**Attachment 2**

**STAFF REPORT,**

**INCLUDING**

**SUBSTITUTE ENVIRONMENTAL DOCUMENTATION**

**FOR**

**STATE POLICY FOR WATER QUALITY CONTROL: TOXICITY PROVISIONS**



**Approved and Adopted by the State Water Resources Control Board on December 1, 2020**

**Revised by the State Water Resources Control Board on October 5, 2021**

DIVISION OF WATER QUALITY

STATE WATER RESOURCES CONTROL BOARD CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY

1. The Executive Summary is revised as follows:

**Executive Summary**

***Introduction***

The State Water Resources Control Board (State Water Board) is proposing to adopt the State Policy for Water Quality Control: Toxicity Provisions (hereafter referred to as the Provisions).[[1]](#footnote-2) The Provisions would establish the following elements: (1) numeric water quality objectives for both acute and chronic aquatic toxicity, (2) a program of implementation to control aquatic toxicity, (3) a consistent yet flexible framework for monitoring toxicity, and (4) a statewide statistical approach to analyze test results. The Provisions aim to provide consistent protection of aquatic life beneficial uses in waters throughout the state and protect aquatic habitats and biological life from the effects of known and unknown toxicants.

Aquatic toxicity occurs when the effects of pollutants in surface water negatively impact aquatic life beneficial uses. When originating from an effluent, these effects are typically referred to as “whole effluent toxicity” (WET). Toxicity tests estimate the effects of discharges to surface waters on the survival, growth, and reproduction of aquatic species in the receiving water. This is done through exposing test species to a laboratory test sample of either ambient water or effluent and comparing the effects to control water.

Currently, Section 4 of the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, which is also known as the Statewide Implementation Plan (SIP), includes minimum chronic toxicity control requirements for implementing the narrative toxicity objectives found in the Regional Water Quality Control Plans (basin plans) adopted by the nine Regional Water Quality Control Boards (Regional Water Boards). Each basin plan contains narrative toxicity objectives that require all waters to be maintained free of toxic substances in concentrations that produce detrimental responses in aquatic organisms, which are interpreted and implemented by the Regional Water Boards on a permit-by-permit basis. Such an approach has caused a lack of statewide consistency when addressing aquatic toxicity, and therefore new statewide aquatic toxicity water quality objectives are needed.

The purpose of the Staff Report is to present the basis for and rationale applied in the development and analysis of the Provisions and meet the State Water Boards requirement to comply with the California Environmental Quality Act (CEQA).

***Background***

Beginning in 2003, the State Water Board acknowledged the need to revise the SIP to address inconsistencies in the application of effluent limitations for toxicity. In Order WQO 2003-0012, the State Water Board determined that (1) the propriety of including numeric effluent limitations for chronic toxicity in NPDES permits for publicly-owned treatment works (POTWs) should be considered in a regulatory setting, to allow for full public discussion and deliberation; and (2) the SIP be modified to specifically address the issue.

State Water Board Resolution No. 2003-0070 authorized State Water Board staff to make language corrections to the SIP and Resolution No. 2005-0019 directed State Water Board staff to introduce an amendment to the SIP to address narrative toxicity control provisions. Under State Water Board direction, the project was later changed from developing a policy as an amendment to the SIP, to developing a water quality control plan. In addition, the Provisions will provide consistent protection of aquatic life through the establishment of numeric water quality objectives for aquatic toxicity and a program of implementation.

*Geographic Scope*

The water quality objectives for aquatic toxicity would apply to all inland surface waters, enclosed bays, estuaries, and coastal lagoons in California with aquatic life beneficial uses. The Provisions would not apply to ocean waters and non-enclosed bays such as Monterey Bay and Santa Monica Bay.

*Relationship to the Regional Water Quality Control Board Basin Plans*

In accordance with Water Code section 13170, the Provisions automatically supersede a Regional Water Quality Control Board’s water quality control plan (also known as a basin plan) for waters of the United States to the extent of any conflict. Consistent with its authority in Water Code sections 13140 and 13142, the State Water Resources Control Board has also determined that the Provisions will supersede any Basin Plans for all waters of the state to the extent of any conflict.

