



Public Comment (11/16/10 Wrkshp)  
Policy for Toxicity Assessmnt  
Deadline: 1/21/11 by 12 noon

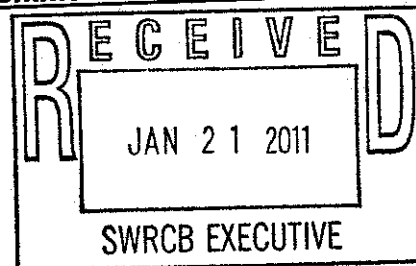
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**VIA E-Mail: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)**

January 19, 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,

Sempra Energy's regulated utilities, San Diego Gas & Electric Company and Southern California Gas Company (collectively, the "Utilities") appreciate this opportunity to provide the State Water Resources Control Board ("SWRCB") with comments on the 2010 draft Policy for Toxicity Assessment and Control ("Draft Policy").

Delivery of essential public services requires routine and emergency construction, operation, inspection, maintenance, repair and replacement of utility and other linear infrastructure. A primary mandate to utilities and other entities with linear facilities regulated by the California Public Utilities Commission and/or other state and federal regulatory agencies is to provide safe and reliable service. Since the Utilities have thousands of miles of linear facilities throughout southern California, to accomplish this mandate they each need an efficient and timely process to obtain any required permits and authorizations for their work. These operations and activities often require the use of National Pollutant Discharge Elimination System ("NPDES") permits and/or Waste Discharge Requirements ("WDRs").

The Draft Policy would establish toxicity objectives for California's inland surface waters, enclosed bays and estuaries and toxicity implementation requirements for three categories of discharges permitted under the federal Clean Water Act and/or the California Porter-Cologne Water Quality Control Act ("Porter-Cologne Act"). These categories apply to dischargers under NPDES permits and WDRs and include:

- ◆ NPDES wastewater dischargers and point source WDR dischargers;
- ◆ Stormwater dischargers regulated pursuant to NPDES permits (*i.e.*, Phase I and II Municipal Separate Storm Sewer System ("MS4") NPDES permits, individual industrial stormwater discharge NPDES permits, and construction and industrial stormwater NPDES general permits); and
- ◆ Channelized dischargers (*e.g.*, dischargers subject to the Irrigated Lands Regulatory Program and other non-point source discharges, directed through a channel, that are not regulated under the NPDES permit program) regulated exclusively under Porter-Cologne Act.

The Utilities' comments address the following issues presented by the Draft Policy:

- ◆ The Toxicity Objectives/Limits;
- ◆ Implementation Issues; and
- ◆ Clarifications.

### **The Toxicity Objectives/Limits**

The proposed methodology to be used to evaluate the toxicity test results under the Draft Policy uses a statistical method ("Test of Significant Toxicity" or "TST") from an EPA guidance document that is not part of EPA's approved 40 C.F.R. section 136 methods. As such, it has not undergone adequate public review and comment. Furthermore, oral testimony presented at the SWRCB's workshop held on November 16, 2010, indicated that there are still a number of scientific and policy issues (*e.g.*, excessive false positive test results with TST; TST presumes samples are toxic unless proven non-toxic instead of the current presumption of samples being non-toxic until proven toxic) with the TST methodology to be resolved which underscores the point that it should not be used in the Draft Policy until it has undergone a thorough review and comment process pursuant to EPA's formal regulation promulgation process.

### **Implementation Issues**

The Draft Policy would apply toxicity requirements to many permittees that should be, by definition, considered "insignificant dischargers" and therefore exempt from the Draft Policy's requirements.

The Draft Policy would establish toxicity requirements that would be applicable to most all categories of dischargers to surface waters that are regulated under both the Clean Water Act and the Porter-Cologne Act and to most dischargers to surface waters that are only regulated under the Porter-Cologne Act. The Draft Policy addresses:

- ◆ Wastewater dischargers with either individual or general discharge permits;
- ◆ Stormwater dischargers with either individual or general discharge permits; and
- ◆ Non-point source dischargers (including those under the Irrigated Lands Regulatory Program) that discharge through a channel and are not regulated under the NPDES permit program.

The only discharger types that are specifically defined as exempt from the Draft policy are non-traditional MS4s and communities with a population of less than 50,000.

The Draft Policy appears to require its application to all other dischargers either directly or upon the discretion of a Regional Water Quality Control Board (RWQCB). This would include individual or general permits for intermittent and/or short-term discharges of wastewater from sources such as underground utility vaults, hydrotest discharges, construction dewatering discharges, other "low-threat" or "de minimus" discharges, and intermittent and/or short-term construction and industrial stormwater discharges. Because many of these discharges inherently present little to no threat to water quality, they do not have the potential for significant impacts to receiving waters and consequently should not be subject to toxicity requirements. These discharges should be specifically defined in the Draft Policy as "insignificant dischargers" and exempt from the Draft Policy's requirements.

