

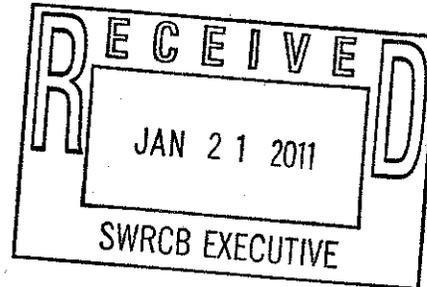


UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901

Mr. Thomas Howard
Executive Director
California State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Dear Mr. Howard:

Thank you for the opportunity to comment on the *Draft Policy for Toxicity Assessment and Control*, released for public review on October 20, 2010. We urge the Board to adopt the proposed numeric water quality objectives for chronic and acute toxicity and associated implementation procedures.

Toxicity is a widespread cause of surface water quality impairment in California. The current approach for controlling and managing toxicity does not work well because implementation across the nine Regional Water Boards is inconsistent. This has created confusion and uncertainty about regulatory expectations, resulting in a lack of progress in addressing toxicity where it occurs. California needs, and the proposed policy provides, an effective approach to improve toxicity control and management by providing a consistent framework for setting clear toxicity limits, deciding when an environmental sample is toxic, and addressing toxicity when it occurs.

Toxicity testing is a valuable tool for measuring not only the toxicity of individual pollutants, but also aggregate toxicity, unknown toxicants, and toxicant bioavailability that are not effectively measured through chemical monitoring and bioassessments. For both chronic and acute toxicity, the current approach used to address toxicity in California relies on narrative objectives in basin plans and a patchwork of basin plan and State Implementation Policy implementation procedures. This approach has led to inconsistent evaluations of toxicity data, unclear expectations of dischargers, and ineffective toxicity controls in permits. For the NPDES program, the current practice of implementing narrative toxicity objectives as narrative "effluent limits" in permits does not create an objective, accountable means for restricting and controlling toxicity in effluents and does not meet the basic requirements for a water quality based effluent limit (CWA sections 301(b)(1)(C), 502(11); 40 CFR 122.44(d), 122.2, 122.45(d); 50 *Fed. Reg.* 23868, 23871, 23874 (Jun. 2, 1989)).

We support the requirement for numeric daily maximum effluent limits for toxicity in NPDES permits, measured with the Test of Significant Toxicity (TST) hypothesis-testing approach. In 2010, following an extensive external peer review process, EPA formally endorsed the TST approach as an improved hypothesis testing tool to evaluate data collected using authorized whole effluent toxicity (WET) methods. Use of the TST will simplify the interpretation of toxicity test results and increase confidence in the decisions made using these results. Unlike current

hypothesis testing and point estimate approaches for interpreting toxicity test results, the TST provides a clear incentive for regulated stakeholders to reach a definitive conclusion in each toxicity test as to whether unacceptable toxicity has indeed occurred. This is a key improvement that is superior to the way the current approaches address within-test variability and the error rates that are of ongoing concern to both permitting authorities and dischargers. The TST approach should lower toxicity monitoring costs by reducing the complexity of toxicity tests.

We fully support the reasonable potential procedure and required daily maximum numeric effluent limits for all NPDES wastewater dischargers that show reasonable potential. The proposed policy authorizes numeric toxicity effluent limits for individual industrial and construction storm water discharges, and MS4 discharges, when deemed necessary by Regional Water Boards. This provision is a vital improvement over the pre-notice draft. As numeric effluent limits are currently required for industrial storm water discharges when reasonable potential has been found, the policy should be changed to require numeric effluent limits for toxicity in these situations (CWA section 402(p)(3)(A); 40 CFR 122.26(b), 122.44(d)(1) and (k)). We also support the policy provisions to authorize the very limited use of compliance schedules.

Draft policy language on single or infrequent exceedances of the daily maximum effluent limit and permit violation is confusing and should be clarified (Part III. A.7.b). The policy must be consistent with Clean Water Act section 309, which provides that any exceedance of an effluent limit is a violation subject to enforcement. EPA's 1995 WET enforcement policy recommends the initial response to a single exceedance of a toxicity effluent limit, causing no known harm, should not be a formal enforcement action with a civil penalty. Instead, we recommend accelerated toxicity monitoring and a Toxicity Reduction Evaluation, if ongoing toxicity is measured. The policy should be clarified to acknowledge that an exceedance of an effluent limit is a violation, but that whether and how to take enforcement action depends upon the severity and duration of the violation.

These new toxicity objectives and the policy provisions affecting their implementation in Clean Water Act programs require EPA's approval as water quality standards. We have shared recommendations for minor language changes to the policy with your management team and are working with them to address comments expressed at the November 16, 2010 workshop. We are pleased to assist in developing this policy and addressing public comments, and look forward to working with the State and Regional Water Boards to enhance their capacity and expertise to effectively implement the policy.

If you have questions regarding these comments, please call me or David Smith, NPDES Permits Office Manager, at (415) 972-3464.

Sincerely,


Alexis Strauss
Director, Water Division

21 January 2011