CAMARILLO SANITARY DISTRICT

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District Manager
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January 20, 2011

Via Electronic Mail

Charles R. Hoppin, Chairman and Members
State Water Resources Control Board
c/o Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, Sacramento, CA 95814
commentletters@waterboards.ca.gov

Subject: Comment Letter – Policy for Toxicity Assessment and Control

Dear Chairman Hoppin and Members:

The Camarillo Sanitary District (CSD) appreciates the opportunity to comment on the Draft Policy for Toxicity Assessment and Control (Draft Policy). As an active participant in the Calleguas Creek Watershed Management Plan (CCWMP), CSD has worked cooperatively with other stakeholders and regulatory agencies to reduce the discharge of pollutants and reduce toxicity in the Calleguas Creek Watershed. Given our history of cooperative decision-making with regulatory agencies, we have a strong interest in developing a Toxicity Policy that will maintain our commitment to improving the water quality in the watershed without presenting unreasonable compliance risks for our discharge. As such, we support the goal of the Draft Policy, which is to increase confidence in the end of result of toxicity testing— to protect water quality while minimizing false negatives and false positives. However, we feel that the proposed Draft Policy contains a number of unworkable provisions and alternatives are available that would achieve the same goals in a more effective manner.

Our fundamental concern is that the Draft Policy has an unacceptably high false positive rate combined with a numeric effluent limit that will have the following consequences for our discharge:

1. Unacceptably high probability of violation of numeric effluent limits
2. Inability to delist and complete CCW Toxicity TMDL
3. Possibility of enforcement action while taking steps to address any observed toxicity

We also believe that the Draft Policy should recognize that identification of the pollutants causing toxicity can be challenging and resource intensive. Thus, we believe the fundamental principal that the State should consider in establishing a toxicity policy is to address the discharges that cause persistent toxicity. Single exceedances of toxicity objectives should not be used to direct our limited resources as is currently done by the Draft Policy.

In addition, the SWRCB did not fully consider the alternatives available to them in developing the Draft Policy and feel the following alternative would help eliminate the concerns about the current approach to toxicity regulation, meet the goal of developing a consistent, enforceable toxicity policy, and not result in the significant costs and potential issues associated with the proposed Draft Policy. Attached for your review are detailed recommendations for changes to the Draft Policy and the following proposed alternative approach for your consideration.

Proposed Alternative

1. Define a consistent narrative objective for all inland surface waters, enclosed bays, and estuaries of the state.
2. Utilize the following numeric values to interpret the narrative objective and trigger actions.

   Monthly median 1.0 TUc using the EC/IC25 as the chronic toxicity accelerated testing trigger

   Two of six accelerated tests exceeding a 1.0 TUc using the EC/IC25 as the TRE trigger

3. Define specific, enforceable requirements that would result in violations. Suggestions for these requirements include:
   - Failure to prepare and submit an Initial TRE Work Plan within 90 days after permit issuance
   - Failure to amend TRE Work Plan as requested by Regional Board after review
   - Failure to report WET results
   - Failure to perform WET tests at the required frequency
   - Failure to initiate accelerated testing after exceeding the accelerated testing trigger
   - Failure to conduct accelerated testing at minimum required frequencies (every two weeks)
   - Failure to initiate TRE Work Plan when TRE trigger was exceeded
   - Failure to conduct specific steps in the TRE Plan at the specified frequency

We feel that this approach will address our concerns with the Draft Policy and result in a consistent, environmentally protective toxicity policy. This approach provides an incentive to

the discharger to aggressively identify and control the constituents causing the toxicity as inaction will result in a violation. The Draft Policy causes dischargers to be in violation regardless of whether or not actions are taken to address the toxicity. As a result, there is a potential disincentive to spend money to identify and control the toxicity if violations occur regardless of whether or not you are taking actions. Additionally, efforts are focused on identifying and controlling persistent toxicity and resources are not wasted on situations that are unlikely to be controllable, such as sporadic events or non-toxic samples erroneously identified as toxic. Finally, we feel that the identification of clear, specific, enforceable requirements in the policy will address concerns identified in the Draft Staff Report that a narrative objective does not provide a clear method for determining compliance with the objective.

