

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2021-0044**

RECISSION OF DECEMBER 1, 2020, ESTABLISHMENT OF
WATER QUALITY CONTROL PLAN FOR INLAND SURFACE WATERS,
ENCLOSED BAYS, AND ESTUARIES OF CALIFORNIA AND
CONFIRMATION THAT THE “TOXICITY PROVISIONS” WERE ADOPTED AS
STATE POLICY FOR WATER QUALITY CONTROL
FOR ALL WATERS OF THE STATE

WHEREAS:

1. On April 2, 2019, the State Water Resources Control Board (State Water Board) adopted [Resolution No. 2019-0015](#) adopting the “State Wetland Definition and Procedures for Discharges of Dredged or Fill Material to Waters of the State” (Procedures).
2. On May 1, 2019, the San Joaquin Tributaries Authority (SJTA) filed a petition for writ of mandate in Sacramento Superior Court challenging the State Water Board’s adoption of the Procedures. On May 20, 2019, SJTA filed an amended petition. One of SJTA’s claims was that “[t]o the extent the Procedures regulate waters of the state not covered by the Clean Water Act (i.e., waters of the state that are not waters of the United States) through a statewide water quality control plan, the Board has exceeded its authority under Water Code section 13170 because these waters are not waters for which water quality standards are required under the Clean Water Act.” (Amended Pet., ¶ 56.)
3. 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 Procedures as part of the (1) California Ocean Plan and (2) Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE 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 SJTA.

4. In response to the Superior Court's decision, on April 6, 2021, the State Water Board adopted [Resolution No. 2021-0012](#), "Confirmation That The "State Wetland Definition And Procedures For Discharges Of Dredged Or Fill Material To Waters Of The State" (1) Are In Effect As State Policy For Water Quality Control For All Waters Of The State And (2) Shall Be Applied Via The Inland Surface Waters And Enclosed Bays And Estuaries Plan To Only Waters Of The United States." Resolution No. 2021-0012 confirms that because the State Water Board's Resolution No. 2019-0015 relied, in part, on Water Code section 13140, the Procedures were also effective as state policy for water quality control for all waters of the state. Accordingly, the Procedures should continue to be applied to non-federal waters as state policy for water quality control, but not via the ISWEBE Plan.
5. 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.
6. 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 Toxicity 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.
7. As described below, the State Water Board adopted the Toxicity Provisions as both a state policy for water quality control and a component of the newly-established ISWEBE Plan. The purpose of this Resolution is for the State Water Board to confirm that the State Water Board adopted the Toxicity Provisions for all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, regardless of their status as waters of the United States, as state policy for water quality control pursuant to Resolution No. 2020-0044, and to rescind Resolution No. 2020-0044's establishment of the ISWEBE Plan until further action by the State Water Board. The State Water Board is adopting this Resolution in response to the Superior Court's decision.

The State Water Board's Authority to Adopt State Policies for Water Quality Control under Water Code Section 13140

8. 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.)
9. 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.)
10. 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.
11. 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 Quality Control Boards (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].)

The State Water Board's December 1, 2020 Establishment of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California and Adoption of the Toxicity Provisions

12. On December 1, 2020, the State Water Board held a public meeting to consider establishment of the ISWEBE Plan and adoption of the Toxicity Provisions.
13. In developing, considering, and adopting the Toxicity Provisions, the State Water Board complied with the procedural requirements applicable to actions taken under both Water Code sections 13140 and 13170 and provided additional public participation opportunities to afford the public with a reasonable opportunity to participate in the consideration of the Toxicity

Provisions. The State Water Board held hearings on August 21, 2012 and October 19, 2018 after appropriate notice. (Wat. Code, §§ 13147, 13170.)

14. On December 1, 2020, the State Water Board adopted Resolution No. 2020-0044 establishing the ISWEBE Plan and adopting the Toxicity Provisions.
15. The version of the Final Staff Report, Including Substitute Environmental Documentation for the Establishment of the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California; and Toxicity Provisions (Staff Report), that was posted on the State Water Board's website following December 1, 2020, includes changes to conform with the Toxicity Provisions adopted on December 1, 2020, which allowed additional routine monitoring tests to be initiated up to two weeks after the calendar month in which the MMEL or MDEL violation occurred and which clarified the definition of the instream waste concentration. These conforming changes to the Staff Report are identified in editor's notes in the footnotes on pages viii, 25, 136, 138, and 147.
16. As stated in Section I of the ISWEBE Plan and the Staff Report, the ISWEBE Plan was established by the State Water Board under authority provided by Water Code sections 13140 and 13170. The Toxicity Provisions were adopted under the authority of both section 13170 and section 13140. As adopted on December 1, 2020, the Toxicity Provisions were to be included in the ISWEBE Plan.
17. Resolution No. 2020-0044 indicated: "This action establishes the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California (ISWEBE Plan) as a single planning document to contain all the water quality control plan provisions adopted by the State Water Board relating to inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, including waters of the United States and all other surface waters of the state. The ISWEBE Plan will 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. The Porter-Cologne Water Quality Control Act authorizes the State Water Board to formulate, adopt, and revise state policy for water quality control, which may include water quality objectives, principles, and guidelines. (Water Code § 13140-13143). State policies for water quality control may supersede conflicting provisions in regional water quality control plans where the State Water Board determines it is appropriate. 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. Including policies for water quality control in the ISWEBE Plan will facilitate public access to relevant regulatory requirements by consolidating them in one document."

18. 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 establishment of the ISWEBE Plan from the California Office of Administrative Law (OAL).