In particular, the Provisions would supersede portions of basin plans insofar as the basin plans 1) specify methods of assessing compliance with any numeric or narrative water quality objectives for acute and chronic toxicity; 2) regard aquatic toxicity testing or interpretation of aquatic toxicity testing results; 3) specify a numeric aquatic toxicity water quality objective that is not a site-specific water quality objective; or 4) are in conflict with the Provisions. The Provisions would also supersede Section 4 of the SIP and provide the Regional Water Quality Control Boards (Regional Water Boards) consistent requirements for monitoring and assessing compliance with aquatic toxicity water quality objectives.

The Provisions would not supersede existing narrative toxicity water quality objectives nor site-specific toxicity water quality objectives in basin plans. The Provisions also would not supersede any basin plan provisions regarding the application of narrative toxicity water quality objectives used to derive chemical-specific limits, targets, or thresholds. Additionally, the Provisions would not supersede any total maximum daily loads (TMDLs) related to aquatic toxicity (including their implementation provisions) that were established prior to the effective date of the Provisions.

***Project Elements***

*Water Quality Objectives*

The Provisions propose numeric water quality objectives for chronic and acute aquatic toxicity that are expressed as null hypotheses and incorporate a regulatory management decision (RMD). The RMDs represent the allowable error rates and thresholds that would result in an unacceptable risk to aquatic life. For chronic toxicity, the RMD is set at 25 percent and for acute toxicity, the RMD is set at 20 percent. Attainment of both the acute and chronic water quality objectives would be demonstrated by rejecting the null hypotheses and accepting the alternative hypotheses in accordance with the Test of Significant Toxicity (TST) statistical approach.

*Test of Significant Toxicity Approach*

Acute and chronic aquatic toxicity test data would be assessed using the Test of Significant Toxicity (TST) statistical approach as developed by United States Environmental Protection Agency (U.S. EPA 2010b). The TST approach is based on a type of modified hypothesis test referred to as bioequivalence testing. Bioequivalence is a statistical approach that has long been used in evaluating clinical trials in pharmaceutical products and by the Food and Drug Administration (FDA), in evaluating the attainment of soil cleanup standards for contaminated sites, and to evaluate the effects of pesticides in experimental ponds (U.S. EPA 2010a). The TST approach compares the organisms’ response (e.g., survival, growth, and reproduction) in test water to the response of organisms held in control water. The TST approach improves upon the traditional hypothesis tests used to assess aquatic toxicity by establishing RMDs and through the reversal of the null and alternative hypothesis. The RMDs provide an unambiguous measurement of a test concentration’s toxicity, while low false positive and false negative rates provide more statistical power to correctly identify a test concentration as “toxic” or “non-toxic.” The restated acute and chronic null hypotheses provide dischargers with an incentive to improve the precision of test results (i.e., decrease within-test variability) by improving laboratory procedures and/or by increasing the number of replicates used in a given aquatic toxicity test.

*Program of Implementation*

The Porter-Cologne Water Quality Control Act (Wat. Code § 13000 et seq.) authorizes the Water Boards to establish a program of implementation to achieve water quality objectives. The program of implementation must include a description of actions necessary to achieve the water quality objectives, a time schedule for the actions to be taken, and a description of monitoring to be undertaken to determine compliance with the water quality objectives. (Water Code §13242).

The Provisions include a program of implementation that contains the following elements: (1) aquatic toxicity testing methods and analysis, (2) implementation for non-storm water National Pollution Discharge Elimination System (NPDES) dischargers,
(3) implementation for storm water dischargers regulated pursuant to NPDES permits, (4) implementation for nonpoint dischargers required to monitor toxicity, and
(5) variances and exceptions to the aquatic toxicity water quality objectives.

*Toxicity Test Methods and Analysis*

The Provisions would require the use of U.S. EPA standardized aquatic toxicity methods (U.S. EPA, 2002a, 2002b, 2002c, 1995). Specific aquatic toxicity test methods would ensure appropriate species selection and experimental design are paired with the prescribed statistical approach. This is an important consideration as experimental design paired with an incompatible statistical approach could lead to the incorrect characterization of aquatic toxicity.