## **Ephemeral Surface Waters**

The Draft Policy seems to apply to discharges to all "surface waters" as it does not make any distinction between surface waters that contain water throughout the year and those that are ephemeral. The Draft Policy should only apply to those surface waters that are present year-round.

### **Compliance Determination - Time to Implement Accelerated Monitoring**

The Draft Policy requires accelerated monitoring to begin within fourteen days from the date of an exceedance. Given that chronic toxicity tests can last 4 to 7 days, this may leave only a week to obtain and acclimate the test organisms required to conduct the additional tests. Additional time should be provided to schedule and set up the subsequent testing.

### **Compliance Determination - Acute Toxicity Monitoring**

Part III.A.7.b contains the following sentence:

"This accelerated monitoring schedule shall also apply to acute toxicity tests if a numeric acute toxicity effluent limitation is established in a NPDES wastewater permit or point source WDR."

This sentence could be misinterpreted to mean that accelerated acute toxicity monitoring is required in the situation where the chronic toxicity limit is exceeded but the acute toxicity limit is not exceeded. The sentence needs to be revised to clarify that accelerated acute toxicity monitoring is only required when the permit contains an acute toxicity limit and that limit is exceeded.

### **Logistical Considerations**

The Draft Policy could result in thousands of additional toxicity tests being required every year in California. For all the replicates and dilutions for each test, test organisms need to be obtained from a supplier and acclimated before testing can occur. If, as proposed, testing is required for stormwater discharges, it will be difficult to obtain the required organisms and provide them the time to get adequately acclimated prior to a rain event. If the rain event does not occur or does not provide adequate runoff, these organisms may not be able to be used and new organisms will have to be obtained for the next predicted rain event. Adequate supplies of toxicity test organisms may limit the ability of dischargers to comply with the Draft Policy.

Also, for stormwater dischargers, if a test result "fails" the discharger is required to conduct accelerated monitoring within 14 days of the exceedance. However, the unavailability of a subsequent rain event would seem to prevent the discharger from complying with these requirements. The same is true if a stormwater discharger is required to conduct a Toxicity Reduction Evaluation ("TRE"). Subsequent stormwater samples may not be available to conduct the TRE.

## **Economic Analysis**

Water Code sections 13170 and 13241 prescribe the factors to be considered by the SWRCB in establishing water quality objectives, which include "economic considerations."

The economic evaluation provided for the Draft Policy is inadequate because it does not address the costs associated with all of the potentially regulated discharge types (*e.g.*, construction and industrial stormwater general discharges, vault dewatering discharges, hydrotest dewatering discharges, groundwater dewatering discharges and other low-threat or de minimus discharges. Simply making these discharges subject to the Draft Policy at the discretion of the RWQCB without a substantive analysis of the associated costs and benefits provides the illusion that the necessary Section 13241 analysis has been conducted, when it has not. Unless the costs associated with implementing the Draft Policy on these discharges (including the potential monitoring, compliance and/or treatment costs) is fully evaluated and considered under Section 13241, these discharges should be specifically excluded from the Draft Policy.

## **Clarifications**

### **Definition of Storm Event**

Part I, Section Q (p. 2) defines the term "Storm Event". The second sentence of this definition is confusing as it does not further define "Storm Event" but has to do with sample collection. To clarify the term "Storm Event", the second sentence should be replaced with the following sentence:

"Measurement of precipitation to determine a storm event begins with precipitation that starts when there has been at least 72 hours from the last precipitation and continues until there is at least 72 hours of no precipitation."

### **"Percent Effect" vs. "Mean Affect Level"**

Part III, Section A.1 (p. 5) describes when a waste discharge has a reasonable potential to cause or contribute to an excursion above the toxicity objective. In the last paragraph of this section, the terms "percent effect" (3<sup>rd</sup> line) and "mean effect level" (5<sup>th</sup> line) appear to be used interchangeably. Is it the intent of this policy that these terms are to be used interchangeably or should "percent effect" be used in place of "mean effect level" on the 5<sup>th</sup> line?

### **Attachment A**

The title for this attachment needs to clarify that it applies to industrial "wastewater" dischargers.

### **Attachment C**

The footnote for this attachment needs to clarify that it applies only to the referenced "permits" "as applicable", to clarify that the Draft Policy does not apply to all stormwater discharges.

The Sempra Utilities urge the SWRCB to conduct additional review, comment and dialogue on the Draft Policy before considering its adoption and to specifically exempt stormwater general discharge permits, wastewater general discharge permits, low-threat discharge permits and de minimus discharge permits from the Draft Policy.

Please feel free to contact Fred Jacobsen (San Diego Gas & Electric Company) at 858-637-3723 if you have any questions concerning the enclosed comments.

Sincerely,

Yours sincerely,

*Tamara Raspberry*