Response to Comments
Basin Plan Triennial Review

November 2, 2004

Three comment letters were submitted on the draft staff report and tentative resolution for the 2002 Basin Plan Triennial Review, listed below:

Commenting Organization	Org. Type	Date	Signed By
A. Western States Petroleum Association	Industry	22-Oct-04	Kevin Buchan
B. U.S. EPA, Region IX	Federal	25-Oct-04	Douglas Eberhardt
C. Eisenberg, Olivieri and Associates (for City of Sunnyvale)	Municipal	25-Oct-04	Tom Hall

Comment A.1: Acute Toxicity. The proposed evaluation for changes to acute toxicity limits was ranked #25, the low priority category, in the 2004 Prioritized Basin Plan Triennial Review list. WSPA agrees with the RWQCB's conclusion. Because it appears the RWQCB has already evaluated and determined that no change or further action is required, WSPA requests that the acute toxicity limit issue be deleted from the 2004 Basin Plan Triennial Review list.

Response A.1: The draft issue description has been revised to be more accurate and current with respect to federal regulations (see Comment B.4, below). The Water Board has not already evaluated the issue, but staff's evaluation concluded that it was not a high priority at this time. An update to language in the Basin Plan regarding the acute toxicity program may be combined with other updates, but we do not agree with the recommendation to completely remove the issue from the list at this time.

Comment A.2: Reasonable Potential Policy. The RWQCB has identified the establishment of procedures for determining reasonable potential as a medium priority issue. WSPA believes this item should be moved to the higher category and included on the "prioritized list".

Response A.2: We agree with the commenter that a Basin Plan amendment that clarifies guidance for implementation of the reasonable potential process described in the State Implementation Policy for Toxics Standards (SIP) would increase efficiency and consistency in the permitting process. For us to recommend a high priority for this Basin Plan issue, another issue would have to be downgraded from "high" to "medium." Preferably, such a re-prioritization would come from within a Water Board program, in this case NPDES. The next highest issues affecting the NPDES program are the Cyanide and Nickel site-specific objectives. Since resources have already been invested in these NPDES-related Basin Plan Issues ranked higher than reasonable potential, at this time we believe that resources other than Basin Planning resources should be dedicated to resolution of the reasonable potential policy issues. We do not recommend re-ordering priorities within the NPDES program based on the input we have received.

Comment B.1: EPA continues to support as a high priority the Water Board's efforts to update and clarify beneficial use designations (see EPA's letter dated May 29, 2000). Additionally, EPA supports the Board's efforts to consider beneficial uses and policies regarding stream protection and management. We believe these efforts have the potential to accomplish significant environmental results. We hope the Regional Board will be able to allocate resources to continue its efforts on stream protection and management.

Response B.1: Water Board staff acknowledges and appreciates EPA's support to address beneficial use designations and policy development on stream protection.

Comment B.2: Re: adoption of U.S. EPA bacteriological criteria as objectives, …pursuant to the BEACH Act provisions, States are required to adopt EPA's 1986 Ambient Water Quality Criteria for Bacteria by April 2004, and may be subject to legal challenge if this requirement is not met. While an EPA promulgation could relieve the State of this legal requirement, EPA does not have a schedule for promulgation at this time, and any EPA promulgation would include only coastal waters, and not inland surface (fresh) waters.

Response B.2: The decision to make this a low Basin Plan priority stems from consideration of two regulatory processes underway: (1) the process for federal promulgation of marine and estuarine bacteriological objectives for states not in compliance with the BEACH act, and (2) the Basin Plan roundtable's current project with U.S. EPA on a 205(j) planning grant to adopt bacteriological objectives for inland waters that would be consistent statewide. At this time, we do not want to initiate a potentially duplicative process, but propose to maintain the issue on the list of Basin Plan issues in case resolution of the issue is not accomplished in the next three years. Meanwhile, Basin Plan staff will track and participate in the statewide planning process for inland surface waters via the roundtable. It would be a more efficient use of resources to stand by and participate in these processes and then adopt a subsequent "non-regulatory" amendment for coastal and inland waters. At that future time, we can concurrently delete the potentially confusing Table 3-2 that cites U.S. EPA water quality criteria, which were not originally adopted as objectives.

Comment B.3: Re: Alternative Effluent Limits for Bacteria, the issue description for this item discusses fine-tuning procedures for adjusting bacteriological limits in NPDES permits. However, subsequent to discussion with Regional Board staff, we believe this issue might be more effectively addressed by revisiting the objectives currently contained in the Basin Plan.

Response B.3: On this issue, we should clarify that the table of effluent limits for conventional pollutants (Table 4-2) is the element of the Basin Plan that needs to be fine-tuned, not the water quality objectives. There is no explicit quantitative connection in the Basin Plan between the water quality objectives (Tables 3-1, 3-2) and the effluent limits of Table 4-2. The stringent total coliform limits in Table 4-2 mirror water recycling requirements of Title 22, CCR, Section 60300 et seq., for re-use of wastewater.