*Implementation for Non-Storm Water National Pollution Discharge Elimination System Dischargers*

The Provisions contain specific implementation requirements for non-storm water NPDES dischargers, which include the following primary components:

* + Instream Waste Concentration
	+ Species sensitivity screening
	+ Reasonable potential
	+ Aquatic toxicity monitoring
	+ Chronic aquatic toxicity effluent limitations
	+ Acute aquatic toxicity effluent limitations
	+ Targets for non-storm water NPDES dischargers without chronic aquatic toxicity effluent limitations
	+ Toxicity Reduction Evaluation (TRE)
	+ Flow-through acute toxicity testing systems
	+ Violation reporting and target reporting
	+ Exemptions

The Provisions would allow the State Water Board and Regional Water Boards to exempt biological pesticide and residual pesticide discharges, drinking water system discharges, natural gas facilities discharges, and certain non-storm water NPDES dischargers that are considered to be insignificant dischargers from some or all of the requirements of the Provisions.

*Implementation for Storm Water and Nonpoint Source Dischargers*

The Provisions do not require storm water and nonpoint source dischargers to conduct chronic or acute toxicity monitoring. However, storm water and nonpoint source dischargers that are required by the Water Boards to conduct toxicity testing and use the aquatic toxicity test methods and species specified in the Provisions are subject to the analysis and reporting requirements in the Provisions.

2. Section 1.1, first paragraph, is revised as follows:

**1.1 The Provisions**

This Staff Report, Including Substitute Environmental Documentation (SED), for State Policy for Water Quality Control: Toxicity Provisions (referred to as the Staff Report) provides the supporting information used by the State Water Resources Control Board (State Water Board) for the adoption of the *State Policy for Water Quality Control: Toxicity Provisions.* The Toxicity Provisions are referred to as the Provisions throughout the Staff Report.

3. Section 1.2 is deleted:

* +

4. Section 1.3 is revised as follows:

**1.3 Purpose of the Staff Report**

The State Water Board will use this Staff Report in determining whether to adopt the Provisions. The purpose of the Staff Report is to provide the supporting information used to develop the Provisions. This includes the need for the Provisions, technical information to support recommended approaches, as well as options for each approach, and alternatives considered in accordance with the California Water Code and California Environmental Quality Act (CEQA). The Staff Report also provides a record of the process used to develop the Provisions, including the environmental review, early consultation requirements, the public participation process, scientific peer review, and an economic analysis.

5. Section 1.5 is revised as follows:

**1.5. History of Toxicity Planning Efforts**

In 1991, the State Water Board adopted two statewide water quality control plans, the Inland Surface Waters Plan and the Enclosed Bays and Estuaries Plan. In 1994, litigation led to the rescission of both of these plans and California was left without water quality standards for many priority pollutants. To reestablish water quality criteria for these priority pollutants, and to effectively bring California into compliance with the federal regulations, the United States Environmental Protection Agency (U.S. EPA) promulgated the California Toxics Rule (CTR) in May 2000 (40 CFR § 131.38).

In March 2000, the State Water Board adopted the SIP. The SIP implements criteria for priority toxic pollutants contained in the CTR as well as other priority toxic pollutant criteria in the National Toxics Rule (NTR) and water quality objectives in the basin plans. The SIP applies to discharges of toxic pollutants into the inland surface waters, enclosed bays, and estuaries of California.

Section 303 of the Clean Water Act requires states to hold public hearings for review of water quality standards at least once every three years. In October 2002, the State Water Board solicited comments on potential revisions to the SIP. In December 2002, approximately 313 comments were received from 26 individuals and organizations. The State Water Board staff reviewed, carefully considered, and responded to all comments received.

In August 2003, State Water Board staff prepared a report with recommendations for revisions to the SIP to improve the SIP’s clarity and functionality in a reasonable amount of time with existing resources. The State Water Board notified interested parties of its recommended SIP revisions and provided an additional 30-day comment period. The State Water Board held a public workshop on September 30, 2003, regarding issues to be addressed in future SIP amendments.

In 2002, Los Angeles Regional Water Board staff included numeric effluent limitations for toxicity in National Pollutant Discharge Elimination System (NPDES) permits for three publicly owned treatment works (POTW) in the Los Angeles County Sanitation District. The numeric effluent limitations were intended to implement the narrative chronic toxicity objectives established in the Los Angeles Regional Water Board basin plan. In response, the Los Angeles County Sanitation District filed petitions challenging these limitations and other permit requirements (Los Coyotes Water Reclamation Plant Order Nos. R4-2002-0121 and R4-2002-0122; Long Beach Water Reclamation Plant Order Nos. R4-2002-0123 and R4-2002-0124; and Whittier Narrows Water Reclamation Plant Order No. R4-2002-0142).

