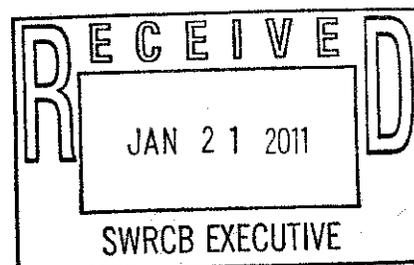




**INDUSTRIAL  
ENVIRONMENTAL  
ASSOCIATION**

January 21, 2011

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



**Re: Policy for Toxicity Assessment and Control**

Dear Chair Hoppin, and Members of the Board:

Thank you for the opportunity to provide comments on the Policy for Toxicity Assessment and Control (Policy). The Industrial Environmental Association (IEA) is a consortium of commercial and industrial members, many of whom are regulated industrial dischargers. As such IEA is greatly concerned over the potential impact the Policy will have on its member's organizations. IEA strongly supports the reliance on scientific and analytical data to evaluate the regulations necessary to protect the public and the environment. IEA recognizes the effort that has been put forth in the production of the Policy, however, there are a number of significant technical and policy issues that prevent the IEA from supporting adoption of the Policy as currently proposed. IEA strongly recommends that the State Water Resources Control Board (State Board) not adopt the Draft Policy due to the technical and policy issues and their potential impact on the regulated community.

IEA concerns related to the Draft Policy are summarized below:

- The proposed toxicity testing method (TST method) has not been approved under 40 Code of Federal Regulations (CFR) Part 136. The TST method employed in the Draft Policy has not undergone rigorous peer review or the public comment process. In addition, the decision to define toxicity based on the new method constitutes a water quality standards change, and therefore must be adopted through rule-making rather than through policy guidance. The State Board must comply with the requirements in California Water Code Sections 13241 and 13242.
- The TST method false positive error rate is 15% for non-toxic samples. This means that 15% of samples which are non-toxic will be identified as toxic based on the USEPA blank data. Accordingly, the probability of falsely failing a chronic toxicity test increases significantly from previous test methods. This will result in public perception issues with the discharger, as well as potential waste of resources to further study sources of toxicity in non-toxic waters.

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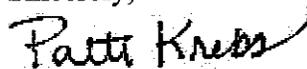
- The proposed TST method is more stringent than that of existing USEPA procedures approved for toxicity determination. Currently, effluent-exposed organisms exhibiting 75% reproduction or growth as compared to control organisms within a test sample are considered non-toxic. The TST method would require that this rate increase to 90%; this will result in a higher rate of apparent toxicity as opposed to current USEPA test methods.
- The statistical measures and hypotheses in the Draft Policy reverse the presumption of innocence, and automatically assume that an effluent is toxic. As part of the TST method, testing must demonstrate that the effluent is in fact not toxic, shifting the burden of statistical proof to the discharger to “prove the negative”, which will be exceedingly difficult under the proposed testing methodology.
- The Draft Policy is more stringent because it assumes reasonable potential for toxicity which will, in turn, produce an effluent limitation under two conditions: 1) if the effluent fails the TST method or, 2) if the percent effect (response between effluent-exposed organisms and control organisms) is greater than 10%. The 10% effect rate has no apparent relationship to actual toxicity. The reasonable potential analysis will result in unfounded determinations of toxicity and therefore unnecessary application of effluent limits.
- As part of the Policy, the Regional Water Quality Control Boards (RWQCB) will have the discretion to impose both numeric chronic toxicity limits and numeric acute toxicity limits to all MS4s (Phase 1 and Phase 2), individual industrial and construction storm water dischargers, and agricultural dischargers under conditional waivers. Violations of chronic and acute toxicity limits are Clean Water Act violations subject to large State penalties, third party lawsuits, and will also result in significant expenditures related to accelerated monitoring, Toxicity Identification Evaluations (TIEs), and Toxicity Reduction Evaluations (TREs). Costs associated with these monitoring requirements are estimated to range from \$120,000 to \$240,000 *per discharge location* over the life of a 5-year permit cycle. This is of particular concern to the IEA, since many member organizations have facilities with multiple discharge locations.
- The Draft Policy will require significant resources to comply with the requirements of the TST method. Costs associated with unnecessary treatment upgrades in response to the anticipated high rate of false-positive toxicity violations are likely to be significant. This will likely result in the unnecessary expenditure of limited resources for many dischargers to address discharges that are not in fact toxic.
- The Policy does not allow for the variability in water chemistry throughout California’s surface waters. Natural surface waters often contain higher concentrations of salinity, hardness, and alkalinity than the synthetic freshwater used in laboratory toxicity tests. This testing procedure will increase the presumption of toxicity based on the organisms’ acclimation to laboratory water.

- The Draft Policy lacks consideration of the unique characteristics of stormwater which contains highly variable differences in flow rates and constituent concentrations. Treatment methods applied to stormwater are different than that of traditional point source discharges; there is no evidence to support the application of the TST method to stormwater. Given the lack of data and validation studies, stormwater should not be subject to effluent limitations that are outlined within this Draft Policy. In addition, there are practical issues related to the ability to collect sufficient volume of representative sample to conduct chronic sublethal toxicity tests. These tests require water changes using fresh sample every day over a period of about 8 days. Stormwater discharges typically only last for several hours or a few days, and vary significantly in composition, making adequate sample collection infeasible.
- The Policy compliance schedule is overly restrictive. Dischargers will have difficulty coming into compliance with the limitations that are set forth within the Policy.
- As a result of the restrictive limits in the Policy, it is anticipated that nearly all waters of the State will be categorized as toxic. This will therefore require TMDLs for all water bodies and cause undue administrative and funding resource strain. Dischargers with TMDL allocations incorporated into NPDES permits will be put at risk for NPDES permit violations for conditions that are in fact non-toxic.

IEA recommends that the State Board not adopt the Policy's proposed numeric objectives or the TST method to derive numeric effluent limitations, until further studies can be conducted to validate the process. IEA supports the use of narrative objectives and monitoring of effluent toxicity, utilizing the current implementation procedures of accelerated monitoring and toxicity reduction evaluation (TRE) triggers. This approach is consistent with USEPA guidance, and has been effectively implemented in California for several years. It is hoped that future drafts of the Policy may incorporate more commonly accepted toxicity testing and data analysis methods to account for variability in stormwater and other factors.

Thank you for your consideration of our comments. We look forward to working with the State Board and its staff on future revisions to the Draft Policy.

Sincerely,



Patti Krebs  
Executive Director