



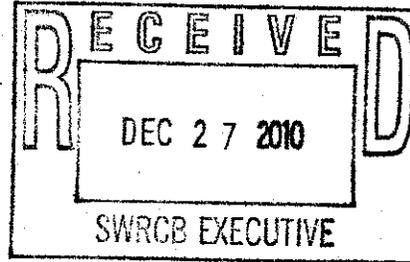
City of Millbrae

621 Magnolia Avenue, Millbrae, CA 94030

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Councilman

December 20, 2010

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Subject: Draft Policy for Toxicity Assessment and Control

Dear Ms. Townsend:

The City of Millbrae appreciates the opportunity to comment on the Draft Policy for Toxicity Assessment and Control. The City of Millbrae is a small full service city with a population of about 21,000 located on the San Mateo Peninsula adjacent to the San Francisco International Airport. The City of Millbrae is currently renovating its aging wastewater treatment plant. The \$30 million project is made possible by the ARRA stimulus funds through the State Revolving Fund (SRF).

Our agency is very concerned about the State Water Quality Control Board's Draft Policy for Toxicity Assessment and Control. This draft Policy, if adopted in its current form, will have significant impacts on our agency. For example, we understand that the Policy will result in required monthly acute and chronic toxicity testing, which will cost an additional \$240,000 at approximately \$4,000 per test over a 5-year permit term for our agency, even though we have had excellent compliance with acute and chronic toxicity testing over the last 5 years.

Additionally, we understand that there will be an increased false positive error rate in the new compliance determination approach, which would trigger yet additional costly sampling for each trigger. This additional testing is not necessary or appropriate for an agency such as ours that has had a good record of toxicity testing compliance. It is unproven whether there is a connection between municipal stormwater chronic toxicity testing results and the protection of beneficial uses. Municipal stormwater has a high variability among stormwater discharges and is transient in nature. The whole effluent toxicity (WET) chronic toxicity testing protocols developed by USEPA are based on continuous wastewater discharges, such as POTW discharges, not intermittent and highly variable stormwater discharges.

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(650) 259-2400

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(650) 259-2360

Under this proposed Policy, exceedances of acute and chronic toxicity limits are Clean Water Act violations subject to State penalties of up to \$10,000 per day or \$10.00 per gallon, and federal penalties of up to \$37,500 per day per violation. In addition, our agency would be subject to third party lawsuit and attorney fee liability, particularly if regulators decide to take no enforcement actions. And, costs associated with conducting Toxicity Reduction Evaluations (TREs) can be high and long lasting, not to mention unnecessary treatment upgrades in response to false positive toxicity exceedances. Our agency is very concerned that the costs associated with coming into compliance in instances of actual or apparent toxicity were not considered by your staff because these costs were determined to be "too speculative." We are very concerned that the California Water Code section 13241 and economic analysis are inadequate. Additionally, the City of Millbrae has just recently concluded negotiation of a consent decree with the San Francisco Baykeeper to settle a claim filed by the San Francisco Baykeeper against the City of Millbrae of potential violation of the Clean Water Act. The City of Millbrae believes that the Clean Water Act must be amended first to prevent third party claims before implementing additional requirements that will cause further third party claims because these additional requirements such as the WET policy that many cities, not just Millbrae, will not be able to comply. This is counter productive as the WET policy will require many cities to spend limited financial resources on testing instead of putting the money to good use such as repairing the aging infrastructure.

The compliance schedule provisions in the proposed Policy are inappropriately restrictive. If a municipal agency currently monitors for toxicity, that agency may not be allowed time to come into compliance with new, more stringent limitations. Further, even where a compliance schedule is authorized, the duration of the compliance schedule may not exceed two years. Current State Water Board policy allows up to 10 years to comply with non-California Toxics Rule (CTR) constituents. Phase I and Phase II MS4 dischargers and individual industrial stormwater dischargers with existing toxicity monitoring requirements are not eligible to receive compliance schedule. MS4 dischargers that are implementing requirements from one or more TMDLs that are intended to correct the occurrence of toxicity in stormwater should be allowed the full implementation period contained in the TMDL for a compliance schedule to remedy the occurrence of toxicity.

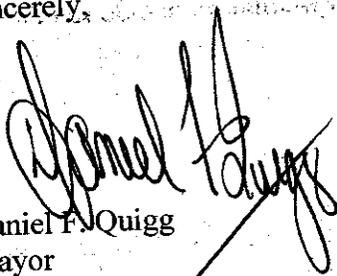
This new policy and associated analytical tools have not been promulgated or established through a formal rule-making and therefore constitute underground rulemaking, because the analytical procedures were adopted from a recent USEPA *guidance* document, that was never released for public comment.

The City of Millbrae hopes that the State Water Resources Control Board will take these comments under serious consideration. We further request that the Water Board allow an additional 60 days for the comment period and direct staff to allow stakeholders to develop an

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alternative policy, and that an additional workshop on a draft Policy be held in 2011. Thank you for your consideration of our comments.

Sincerely,



Daniel F. Quigg
Mayor

Cc: Ron Popp, Public Works Director
Mike Riddell, Public Works Superintendent
Joe Magner, WPCP Superintendent

Also sent via e-mail: commentletters@waterboards.ca.gov