On September 16, 2003, during the comment period on the recommended revisions to the SIP, the State Water Board ruled on the petitions, resulting in Water Quality Order No. 2003-0012. In this Order, the State Water Board determined that (1) the propriety of including numeric effluents for chronic toxicity in NPDES permits for publicly-owned treatment works should be considered in a regulatory setting, in order to allow for full public discussion and deliberation; and (2) the SIP be modified to specifically address the issue. Likewise in Water Quality Order No. 2003-013, the State Water Board referred to Water Quality Order No. 2003-0012 and concluded that the propriety of including numeric effluent limitations for chronic toxicity is best addressed through a rulemaking action in order to allow full public participation and deliberation.

Subsequently, on October 15, 2003, the State Water Board adopted Resolution No. 2003-0070 authorizing staff to prepare amendments to the SIP. Staff completed the draft amendments and provided an SED for public review on December 15, 2004. In January 2005, public comments were received from six organizations. The State Water Board held a public hearing on February 24, 2005, and addressed public comments. At this hearing, the State Water Board amended the SIP to provide a mechanism to implement the water quality criteria established in the CTR. The SIP establishes minimum requirements for implementing narrative toxicity objectives in the basin plans. However, these requirements are specific to narrative toxicity objectives and they do not address important implementation components such as effluent limitations, or how to establish reasonable potential. In Resolution No. 2005-0019, the State Water Board adopted the amendments to the SIP. These amendments included 1) allowing water effects ratios to be established in NPDES permits, 2) eliminating the reasonable potential trigger when ambient background pollutant concentrations exceed a priority pollutant objective, 3) adding mutual water companies to the exceptions in section 5.3, and 4) adding some non-regulatory language corrections for improved clarity.

As part of Resolution No. 2005-0019, the State Water Board also directed staff to introduce another amendment to the SIP to address narrative toxicity control provisions by January 2006. The draft Policy for Toxicity Assessment and Control (Toxicity Policy) proposed numeric toxicity objectives, a standardized method of data analysis, corresponding monitoring, reporting, and compliance determination requirements. If adopted, the draft Toxicity Policy would have superseded Section 4 of the SIP. The draft Toxicity Policy considered many of the same elements now included in the Provisions.

The State Water Board continued to indicate that the propriety of including numeric effluent limitations is best considered in a regulatory setting. For example, State Water Board WQO No. 2008-0008 referenced WQO No. 2003-0012 indicating that the propriety of including numeric effluent limitations is best considered in rulemaking. State Water Board WQO No. 2012-0001 indicated that numeric effluent limitations were not appropriate for the permit under review, but did not indicate or make a determination on whether NPDES permits more generally should include numeric toxicity effluent limitations; instead referencing WQO No. 2003-0012 indicating that the propriety of including numeric effluent limitations is best considered in rulemaking. In
January 17, 2006, the first scoping meeting was held in Sacramento to provide the public an opportunity to comment on the draft Toxicity Policy. Staff also held a CEQA scoping meeting to seek input on the scope and content of the environmental information that should be considered in the planned amendment of the Toxicity Control Provisions in the SIP. Scoping was helpful in identifying the range of actions, alternatives, mitigation measures, and significant environmental effects to be analyzed prior to the decision-making process. Scoping was also found to be an effective way to bring together and resolve the concerns of affected federal, state, and local agencies, and other interested persons including those who might not be in accord with the action on environmental grounds. In November 2010, the State Water Board held a workshop and received public comments on the draft Toxicity Policy. In August 2011, the State Water Board held a workshop in which Dr. Jerry Diamond from Tetra Tech, provided a presentation on the *Effluent, Stormwater, and Ambient Toxicity Test Drive Analysis of the Test of Significant Toxicity (TST),* referred to as the TST Test Drive (U.S. EPA, 2011b).

On June 27, 2012, State Water Board staff circulated the draft Toxicity Policy for public review and comment. The comment period ran from June 27, 2012, until
August 21, 2012. The State Water Board held a public hearing to receive oral comments on the draft Toxicity Policy on August 21, 2012. Additionally, accompanying draft environmental documents were provided to the public and prepared for the State Water Board pursuant to Section 21080.5 of the Public Resources Code.

Subsequent to the 2012 public hearing, staff were directed to incorporate the contents of the draft Toxicity Policy as an amendment to the Water Quality Control Plan for Enclosed Bays and Estuaries of California. The plan would directly supersede conflicting provisions in the basin plans and the Regional Boards would not have to amend their basin plans to incorporate the requirements.

