



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

75 Hawthorne Street
San Francisco, CA 94105-3901



August 20, 2012

Mr. Thomas Howard, Executive Director
California State Water Resources Control Board
1001 I Street
Sacramento, CA 95614

RE: Comment Letter – Policy for Toxicity Assessment and Control

Dear Mr. Howard:

Thank you for the opportunity to comment on the draft Policy for Toxicity Assessment and Control. We urge the Board to adopt the proposed numeric water quality objectives for chronic and acute toxicity and associated implementation procedures, with clarified storm water implementation language.

Toxicity is a widespread cause of surface water quality impairment in California. The current approach to using toxicity testing relies on a patchwork of narrative and numeric objectives, implementation procedures, and policies contained in basin plans, statewide policies, and individual permit decisions. This approach has led to inconsistent and incorrect evaluations of toxicity data, unclear expectations of dischargers, and ineffective toxicity controls in permits. For the NPDES permit program, the current practice of implementing narrative toxicity objectives as numeric triggers and Toxicity Reduction Evaluations does not create an objective, accountable means for controlling toxicity in effluents and does not meet basic Clean Water Act (CWA) requirements for water quality based effluent limits. California needs, and this policy provides, an effective approach to improving toxicity control by providing a consistent framework for setting toxicity effluent limits and addressing toxicity when it occurs.

We support the proposed numeric toxicity objectives and process for developing NPDES effluent limits for wastewater facilities based on the Test of Significant Toxicity (TST) hypothesis testing approach. In 2010, EPA formally endorsed the TST approach as an improved hypothesis testing tool to evaluate data collected using authorized whole effluent toxicity (WET) methods. The TST method is currently used in EPA Region 9-issued permits, Hawaii permits, and in Orange County Sanitation District's ocean discharge permit. We note there are several long-expired California permits with applicable TMDL wasteload allocations based on 1 TUc. The final policy should be revised to clarify that it is not necessary to revise existing TMDL wasteload allocations to implement numeric TST-based toxicity effluent limits for permits addressed by those TMDLs.

Effluent, Stormwater, and Ambient Toxicity Test Drive Analysis of the Test of Significant Toxicity (TST) Test Drive Report (SWRCB, 2011) confirms that the TST approach more reliably identifies toxicity—in relation to chronic (25%) and acute (20%) effect levels of concern—than the current hypothesis testing approach (NOEC) used by many Regional Water Boards. TST results are also more transparent and statistically rigorous than the point estimate model approach (EC25), used by the San Francisco Bay Region. Your external peer review concluded that the TST approach and proposed numeric toxicity objectives effectively unify toxicity control and management across California’s water programs, creating a simple, transparent, and cost effective approach for assessing toxicity in wastewater, storm water, and surface waters. We concur. Unlike current approaches, the TST provides a clear incentive for regulated stakeholders to reach a definitive conclusion in each toxicity test as to whether unacceptable toxicity has indeed occurred. This is a key improvement that is superior to the way current approaches address within-test variability and the error rates that are of ongoing concern to both permitting authorities and dischargers.

We fully support the reasonable potential procedure and required numeric daily maximum and monthly median effluent limits for all NPDES wastewater dischargers that show reasonable potential. We are concerned the proposed language in Part III.B and definitions in Part I have been revised to draw an invalid distinction concerning the applicability of water quality standards and evaluation of water quality based effluent limits to storm water discharges. As addressed in *Defenders of Wildlife v. Browner* (191 F. 3rd 1159 (9th Cir. 1999)), permitting authorities have some latitude in interpreting how water quality based requirements are established for municipal storm water permits pursuant to CWA section 402(p)(3)(B)(iii). However, as discussed in *Defenders*, development of water quality based effluent limits for other storm water (e.g., industrial and construction storm water) and wastewater discharges are governed by CWA section 301(b)(1)(C), which requires water quality based effluent limits for pollutants where reasonable potential is established. Accordingly, to accurately characterize storm water permitting requirements under the CWA and its implementing regulations, the following language should be inserted at the beginning of Part III.B prior to the storm water monitoring guidance:

“Determination of the need for toxicity effluent limitations in storm water permits is based on analysis of permit-specific data and information and should occur when Water Boards consider issuance of individual and general storm water permits. This policy neither requires nor precludes establishment of numeric effluent limitations for toxicity in MS4 permits. Effluent limitations are required for non-MS4 storm water permits (including, but not limited to, industrial and construction storm water permits) for which the discharge demonstrates reasonable potential to exceed numeric toxicity objectives (40 CFR 122.44(d)(1)(iv)). For non-MS4 storm water permits, if the effluent at the IWC produces a test result of “fail”, or if the percent effect at the IWC is greater than 0.10, then Water Boards shall apply effluent limitations based on either: (1) the numeric effluent limitation for chronic toxicity of “fail” at a percent effect equal to or greater than 0.25 for a chronic toxicity test, or (2) best management practices if numeric effluent limitations are infeasible (see 40 CFR 122.44(k)).”

We support the revised draft policy language on exceedance of effluent limits, which clarifies that an exceedance of an effluent limit is a violation. This is consistent with CWA section 309, which provides that any exceedance of an NPDES effluent limit is a violation subject to enforcement. EPA's 1995 WET enforcement policy recommends the initial response to a single exceedance of a toxicity effluent limit, causing no known harm, should not be a formal enforcement action with a civil penalty. We also support the policy provision authorizing the limited use of compliance schedules and recommend this authorization be extended to storm water discharges under Part III.B.

We commend the State Water Board for its hard work in developing this policy and look forward to working with the State and Regional Water Boards to enhance their capacity to effectively implement the toxicity policy. If you have questions regarding these comments, please call me or David Smith, NPDES Permits Office Manager, at (415) 972-3464.

Sincerely,

A handwritten signature in blue ink, appearing to read "Nancy Woo", with a horizontal line extending to the right.

Nancy Woo, Acting Director
Water Division