We appreciate the opportunity to provide comments on the Draft Policy and request that the State Board review these comments and consider the proposed alternative as a mechanism for addressing many of the concerns identified in our attached comments. If you have any questions, please feel free to contact Lucia M. McGovern at lmcgovern@ci.camarillo.ca.us or (805) 388-5334.

Sincerely,

Bruce Feng
District Manager

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Sincerely,

Bruce Feng
District Manager

Camarillo Sanitary District

Specific Comments on the Draft Policy for Toxicity Assessment and Control

The Camarillo Sanitary District (CSD) has the following comments on the Draft Policy for Toxicity Assessment and Control (Draft Policy). In addition, we support the comments submitted by CASA/Tri-Tac and the parties implementing TMDLs in the Calleguas Creek Watershed (CCW MOA).

Numeric Objectives for Chronic Toxicity Remove the Flexibility Necessary to Address Complex Toxicity Issues

As demonstrated by the CSD's participation in the CCW Toxicity TMDL development and the ongoing efforts to reduce toxicity in the watershed through implementing the TMDL, we acknowledge that toxic discharges represent a threat to beneficial uses. We support the State Board efforts to develop a consistent statewide policy to eliminate toxic discharges to waters of the State. However, numeric objectives for chronic toxicity are unnecessary to protect water quality within the State and will reduce the flexibility of dischargers to effectively address persistent toxicity. Narrative objectives will provide this flexibility and can be structured to address the concerns with narrative objectives identified in the Draft Staff Report.

The Draft Staff Report provides three reasons why narrative objectives are not the selected alternative:

1. Narrative objectives do not provide a clear measurement of compliance.
2. Because there is not a clear measurement of compliance, enforcing the policy would deplete Regional Water Board's resources.
3. The potential for ecological harm would likely increase as a result of these vague objectives.

As discussed in the CCW MOA letter, the justifications for using numeric objectives in the Draft Staff Report are insufficient to justify the need to switch to numeric objectives. In particular, we feel that narrative objectives can be structured to provide a clear measurement of compliance by defining specific, enforceable actions in the policy that can be incorporated as NPDES permit provisions.. The alternative approach proposed in our comments will provide a mechanism for ensuring that the narrative objectives can be clearly enforced.

Additionally, we feel that interpretation of toxicity data is a complex undertaking because of the inherent variability and anomalies associated with biological data. Toxicity is not a pollutant, but an effect, and therefore test results only provide an indication that an effluent may cause toxicity in receiving waters but do not identify the exact cause. Additional studies (such as accelerated monitoring, TIEs and TREs) are needed to establish the persistence and magnitude of the toxicity and the toxicant(s) causing the toxicity. Numeric objectives do not provide flexibility in addressing this complex problem or in addressing the need to do additional studies. Under the Draft Policy, numeric objectives lead to numeric effluent limitations for wastewater dischargers, which require immediate findings of violation, despite the fact that the additional studies needed to confirm toxicity and establish the cause and remedy have yet to be performed. It would be

more effective in achieving the ultimate intent of a toxicity policy – the reduction of toxicity in receiving waters – to use toxicity tests as a starting point to identify the cause(s) rather than as a regulatory endpoint. Narrative objectives provide more flexibility to appropriately address the complex issues associated with toxicity testing.

Finally, as discussed in the letters provided by other types of dischargers in the CCW and in the following section, significant technical challenges associated with toxicity analysis and testing result in difficulties in defining an appropriate numeric objective by determining an appropriate averaging period and allowable exceedance frequency. Without an appropriately defined averaging period, the use of monthly medians or other mechanisms to address the implications of false positives (discussed in next section) will not be feasible. The policy will not be able to define multi-sample exceedances or focus on addressing persistent toxicity as the objective will need to be interpreted as an instantaneous maximum.

For these reasons, we feel that numeric objectives will significantly reduce the ability of the policy to address the other concerns identified in this letter. We feel that numeric objectives will eliminate the flexibility necessary to deal with the complex issues associated with toxicity testing. Therefore, we strongly support the use of narrative limits with accelerated monitoring and toxicity reduction evaluation (TRE) triggers rather than numeric limits. This step-wise approach is consistent with guidance from the EPA, both at the national[1] and regional[2] levels, a diverse national expert advisory panel[3] formed by SETAC and funded by the EPA to provide guidance on WET issues, and the State Board Toxicity Task Force[4] specifically assembled to provide guidance on the regulatory use of toxicity tests within the State.