Statewide Plans supersede regional water quality control plans, to the extent of any conflict between the two plans for the same waters (Wat. Code, § 13170.).

To achieve this combination, staff proposed the establishment of Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan), which can incorporate all statewide planning efforts for inland surface waters, enclosed bays, and estuaries in California into one statewide plan. The change from a “statewide policy” for aquatic toxicity to a statewide plan was made to facilitate implementation.

Additional stakeholder meetings were held were held in 2013 and 2017 with a variety of interested groups consisting of representative for POTWs, industry, regulatory agencies, storm water agencies, nonpoint sources, environmental groups, non-governmental agencies, and tribes. These public meetings are listed in Chapter 2.

On October 19, 2018, staff released the *Draft Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries; and Toxicity Provisions*, and the Draft Staff Report for public comment. The public comment period ran from October 19, 2018, to December 21, 2018. The State Water Board held a hearing on November 28, 2018. In addition to the oral comments received during the hearing, the Board received
37 comment letters on the October 19, 2018 Draft Toxicity Provisions and Staff Report. In their comment letters, commenters requested changes to several components of the draft Toxicity Provisions.

Staff met with stakeholders to review their comment letters and understand their concerns and, in response, prepared proposed changes to the Toxicity Provisions. Staff posted the First Revised Draft Toxicity Provisions and Staff Report on July 25, 2019. Staff held three staff workshops in August 2019 and the State Water Board held a workshop on October 3, 2019, to discuss the changes that were made and other proposed changes.

On December 24, 2019, staff posted two new appendices (Appendix J: Evaluating Laboratory Performance with the Chronic *Ceriodaphnia dubia* Reproduction Toxicity Test, and Appendix K: Survey of Laboratory Toxicity Testing Logistical Capacities) to the Staff Report for public comment, and held a workshop to discuss the appendices on January 9, 2020. Additionally, a First Revised Draft of Appendix J was released on January 10, 2020. The appendices address concerns raised by commenters in the 2018 comment letters. The public comment period closed on February 10, 2020. The Board received 9 comment letters on the new appendices.

Based on the input received during the workshops, staff made additional changes to the Toxicity Provisions and Staff Report. On July 7, 2020, staff posted the Second Revised Draft Toxicity Provisions and Staff Report for a limited scope 45-day public comment period. The Second Revised Draft Toxicity Provisions and Staff Report contains underline additions and strikeout deletions (shown with the “Track Changes” feature), which indicate revisions made to the 2018 Draft Toxicity Provisions and Staff Report. On July 22, 2020, staff posted the responses to the 2018 comments. Staff held a public workshop on July 29, 2020, to discuss the significant changes between the
October 19, 2018 Draft Toxicity Provisions and Staff Report and the July 7, 2020 Draft Toxicity Provisions and Staff Report. The limited-scope public comment period ended on August 24, 2020, and the Board received 17 comment letters on the differences between the October 19, 2020 Draft Toxicity Provisions and Staff Report and
July 7, 2020 Draft Toxicity Provisions and Staff Report. Staff reviewed the comment letters and prepared changes to the Toxicity Provisions.

On October 30, 2020, staff posted the Proposed Final Toxicity Provisions and Staff Report, with responses to the Appendices J and K comments and the differences between the October 19, 2018 Draft Toxicity Provisions and Staff Report and
July 7, 2020 Draft Toxicity Provisions and Staff Report comments posted shortly thereafter.

On December 1, 2020, the State Water Board adopted Resolution No. 2020-0044 “Establishing the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California and Adopting Toxicity Provisions.” Resolution No. 2020-0044 established the ISWEBE Plan, adopted the Provisions, and approved and adopted the Substitute Environmental Documentation, which was prepared in accordance with the regulations applicable to the State Water Board’s certified regulatory programs, California Code of Regulations, title 23, sections 3777 through 3779.

On January 26, 2021, the Superior Court in *San Joaquin Tributaries Authority v. California State Water Resources Control Board* issued a judgment and writ “enjoining the State Water Board from applying, via the Water Quality Control Plan for Inland Surface Waters and Enclosed Bays [and Estuaries], the ‘State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State’ adopted by the State Water Board on April 2, 2019, to waters other than those for which water quality standards are required by the Federal Clean Water Act (33 U.S.C. Section 1251 et seq.).” The Superior Court’s decision upheld the adoption of the ‘State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State’ (the Procedures) as part of the (1) California Ocean Plan and (2) IISWEBE Plan for “waters of the United States” as defined by the Clean Water Act. The Superior Court rejected the other challenges to the Procedures that were raised by San Joaquin Tributaries Authority.

