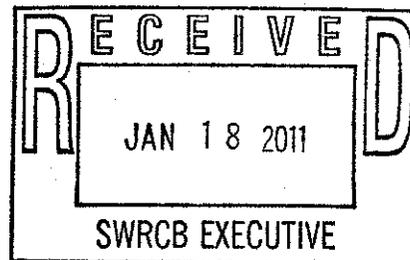


Public Works Department

January 18, 2011

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



**RE: Comment Letter – Policy for Toxicity Assessment and Control**

Dear Ms. Townsend:

The City of West Covina Public Works Department appreciates the opportunity to comment upon the State's proposed draft Policy for Toxicity Assessment and Control. Public Works recognizes and appreciates 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, the City of West Covina Public Works Department has serious concerns regarding the Draft Policy.

**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.

**Financial burden on small cities will be tremendous.** Small cities may 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, which will trigger requirements to conduct six accelerated tests within 12 weeks and TREs. Cost of complying with these requirements will be exorbitant and will greatly exceed the costs envisioned by Staff in the Staff Report accompanying the Draft Policy. For instance, City of San Bernardino 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.

**The use of USEPA's TST method and its implementation as numeric effluent limitations are invalid.** 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 strongly 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 West Covina Public Works Department strongly recommends that the State Board should 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.

The City of West Covina Public Works Department looks forward to working with the State Water Board and its staff on future revisions to the Draft Policy. Please contact me at (626) 664-3674 if you have any questions regarding the information provided in this letter.

Sincerely,



Shannon A. Yauchzee  
Public Works Director/City Engineer