Requested Changes:

Replace the numeric objectives with a consistent narrative objective for all inland surface waters, enclosed bays, and estuaries of the state.

Utilizing Single Exceedances to Trigger Actions is Problematic

The most significant concern we have with the Draft Policy is the use of single exceedances of the numeric objectives/effluent limits to trigger accelerated monitoring and single exceedances during accelerated monitoring to trigger TREs. We believe that an approach based on multiple results to identify a pattern of persistent toxicity is fundamental to addressing our primary concerns with the Draft Policy. Following is a discussion of the significant implications of the use of single exceedances to address toxicity.

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[1] *Technical Support Document for Water Quality-Based Toxics Control, EPA Office of Water, March 1991, EPA/505/2-90-001, p. 62, Section 3.3.7.*

[2] *EPA Regions 9 and 10 Guidance for Implementing Whole Effluent Toxicity Testing Programs, EPA, May 31, 1996, pp. 2-1, 4-1, and 5-2.*

[3] *SETAC Wet Expert Advisory Panels, http://www.setac.org/wettre.html, Sections 1 and 4.*

[4] *Memo to Members of the State Water Resources Control Board from the Toxicity Task Force, September 27, 1995. Recommendations 2, 5, 9, and 10.*

False determinations of toxicity resulting from the TST have significant implications when combined with single sample exceedances of a numeric objective and numeric effluent limit.

As discussed in the CCW MOA letter, we are very concerned about the interpretation of false determinations of toxicity (i.e., incorrectly identifying a non-toxic effluent as toxic) under the Draft Policy and the impacts that will result. In particular:

1. The TST method outlined in the Draft Policy includes an inherent 5% statistical false positive error rate for individual tests, which is unacceptably high when utilized as a numeric objective and effluent limit. According to the Staff Report (page 40), a 5% statistical false positive rate was selected for the TST method because it is the same statistical false positive rate as the current approach. This selection is problematic because the Draft Policy does not maintain the rest of the current approach that made the statistical false positive rate more acceptable, namely utilizing the numeric value with the 5% statistical false positive rate as a trigger for additional monitoring and investigation. The 5% statistical false positive rate is acceptable in the current approach because a positive test triggers additional testing and evaluation of the presence of persistent toxicity, but does result in a violation – thereby allowing the follow up testing to validate the test result before action is required. Additionally, the current approach does not include single sample determinations of toxicity.
2. Statistical analysis of the method shows that the actual statistical false positive rate would be even higher.
3. Analysis of toxicity tests run using EPA blank water shows that the rate of falsely finding clean water to be toxic was 15% using the TST method.

As outlined in the CCW MOA letter, the TST method outlined in the Draft Policy results in a false positive error rate of somewhere between 5% and over 20%. Using this range, the potential implications for wastewater dischargers are significant. These high rates of false determinations of toxicity will translate into many incorrect determinations of non-compliance with POTW effluent limits and associated risks for State and Federal penalties resulting from Clean Water Act Violations. The associated effluent limit violations will result in RWQCB enforcement resources being diverted away from real water quality violations. One of the main reasons that State Water Board staff is proposing to move to numeric objectives and limits instead of a narrative approach is because staff believes it takes too many resources to ensure that dischargers take the required actions when triggers are exceeded (Draft Staff Report p. 45). However, the proposed Policy would impose an even greater burden on the Water Boards than a narrative approach. Not only would a significant amount of Water Board staff resources be spent assessing and tracking false violations, but greatly increased resources will be required to respond to a greater number of appeals of enforcement actions for alleged toxicity violations, since the validity of toxicity testing results will be contested. As a result, water quality will suffer, because the real toxicity problems will be lost in all the noise and may go unresolved.