The Superior Court’s decision addresses only the scope of the State Water Board’s authority to adopt water quality control plans under Water Code section 13170. It does not restrict the State Water Board’s authority to regulate the discharge of waste to all waters of the state pursuant to the Board’s other regulatory tools, including its authority to adopt state policy for water quality control under Water Code section 13140. Accordingly, the Superior Court’s decision did not impair the Water Boards’ authority to regulate discharges of waste to all waters of the state, including waters of the state that are not also waters of the United States, except to the extent that such regulation is via the ISWEBE Plan.

As a result of the judgment and writ issued on January 26, 2021, described in Finding 3, State Water Board staff has ceased efforts to prepare and obtain approval of the ISWEBE Plan from the California Office of Administrative Law (OAL).

On October 5, 2021, the State Water Board will consider adopting a resolution rescinding the State Water Board’s action to establish the ISWEBE Plan and confirming that because its December 1, 2020 action relied, in part, on Water Code section 13140, the Provisions were adopted as state policy for water quality control for all inland surface waters, enclosed bays, and estuaries and coastal lagoons of the state. Accordingly, the Toxicity Provisions would continue to apply to all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state as state policy for water quality control. The resolution also confirms that because the State Water Board’s December 1, 2020 action relied, in part, on Water Code section 13170, the portions of the Toxicity Provisions that apply to waters for which water quality standards are required by the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto (i.e., waters of the United States) would continue to apply to waters of the United States and would be incorporated into the ISWEBE Plan coincident with, or subsequent to, the State Water Board’s establishment of the ISWEBE Plan in the future. Consistent with the Superior Court’s decision in *San Joaquin Tributaries Authority v. California State Water Resources Control Board*, the Toxicity Provisions would not apply to non-federal waters via the ISWEBE Plan.

It is appropriate for the Provisions, as state policy for water quality control, to supersede any conflicting provisions in regional water quality control plans because one of the primary objectives of the Provisions is to establish procedures for regulation of discharges creating toxicity effects to aquatic life in all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, including those outside of federal jurisdiction. Superseding is also necessary to establish a uniform regulatory approach for all waters of the state and to strengthen regulatory effectiveness and improve consistency across all Water Boards. Because Water Code section 13146 requires state offices, departments, and boards, which includes Regional Water Boards, to comply with state policy for water quality control, superseding any conflicting provisions in regional water quality control plans will improve clarity regarding the Provision’s applicability. Therefore, in accordance with Water Code section 13170, except where otherwise noted, the Provisions would automatically supersede any Basin Plan for waters of the United States to the extent of any conflict. Consistent with its authority in Water Code sections 13140 and 13142, the State Water Resources Control Board has also determined that the Provisions would supersede any Basin Plans for all waters of the state to the extent of any conflict.

Adoption of the Resolution would have no effect on any prior actions by the State Water Board other than as specifically described in the resolution, including, without limitation, the State Water Board’s prior adoption of portions of the ISWEBE Plan using its water quality control plan authority or its state policy for water quality control authority.

6. Section 1.6 is revised as follows:

1.6 Intended Use of the Staff Report by Agencies

The State CEQA Guidelines require that the project description include, among other things, a statement briefly describing the intended uses of the Environmental Impact Report (EIR) (Cal. Code Regs., tit. 14, § 15124, subd. (d)). The agencies expected to use this Staff Report in decision making are described below.

The State Water Board will use this Staff Report in determining whether to adopt the Provisions. The Water Boards may use the information contained within the Staff Report for future decision making or permitting. Furthermore, the Provisions include a program of implementation to achieve the applicable water quality objectives.

Therefore, if the project is approved, the State Water Board and Regional Water Boards (collectively, the Water Boards), permitted storm water dischargers, POTWs, and other dischargers, where they are considered public agencies for purpose of CEQA, may be considered responsible agencies and may use the Final Substitute Environmental Document (SED) adopted by the State Water Board in their decision-making actions to comply with the Provisions.

