

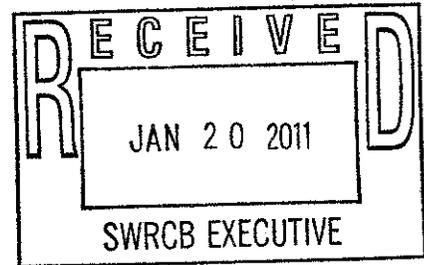
City of Lakewood
City Manager

State Court
Case # 11000000000000000000



State Board
Case # 11000000000000000000

January 20, 2011



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

Subject: Comment Letter – Policy for Toxicity Assessment and Control

Dear Ms. Townsend:

The City of Lakewood appreciates the opportunity to comment upon the State's proposed draft Policy for Toxicity Assessment and Control. We recognize and appreciate the effort that State Board staff has put into the development of the proposed Draft Policy for Toxicity Assessment and Control (the Draft Policy). However, there are several areas of concern we would like to bring to your attention regarding the Draft Policy.

The first area of concern is the expansion of the WET testing to the purpose of MS4 permitting is inappropriate and unsupported. The Draft Policy and the toxicity test methods it requires were primarily designed for wastewater and other steady discharges. However, the Draft Policy was expanded to cover stormwater and dry-weather flows, which differ significantly from wastewater discharges, without sufficient scientific basis and without necessary guidance for implementation. MS4 discharges (both dry and wet weather) typically exhibit highly variable flow rates and constituent concentrations, receive pollutants from a wide range of sources (e.g., atmospheric deposition), and are not amenable to treatment by the processes used to treat wastewater discharges. Neither USEPA nor the State Board has conducted any appropriate studies or data collection or provided any evidence to support the expansion of the WET testing to discharges regulated by MS4 permits. As a result, the Draft Policy provides no guidance for MS4 permittees and leaves too many significant details to the Regional Board's discretion, including how monitoring and testing should be conducted for intermittent, quickly changing flows, and how compliance determinations should be made. The expansion to MS4 permittees will lead to a significant increase in enforcement actions and related appeals.

If enacted, small cities will be placed in the untenable position of having to conduct extensive monitoring, accelerated monitoring, and toxicity reduction evaluations (TREs), particularly for areas where there is no principal permittee for the MS4 permit. This will likely result in duplicative monitoring and unnecessary expenditures. Under the Draft Policy, a single test failure during the compliance monitoring would be considered as a violation, triggering requirements to conduct six accelerated tests within 12 weeks and TREs. The cost of complying with these requirements will be exorbitant and could greatly exceed the

Lakewood

costs envisioned by Staff in the Staff Report accompanying the Draft Policy. For example, the City of San Bernardino has spent more than \$100,000 on accelerated monitoring and preliminary Toxic Identification Evaluations (TIEs) over the last 10 years. In every instance, it appears that the initial failure of the chronic sub-lethal toxicity test using *Ceriodaphnia dubia* (freshwater flea) for reproduction was due to routine (annual) culture crashes at the analytical laboratory.

Small cities are already under enormous financial pressure and have been cutting staff, imposing furloughs and pay reductions, and otherwise reducing their budgets. Essential services will be cut even further in order to afford to comply with the proposed Draft Policy. In Lakewood, storm water programs are paid from the general fund. With the state constantly threatening to take funds from local governments to help balance the \$25 billion budget deficit any added cost such as the proposed Draft Policy just does not help.

Last, the Draft Policy requires the use of the TST method to test for WET, even though the TST method was established by USEPA as guidance in June 2010 and has not been through the public review and comment process. The TST method is scientifically unproven, and the adoption of the method will provide no additional protection for the aquatic environment. The use of the TST method is highly problematic due for the following reasons:

- The TST method assumes that an effluent is toxic unless testing is able to demonstrate that the effluent is in fact not toxic—a reversal of the “presumption of innocence,” and a significant departure from traditional practice.
- The use of the TST method will lead to unacceptably high false violation rates (i.e., determining that an effluent sample is toxic when it is, in truth, not toxic) according to analyses of USEPA WET blank data. The high false violation rates are likely due to inherent variability in the toxicity testing method, and not to actual toxicity in effluent or receiving water samples. False findings of toxicity will lead to the unnecessary expenditure of significant State and Regional Water Board and MS4 permittees’ resources to respond to non-toxic, false indications of toxicity, including unnecessary and unjustified 303(d) listings and development of TMDLs for non-existent problems.
- In addition, under the Draft Policy, the false failure rate of the reasonable potential analysis is too high and will result in unnecessary application of effluent limitations.

Given the lack of validation of the TST method, we believe that it is premature to apply the TST method until the scientific basis and false error rate of the method is further evaluated, and until sufficient evidence is gathered to support the application of the TST method as numeric effluent limitations and as applied to the types of discharges regulated by MS4 permits. We also believe that a single test failure using a single surrogate species as proposed in the Draft Policy should never be construed to constitute a permit violation.

The proposed Draft Policy should be adopted through a formal rule-making process and the State Board must comply with the requirements in California Water Code Sections 13241 and 13242. This is particularly important since the TST method upon which the Draft Policy is based has not been adopted through a public process.

The City of Lakewood recommends that the State Board not adopt the Draft Policy for the purpose of MS4 permitting until appropriate studies and data collection are completed, and that numeric effluent limitations for toxicity should not be imposed for discharges regulated by MS4 permits.

We appreciate your attention to this matter, and look forward to working with the State Water Board and its staff on future revisions to the Draft Policy.

Sincerely,

A handwritten signature in cursive script, appearing to read "Lisa A. Rapp".

Lisa A. Rapp
Director of Public Works