Extensive field studies conducted in this region, pursuant to footnote (d) of Table 4-2, have demonstrated that water contact beneficial uses can be protected through implementation of less stringent fecal colifom-based effluent limits, and that the fecal limits afford the additional environmental benefit of lower chemical usage of sodium hypochlorite and sodium bisulfite for chlorination/dechlorination. The regulated community and permitting staff communicated that clarification of the procedures allowed by footnote (d) of Table 4-2 would create more efficiency and environmental protection in the permitting process, and planning staff agree that this should be among the highest planning priorities.

Comment B.4: Re: Acute Toxicity Update, the issue description contained in the Regional Board's triennial review document appears to be in error and inconsistent with both Federal regulations and the Basin Plan provisions. However, we do support updating the whole effluent toxicity limits portion of the Basin Plan, and we believe the appropriate updates should be completed as part of the NPDES editorial changes triennial review issue.

Response B.4: We agree with the suggestion to update the acute toxicity program description as part of the NPDES editorial changes issue.

Re: Basin Plan provisions, Table 4-4 indicates that for dischargers that monitor monthly or more frequently, the previous 11 samples are considered in evaluation of median- or 90th percentile-based limits. We think the issue description is consistent with the Basin Plan, especially as re-written, below.

We concur that we made an error with respect to the most recent guidance, and note that the federal regulations specify U.S. EPA's most recent guidance, which is currently the 5th edition of Methods for Measuring the Acute Toxicity and Effluents and Receiving Waters to Freshwater and Marine Organisms (EPA 821-R-012-02), as of October 2002.

Additionally, after conferring with U.S. EPA and permitting staff, we revised the issue description in the staff report, but retained the scoring and priority-rank of the issue. The revised description is:

> U.S. EPA has requested that the Water Board change its acute toxicity program described in the Basin Plan. Currently, NPDES permit limits are based on evaluation of the 11-sample median and 90th percentile values for monitoring frequencies of monthly or more frequent (Table 4-4). Federal regulations specify acute toxicity limits to be expressed as: Maximum Daily Limitation = minimum of 70% survival; Monthly Median Limitation = minimum of 90% survival and a statistically significant difference between the effluent and control samples. U.S. EPA has requested that acute toxicity testing protocols follow U.S. EPA's most recent guidance, which is currently the 5th edition of Methods for Measuring the Acute Toxicity and Effluents and Receiving Waters to Freshwater and Marine Organisms (EPA 821-R-012-02).

In response to comments received from U.S. EPA, Water Board staff reviewed the issue and confirmed that the 5th edition is already being implemented in NPDES permits. Since the mandatory minimum penalty law was revised in 2003, whole effluent toxicity violations do not trigger mandatory minimum penalties unless there are no toxic pollutant limits (which is not the case in permits from the San Francisco Bay Region). Therefore, changing the allowable exceedance frequency to conform with federal regulations would not trigger non-discretionary enforcement as had been feared. Staff will consider making changes to Table 4-4 in accordance with U.S. EPA comments in conjunction with general editorial updates to the NPDES program and the effluent toxicity characterization program.

Comment C.1: The City congratulates you and your staff on the very comprehensive and clear description of the triennial review issues, the issues ranking process used, and the rationales for the recommended rankings for the next three years. The City also appreciates the level of detail with which the verbal and written comments previously submitted by EOA on the City's behalf were thoroughly captured and responded to in this Basin Plan Triennial Review Draft Staff Report.

Response C.1: Thank you for recognizing our efforts to incorporate transparency and multiple points-of-view in this work planning process.

Comment C.2: The primary issue that the City (of Sunnyvale) suggests be given a revised higher priority is the Reasonable Potential Policy (Prioritized Rank 19, Score 40). It appears that this issue was not ranked more highly for three main reasons. First, that the complexity was perceived as high, second that it was perceived as controversial, and third that there was no score apparently received under Input from Implementing Divisions.

Response C.2: See also the Response A.2. We believe this comment and Comment A.2 justify a second look at our ranking of the issue. We reviewed the scoring on this issue and confirmed our findings that it is a very complex subject to articulate to Board members, and since it involves calculation of enforceable effluent limitations, it is very likely to be controversial. From a division standpoint, the alternate bacteriological limits are a more pressing Basin Plan issue than the articulation of the SIP reasonable potential process in this region.

The medium ranking of the Reasonable Potential Policy pertains to use of limited planning resources, and the dedication of internal and external resources to other NPDES-related planning issues. As you mentioned in the letter, there may be opportunity to establish the reasonable potential procedures for consistency and efficiency outside of Basin Planning in order to achieve the goals of the regulated community. At the statewide level, you have researched and noted the progress of the SIP revisions on this topic, and that some but not all the issues appear to be addressed. We will continue to participate in and track that statewide planning process. Without additional resources, Basin Planning will not address this issue and other NPDES-related issues like the Dilution Policy in the next three years, unless another issue like copper, nickel or cyanide is supplanted.