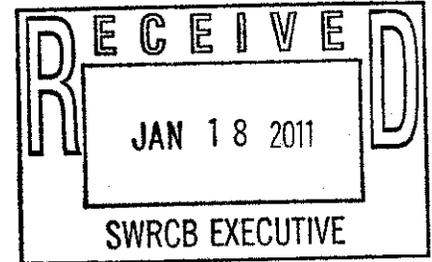


January 18, 2011

TO: Charles Hoppin, Chair
State Water Resources Control Board

CC: Members of the Board

FROM: Agricultural Council of California
California Chamber of Commerce
California Construction and Industrial Materials Association
California League of Food Processors
California Manufacturers and Technology Association
California Paint Council
Chemical Industry Council of California
Industrial Environmental Association
Western Growers Association
Western Wood Preservers Institute
Wine Institute



SUBJECT: Comments on Proposed Draft Policy for Toxicity Assessment and Control

The industry groups listed above appreciate the opportunity to comment upon the State Board's proposed draft Policy for Toxicity Assessment and Control (Draft Policy).

While we recognize and appreciate the effort that State Board staff has put into the development of the proposed Draft Policy, we have a number of serious concerns. Our points are summarized below:

- 1. Implementation as numeric effluent limitations is inappropriate and problematic.** The Draft Policy establishes numeric objectives for chronic and acute toxicity; these objectives are intended for use as numeric effluent limitations in NPDES permits. Exceedance of numeric effluent limitations derived from the Draft Policy would constitute a violation of the permit.

Unlike chemical analyses, toxicity tests measure responses of certain test organisms, and can be influenced by numerous factors other than and in addition to effluent toxicity. For these reasons, failure of any single toxicity test should not be automatically considered to be a violation but rather should trigger further investigation to determine if the effluent is toxic and/or to identify a toxicant(s).

- 2. The use of USEPA's TST method, and the application of toxicity requirements as numeric effluent limitations is inappropriate.** The Draft Policy requires the use of the TST approach to test for whole effluent toxicity (WET), even though the TST method was established by USEPA as guidance and has not been through the public review and comment process. The statistical measures and hypotheses of the Draft Policy (and of the

TST) assume 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.

We believe that the TST method should not be used to derive numeric effluent limitations. With lower rates of false toxicity, the TST method could potentially be used as triggers for additional testing and investigation in conjunction with a narrative objective for toxicity.

- 3. The reasonable potential analysis (RPA) of the Draft Policy will result in unnecessary application of effluent limitations.** The Draft Policy results in a finding of reasonable potential (i.e., the determination that a discharge has the potential to cause or contribute to an excursion above a water quality standard, and thus requires an effluent limitation) under either of two conditions: (1) if an effluent sample fails the TST method or (2) if the percent effect (i.e., the difference between responses of the effluent sample and the control) is greater than 10%. Because of the variability inherent in toxicity testing, particularly for sublethal, chronic toxicity endpoints, the second condition would be expected to be frequently expected. In fact, industry analyses have demonstrated a false failure rate of the RPA at 25% for chronic toxicity tests using *C. dubia* for reproduction from USEPA WET blank data. The State Board should not consider for adoption a proposed method with such a high false failure rate.
- 4. The proposed Draft Policy should not be considered until the TST Method has been peer reviewed and adopted through a formal rule-making process.** The State Board's definition of whole effluent toxicity using the entirely new TST method constitutes a change in water quality standards. The proposed Draft Policy and its contents must 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. The TST method, upon which the Draft Policy is based, has not been adopted through a public process.
- 5. The TST method is not approved for use under current legal requirements.** 40 CFR Part 136 contains guidelines establishing test procedures for the analysis of pollutants. The TST method is new and has not been approved as meeting these guidelines. No federal register notices were released concerning the TST guidance. No peer review that meets California requirements was conducted by USEPA. No estimates were made of inter-laboratory test precision, which is required for any new method. It has not yet been authorized as an alternate test procedure pursuant to 40CFR 136.5 Approval of Alternate Test Procedures.
- 6. The cost analysis significantly underestimates the costs and environmental impacts of the Draft Policy.** The economic analyses contained in the Staff Report for the Draft Policy underestimate the likely monitoring costs. Neither the economic and environmental impact analyses considered the reasonably foreseeable costs of compliance. In order to comply with the provisions in the Draft Policy, we are concerned that additional treatment facilities may need required (potentially including nitrification,

disinfection by UV/ozone, activated carbon, and/or reverse osmosis), even if the findings of toxicity are false.

- 7. Expansion of whole effluent toxicity testing to stormwater discharges is invalid.** The proposed Policy expands whole effluent toxicity testing to stormwater dischargers even though this expansion is unsupported by appropriate studies or data collection. This expansion would be expected to result in a significant increase in enforcement actions and related appeals.

In summary, we strongly recommend that the State Board not adopt the numeric objectives or use of the TST method in the Draft Policy to derive numeric effluent limitations. Existing methods and data support the continued use of narrative objectives with accelerated monitoring and toxicity reduction evaluation (TRE) triggers to address effluent toxicity. These methods have been effectively implemented in California for several years, are consistent with guidance from USEPA, and are supported by recognized national and regional experts. It may be appropriate to use the TST methods as one component of a Policy based on narrative objectives, but only after significant additional analysis and only for those species and endpoints that have reasonable rates of finding false toxicity.

Thank you for the opportunity to comment. We look forward to working with the State Water Board and its staff on future revisions to the Draft Policy.