7. Section 2.3 is revised as follows:

**2.3 Project Title**

This project is titled *State Policy for Water Quality Control: Toxicity Provisions* (the Toxicity Provisions are referred to throughout the Staff Report as the Provisions).

8. Section 3.1 is revised as follows:

**3.1 Regulatory Background and Authority**

The Federal Water Pollution Control Act of 1972, as amended (33 U.S.C. § 1251 et seq. (Clean Water Act) “is a comprehensive water quality statute designed to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”
(33 U.S.C § 1251(a).) The Clean Water Act directs states to adopt water quality standards “to protect the public health or welfare, enhance the quality of water and serve the purposes of this [Act].” (33 U.S.C. § 1313(c).)

Water quality standards generally consist of three components: designated uses for each water body or segment, water quality criteria (referred to as water quality objectives under California law) to protect the designated uses, and an antidegradation policy (40 CFR §131.6; 40 CFR § 131.13). In general, “uses” refer to what a water body is or potentially may be used for (40 CFR § 131.3(f)), with examples as diverse as use as wildlife and riparian habitat, use of water for industrial production, agricultural supply, or use for recreation due to activities such as fishing and swimming in water bodies.
(40 CFR.131.10(a).) Most, if not all, water bodies have multiple uses. “Existing uses” are “those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.” (40 CFR § 131.3(e).) “‘Designated uses’ are those uses specified in water quality standards for each water body or segment whether or not they are being attained.” (40 CFR § 131(f).) “Water quality criteria” are “expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” (40 CFR § 131.3(b).) The Federal Antidegradation policy provides three levels (tiers) of water quality protection to maintain and protect existing water uses, high quality waters, and outstanding national resource waters. (40 CFR § 131.12.).

The Porter-Cologne Water Quality Control Act (Wat. Code § 13000 et seq.) is the principal law governing water quality in California. California law designates the State Water Board and the nine Regional Water Boards as the principle state agencies for enforcing federal and state water pollution law. (Wat. Code, §§ 13140, 13160, 13225, 13240.). The Porter-Cologne Water Quality Control Act establishes a comprehensive statutory program to protect the quality and “beneficial uses” (or “designated uses” under federal parlance) of waters of the state. Beneficial uses include, but are not limited to, “domestic, municipal, agricultural, and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.” (Wat. Code, § 13050, subd.(f)).

Pursuant to California Water Code section 13241, regulatory protection of beneficial uses is carried out, in part, through water quality objectives (or “water quality criteria’’ under federal parlance) established by each of the Regional Water Quality Control Boards (Regional Water Boards) or by the State Water Board. Beneficial uses of water bodies, water quality objectives designed to protect those uses, a corresponding implementation program, and an antidegradation policy constitute a complete water quality standard.

The National Pollutant Discharge Elimination System (NPDES) Program is a federal program which has been delegated to the State of California for implementation through the State Water Resources Control Board (State Water Board) and the nine Regional Water Quality Control Boards (Regional Water Boards), collectively Water Boards. In California, NPDES permits are also referred to as WDRs that regulate discharges to waters of the United States. Under the Clean Water Act, a discharger must obtain an NPDES permit prior to discharging any pollutant from a point source into waters of the US. (33 U.S.C. § 1342.).

NPDES permits must contain effluent limitations that control all pollutants that “are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any state water quality standard, including state narrative criteria for water quality.” (40 CFR § 122.44(d)(1)(i).) As defined in the Clean Water Act, *Effluent limitation* means any restriction on “quantities, discharge rates, and concentrations of ‘pollutants’ which are ‘discharged’ from ‘point sources’ into ‘waters of the United States,’ the waters of the “contiguous zone,” or the ocean.” (40 CFR § 122.2). States are not precluded from omitting or modifying any provisions of the Clean Water Act to impose more stringent requirements. (40 CFR 123.25(a).).

The Porter-Cologne Water Quality Control Act authorizes the State Board to formulate, adopt, and revise state water policy, which may include water quality objectives, principles, and guidelines. (Water Code § 13140-13143). The State Water Board may also adopt water quality control plans for waters of the state. Regional Water Boards are required to establish regional water quality control plans, also known as basin plans, for all areas within their regions (Wat. Code, §13240). Statewide water quality control plans automatically supersede regional water quality control plans to the extent of any conflict between the two plans for the same waters. (Wat. Code, § 13170.)

