described in the Notice and this comment letter from entering Mule Creek.

As a result, the Draft Order and ECA projects will not stop or prevent discharges from the sanitary sewer system and storm drain system, from the spray fields, or from the industrial activities at the Prison. The Draft Order does not impose a penalty for these discharges in

¹ It is unclear to the County how upgrades to the irrigation system qualify as enhanced compliance. The irrigation system should have been maintained in the regular course of business. In no way is maintaining an irrigation system "enhanced." In fact, it is routine. This, coupled with the finding that the irrigation system is not the cause of the problem, makes it unclear why the irrigation replacement project qualifies as an ECA. The County supports fixing the system, but the cost of that project should be a normal cost for the prison operations.

violation of the NPDES Permit or require any corrective actions related to these illegal discharges. Because the Draft Order will not stop illegal discharges from the sanitary sewer system, spray fields, or industrial activities, the County will continue pursuing its Notice.

Conclusion

The County is supportive of the Regional Board's intention to issue an enforcement action against CDCR for the limited violations alleged in the Draft Order. The limited scope of alleged violations and limited nature of the remedies in the Draft Order, however, require the County to continue pursuing the more extensive claims included in the Notice. For all the reasons expressed above, the County requests that Regional Board amend the Draft Order to address the limited discharges identified in the Draft Order and this comment letter. The County appreciates your time in considering these comments. The County remains willing to discuss the concerns in this comment letter with both the Regional Board and CDCR. The County's goals are merely to have CDCR comply with the law, stop the illegal discharges and repair the damage it has caused. Please contact me for further information or discussion. My direct telephone number is (209) 223-6213.

Sincerely,



Greg Gillott
County Counsel