For major wastewater treatment facilities, any failed test result, including non-toxic samples identified as toxic as a result of the statistical procedure, are considered an exceedance of effluent limitation **and** an excursion above the toxicity objectives. Consequently, false

determinations of toxicity put dischargers at risk of state penalties of up to $10,000 per day or $10.00 per gallon, and federal penalties of up to $37,500 per day per violation and third party lawsuit and attorney fee liability. False determinations of toxicity also result in requirements to conduct accelerated monitoring consisting of six tests over a twelve-week period with multiple dilutions. The estimated cost of one accelerated monitoring event (as estimated in the Economic Analysis provided as an appendix to the staff report) is between $6400 and $9400 per monitoring location and is greater than the total annual cost of doing the monthly monitoring events required by the Draft Policy. Over the course of a five year permit, accelerated monitoring costs due to false determinations of toxicity would range from $18,000 to over $80,000 per monitoring location depending on the actual rate of false determinations of toxicity using the estimated costs provided in the Staff Report.

Since a numeric effluent violation would be assessed with every identification of toxicity according to the Policy, a discharger of **non-toxic** effluent with a monthly monitoring frequency would be expected to accrue nine violations over the course of a five-year permit cycle or about two violations a year with a 15% "false determination of toxicity rate" resulting in significant liability under the Clean Water Act for each of these false violations. Conversely, the probability that the same discharger of **non-toxic** effluent will not accrue any effluent toxicity violations during a permit cycle would be functionally zero (<0.006%).

Draft Policy does not facilitate the use of limited resources to address persistent toxicity issues

By having single sample exceedances result in violations of numeric effluent limits, the Draft Policy places dischargers in the situation of having to assess the amount of resources to expend on addressing potentially transient or false toxicity determinations versus accepting enforcement action. If a single effluent sample is identified as "toxic", one of three outcomes is possible:

1. The effluent was actually toxic and subsequent samples will be toxic which will allow for a successful TRE.
2. The effluent was actually toxic but the toxicity was sporadic/episodic and subsequent samples will be non-toxic which will result in an unsuccessful TRE.
3. The effluent was actually non-toxic (false determination of toxicity) and subsequent samples will be non-toxic which will result in an unsuccessful TRE.

Since the discharger will be in potential violation regardless of actions taken to address the toxicity, in situation #2 or #3, a more cost-effective approach could be to deal with the violations for a single exceedance of a numeric effluent limitation. Therefore, the Policy should be designed to most effectively address situation #1 and avoid unnecessary expenditures to address situations #2 and #3.

Requested Changes

To address the concerns with false positives and to focus resources on persistent toxicity that can be addressed through a TRE, we request that multiple samples be used to trigger actions to minimize the impact of false positives and evaluate the presence of persistent toxicity.

Specifically, we request that the following numeric values be used to interpret the narrative toxicity objective and trigger actions to reduce the observed toxicity:

- Exceedance of a monthly median to trigger accelerated monitoring
- Exceedance of at least two of six accelerated monitoring samples to trigger development and implementation of TRE.

Implications of TST unknown and result in concerns for use of the TST to address toxicity

Unlike other water quality parameters, measurements of toxicity are determined based on the method selected. As a result, a change in data analysis essentially changes the water quality criteria. The 40 Code of Federal Regulations (CFR) Part 136-approved chronic toxicity methods specify use of the NOEC and/or point estimates (i.e., EC/IC25) as the methods for determining toxicity. The Draft Policy proposes the use of a new method, the TST, for evaluating toxicity in water samples. As highlighted by the Draft Staff Report, all of the available methods for determining toxicity have pros and cons. However, the TST has not been evaluated and validated through a formal process and has not been formally promulgated as part of 40 CFR Part 136. As a result, we are concerned that the impacts of the TST have not been fully vetted and found to be appropriate for regulating wastewater discharges.

Primarily we are concerned with the false positive rate, as discussed above. The method and assumed false positive rate was never validated using non-toxic, blank water samples. The only way to confirm that the method assumptions do result in 5% or less of non-toxic samples being declared toxic is to conduct this type of testing. Until this type of testing is completed, the actual false positive rate for the method is unclear. As is discussed in all of the CCW letters, the false positive rate has significant implications on all dischargers and 303(d) listing decisions and should be verified before the TST is used. In addition, we have a number of other issues that we feel should be properly evaluated prior to implementing the TST as a water quality objective.