The State Water Board is authorized to adopt state policy for water quality control. (Water Code § 13140.) The components of state policy for water quality control include all or any of the following: (1) water quality principles and guidelines for long-range resource planning, including ground water and surface water management programs and control and use of recycled water, (2) water quality objectives at key locations for planning and operation of water resource development projects and for water quality control activities, and (3) other principles and guidelines deemed essential by the State Water Board for water quality control. (Wat. Code, § 13142.)

The permissible contents of water quality control plans pursuant to Water Code section 13170 overlap with the permissible contents of policies for water quality control pursuant to Water Code section 13140. In some cases, the State Water Board acts under the authority of both Water Code sections 13170 and 13140.

State policy for water quality control may supersede conflicting provisions in regional water quality control plans where the State Water Board determines it is appropriate. (*WaterKeepers Northern California v. State Water Resources Control Bd.* (2002) 102 Cal.App.4th 1448, 1460.) Pursuant to Water Code, section 13146, “State offices, departments and boards, in carrying out activities which affect water quality, shall comply with state policy for water quality control unless otherwise directed or authorized by statute, in which case they shall indicate to the state board in writing their authority for not complying with such policy.” This section applies to the Regional Water Boards. (*Cf. State Water Resources Control Bd.* Cases (2006) 136 Cal. App. 4th 674, 730 [interpreting analogous language in Water Code section 13247 as applying to the State Water Board].)

Section 303(c)(2)(B) of the Clean Water Act (33 U.S.C. § 1313) requires states to adopt water quality criteria (i.e., water quality objectives) for all priority pollutants (33 U.S.C. § 1317(a)). In 1994, the State Water Board and U.S. EPA agreed to a coordinated approach to address priority toxic pollutants in inland surface waters, enclosed bays, and estuaries of California. In March 2000, State Board adopted the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) to implement priority toxic pollutant criteria.

The California Toxics Rule was promulgated by U.S. EPA in May 2000. In 2005, the State Water Board amended the SIP to provide a mechanism to implement the water quality criteria established in the CTR. The SIP contains implementation provisions for priority toxic pollutant criteria found within the National Toxics Rule, the CTR, and for priority pollutant objectives found in basin plans.

In addition, the SIP contains minimum requirements for implementing narrative toxicity objectives in the basin plans. In Order WQO 2003-0012, the State Water Board determined that (1) the propriety of including numeric effluent limitations for chronic toxicity in NPDES permits for publicly-owned treatment works should be considered in a regulatory setting, in order to allow for full public discussion and deliberation; and (2) the SIP be modified to specifically address the issue. In Resolution No. 2005-0019, the State Water Board directed staff to introduce an amendment to the SIP to address narrative toxicity control provisions. In 2012, staff were directed to incorporate toxicity control provisions as an amendment to the Water Quality Control Plan for Enclosed Bays and Estuaries of California.

The ISWEBE Plan will be established in the future by the State Water Board under authority provided by Water Code section 13170. In accordance with Water Code section 13170, except where otherwise noted, the ISWEBE Plan would supersede any Regional Water Quality Control Plans (basin plans) for the same waters to the extent of any conflict. The ISWEBE Plan may also be used by the State Water Board in the future on a case-by-case basis to include state policies for water quality control to the extent they address waters of the United States. The Porter-Cologne Water Quality Control Act authorizes the State Water Board to formulate, adopt, and revise state water policy, which may include water quality objectives, principles, and guidelines. (Water Code § 13140-13143). In some cases, including these Toxicity Provisions, the State Water Board acts under the authority of both section 13170 and section 13140. As a result, the Toxicity Provisions will apply to all waters of the State as state policy for water quality control and will be incorporated into the ISWEBE Plan in the future for waters of the United States.

9. Section 5.2.1 (last paragraph under the “***Option 1 – Preferred***” heading) is revised as follows:

Once an alpha error rate is developed, all research and processes will be subject to State Water Board review and rulemaking to amend Table 1 in the Provisions.

1. NOTE: The portions of the Toxicity Provisions that apply to waters for which water quality standards are required by the Federal Water Pollution Control Act and acts amendatory thereof or supplementary thereto (i.e., waters of the United States) will be incorporated into the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California. Future incorporation of those portions of the Toxicity Provisions, as adopted, into the water quality control plan will be considered non-substantive amendments. At that time, formatting and other organizational edits necessary for incorporation into the water quality control plan will be addressed. [↑](#footnote-ref-2)