Notice of and Comment on Adoption of this Resolution

19. The adoption of this resolution is not subject to CEQA because there will be no effects on the environment. The regulations applicable to the State Water Board's certified exempt regulatory programs set forth in California Code of Regulations, title 23, Chapter 27 are not applicable because Chapter 27 "does not apply if the board determines that the activity is not subject to CEQA." (Cal. Code of Regs., tit. 23, § 3720(b).)
20. Even if this action is subject to CEQA, the State Water Board has already complied with the regulations applicable to its certified exempt regulatory programs. The State Water Board approved the Substitute Environmental Documentation in Resolution No. 2020-0044. In the Substitute Environmental Documentation, which was prepared in accordance with the provisions applicable to the State Water Board's CEQA certified regulatory programs, California Code of Regulations, title 23, sections 3777 through 3779, that accompanied the Toxicity Provisions, the State Water Board considered the effects to the environment that would result from applying the Toxicity Provisions to all waters of the state.
21. In developing, considering, and adopting this resolution, the State Water Board complied with the applicable procedural requirements applicable to actions taken under Water Code sections 13140 and 13170.
22. The State Water Board held a written comment period regarding adoption of this resolution from June 25, 2021 through July 27, 2021. Responses to those comments were provided on September 21, 2021 and revised on September 30, 2021.
23. The State Water Board noticed an October 5, 2021 hearing regarding adoption of this resolution in accordance with Water Code sections 13147 and 13170. The State Water Board received oral comments at the October 5, 2021 hearing.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. Confirms that because its December 1, 2020 action relied, in part, on Water Code section 13140, the Toxicity Provisions were adopted as state policy for water quality control for all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state. Accordingly, the Toxicity Provisions will

continue to apply to all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state as state policy for water quality control.

2. Confirms that because its 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) will continue to apply to waters of the United States and will be incorporated into the ISWEBE Plan coincident with, or subsequent to, the State Water Board's establishment of the ISWEBE Plan in the future.
3. Determines that, consistent with the Superior Court's decision identified in Finding No. 3, the Toxicity Provisions will not apply to non-federal waters via the ISWEBE Plan.
4. Determines that it is appropriate for the Toxicity 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 Toxicity Provisions was to establish procedures for regulation of discharges creating toxicity effects to aquatic life in all inland surface waters, enclosed bays, and 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 Toxicity Provision's applicability. In addition, in accordance with Water Code section 13170, except where otherwise noted the Toxicity Provisions supersede any regional water quality control plans for waters of the United States to the extent of any conflict.
5. Determines that the Toxicity Provisions are essential water quality principles and guidelines for water quality control, including the protection of aquatic life beneficial uses of all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, regardless of their status as waters of the United States.
6. Determines that any statements regarding inclusion of the Toxicity Provisions in a water quality control plan in the Toxicity Provisions, Staff Report, and response to comments do not preclude the Toxicity Provisions from also acting as state policy for water quality control.
7. Rescinds the State Water Board's action to establish the Water Quality Control Plan for Inland Surface Waters, Enclosed Bays, and Estuaries of California.

8. Confirms that all other portions of Resolution No. 2020-0044 are unchanged by this resolution.
9. Confirms that the adoption of this Resolution has no effect on any prior actions by the State Water Board other than as specifically described herein, 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.
10. Directs staff to propose the establishment of the ISWEBE Plan and to propose any appropriate incorporation of the Toxicity Provisions to regulate waters of the United States into the ISWEBE Plan at a future meeting of the State Water Board.
11. Approves and adopts the revisions to the Toxicity Provisions set forth in [Attachment 1](#) as state policy for water quality control for all inland surface waters, enclosed bays, estuaries, and coastal lagoons of the state, and for future incorporation into the ISWEBE Plan for waters of the United States, under the authority of Water Code sections 13140 and 13170.
12. Approves and adopts the revisions to the Substitute Environmental Documentation as reflected in the revisions to the Staff Report set forth in [Attachment 2](#).
13. Directs the Executive Director to incorporate the revisions to the Toxicity Provisions and Staff Report as set forth in Attachment 1 and Attachment 2, and to renumber the sections and references to the sections of the Toxicity Provisions and Staff Report accordingly, and to make other non-substantive revisions to the formatting of the Toxicity Provisions and Staff Report as appropriate.
14. Authorizes the Executive Director or designee to submit the revised Toxicity Provisions and the administrative record, including Resolution No. 2020-0044 and this resolution, to OAL and the U.S. Environmental Protection Agency for review and approval.
15. Authorizes the Executive Director or designee to make minor, non-substantive modifications to the language of the Toxicity Provisions, Resolution, and the supporting documentation if State Water Board staff or OAL determines that such changes are needed for clarity or consistency, and inform the State Water Board and the public of any such changes.

16. Directs staff, upon approval by the OAL, to file a Notice of Decision with the Secretary for Natural Resources and transmit payment of the applicable fee as may be required to the Department of Fish and Wildlife pursuant to Fish and Game Code section 711.4.

CERTIFICATION

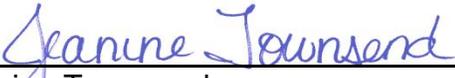
The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on October 5, 2021.

AYE: Vice Chair Dorene D'Adamo
Board Member Sean Maguire
Board Member Laurel Firestone
Board Member Nichole Morgan

NAY: None

ABSENT: Chair E. Joaquin Esquivel

ABSTAIN: None



Jeanine Townsend
Clerk to the Board