1. The regulatory management decisions (RMDs) that form the basis of the TST are potentially problematic. For example, the method sets the false positive rate based on ensuring that no more than 5% of samples are determined to be toxic when the effect level is 10% or less. However, many toxicity test procedures allow for a 10 to 15% "effect" in the control sample because of the variable nature of biological systems and toxicity testing. As a result, it is unclear if this RMD is appropriate. Because the method was not subjected to a public review process or formal peer review process, it is challenging to determine if the RMDs are appropriately assigned.

2. The TST method reverses the null hypothesis, resulting in the assumption that a discharge is toxic until proven non-toxic. This approach is counter to all other water quality objectives in California whereby exceedances are not presumed but demonstrated through water quality analytical results. This policy shift needs to be considered through a formal process and not implemented based on guidance.

3. The TST method is not included as an approved toxicity testing method in 40 CFR Part 136 and there is no intention to incorporate it into the CFR. As stated in EPA's *National*

Pollutant Discharge Elimination System Test of Significant Toxicity Technical Document, "The TST approach does not result in changes to EPA's WET test methods promulgated at Title 40 of the *Code of Federal Regulations* Part 136." Additionally, the document states "EPA could revise this document without public notice to reflect changes in EPA policy and guidance." It is not appropriate to use a method that is not incorporated into EPA's WET test methods and can be changed without public notice as a water quality objective for the State of California.

For these reasons, we feel one of the two methods included in 40 CFR Part 136 should be utilized as the numeric trigger for interpreting the narrative objective in the policy until the TST has been formally reviewed.

Recommended Changes:

The 40 Code of Federal Regulations (CFR) Part 136-approved chronic toxicity methods specify use of the NOEC and/or point estimates (i.e., EC/IC25) exclusively and recommend use of point estimates for NPDES compliance determination. As a result, we request the use of the point estimation method for determining toxic samples (EC/IC25).

The Policy Should Include a Schedule of Compliance for Dischargers to Identify and Address Toxicity

The Draft Policy provides no compliance schedule for exceedances of the new numeric effluent limitation required by the Draft Policy, placing all of these dischargers potentially in noncompliance. (The compliance schedules in the Proposed Policy are limited to two years to establish the toxicity monitoring program. Dischargers that already monitor and/or have narrative effluent limitations will not be eligible for any compliance schedules.)

Without a compliance schedule provision, dischargers would be subject to violations and fines even while making significant efforts to comply by conducting additional toxicity testing, working through the Toxicity Reduction Evaluation (TRE) and Toxicity Identification Evaluation (TIE) processes, and upon completion, planning and building additional treatment, if necessary. The Draft Policy proposes to require numeric effluent limits for toxicity for wastewater discharges even though, as stated in the Staff Report (page 45), a "noncompliant discharger continues to accrue violations despite aggressively pursing the necessary steps to identify and reduce the source(s) of the observed toxicity." The combination of numeric effluent limits and the lack of a compliance schedule provision for addressing the identification of the causes and the implementation of solutions to address toxicity results in a policy that could significantly harm agencies that are actively trying to reduce toxic discharges.

This is unfairly punitive for several reasons. First, and most obviously, dischargers will be tagged with violations based on false determinations where no actual toxicity exists. Given the episodic nature of some false determinations, where accelerated testing shows no further test failures, the discharger will not be able to prove that no true violation occurred. While the State Water Board may choose not to enforce those violations, they will be posted on CIWQS for the

public to see, recited in the compliance history set forth in permits and subject to third party enforcement.

Recommended Changes

Add a compliance schedule provision for conducting TREs and addressing identified toxicity.

Recommendation Summary

In summary, the CSD has a number of significant technical and policy concerns with the Draft Policy. However, we feel these concerns can be addressed through the use of the following alternative approach to developing the toxicity policy:

1. Define a consistent narrative objective for all inland surface waters, enclosed bays, and estuaries of the state.
2. Utilize the following numeric values to interpret the narrative objective and trigger actions.

   Monthly median 1.0 TUc using the EC/IC25 as the chronic toxicity accelerated testing trigger

   Two of six accelerated tests exceeding a 1.0 TUc using the EC/IC25 as the TRE trigger

3. Define specific, enforceable requirements that would result in violations. Suggestions for these requirements include:
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   - Failure to conduct specific steps in the TRE Plan at the specified frequency
4. Include a compliance schedule provision.