

August 21, 2012

Charles R. Hoppin, Chairman and Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Via email to: comment.letters@waterboards.ca.gov

**Re: Policy for Toxicity Assessment & Control (June 2012 - Draft)**

Dear Chair Hoppin and Board Members:

The Partnership for Sound Science in Environmental Policy (PSSEP) is an association of San Francisco area and statewide public and private entities – businesses, municipal wastewater treatment agencies, trade associations and community organizations. PSSEP appreciates the opportunity to provide these comments on the proposed June 2012 *Draft Policy for Toxicity Assessment & Control (Proposed Toxicity Policy)*.

In our January 21, 2011, comment letter on the previously issued draft of this policy PSSEP indicated that the approach proposed by staff created **far more problems and concerns** than might be justified in the name of “statewide consistency” with respect to water resource regulation involving the use of aquatic toxicity measurements -- and their interpretation. Such concerns were also consistently expressed in detailed comment letters by virtually all organizations of highly respected professionals responsible for various technical and regulatory aspects of wastewater and stormwater management throughout the state.

Unfortunately, and despite these concerns, the revised draft under your current consideration remained virtually unchanged. If adopted it would again create many more problems and concerns and, in our view, be actually counter-productive to the interests of constructive collaboration by those dedicated to the protection of state aquatic resources.

If applied properly the science of measuring aquatic toxicity can be an effective tool in protecting water quality. Unfortunately, the *Proposed Toxicity Policy* fails in this important regard, and PSSEP respectfully requests the State Board Members to:

1. Reject the staff recommendation to implement the Test for Significant Toxicity (TST) specified in the *Proposed Toxicity Policy* unless and until the TST is formally promulgated by U.S. EPA in accordance with federal law. If approved by this normal regulatory process it could then be used as appropriate by all states and tribes.

2. Continue to allow and encourage Regional Boards to constructively employ aquatic toxicity measurements and other sound science tools to assure optimal protection of the state's vast, varied and precious aquatic resources.

PSSEP believes there are many technical and legal deficiencies with the *Proposed Toxicity Policy* as more specifically enumerated in the comment letters submitted by the Western States Petroleum Association and a coalition of associations including the California Association of Sanitation Agencies (each dated August 21, 2012), and we support and incorporate those comments here. PSSEP's comments focus primarily on the **policy** and **resource** implications of the *Proposed Toxicity Policy*, and respectfully request the State Board Members to reject the current draft for the following reasons:

- 34.1 → The TST methodology, on which the entire Proposed Toxicity Policy is based, is not simply a "new approach for analyzing toxicity data" developed by U.S. EPA. (Staff Report at p. 37.) In fact, the TST approach has never been formally adopted by U.S. EPA, and thus never been subjected to a rigorous peer review and public comment process. Moreover, PSSEP is aware of no other state in the nation that has formally adopted the TST methodology for purposes of implementing 40 CFR Section 122.44(d) relative to whole effluent toxicity monitoring and compliance.
- 34.2 → Importantly, the TST has only been published by U.S. EPA as an "Implementation Document" that was succinctly prefaced by a "Notice and Disclaimer" that it "does not and cannot impose any legally binding requirements on the EPA, states, NPDES permittees or laboratories conducting or using WET testing for permittees. Contrary to this clear intention, the *Proposed Toxicity Policy* would impose significant, legally-binding requirements on California permittees.
- 34.3 → The TST approach has been reviewed and assessed by scores of respected, credible scientists who have repeatedly expressed serious concerns about the inevitability of "false toxicity determination" errors which will cause dischargers to "report" the presence of toxicity when, in fact, there is no toxicity. This "false toxicity determination" error peril should be enough for the State Board to reject a test methodology which – again – has never been formally approved by U.S. EPA, nor any other state in the nation, to our knowledge.
- 34.4 → According to an analysis conducted by CASA on the proposed TST approach, there is not much doubt that a discharger will "falsely" fail at least one test over its five-year permit term. The CASA analysis revealed that the average permitted entity in California – required to use the TST approach – would potentially have up to 3 violations **each permit cycle** for these "false toxicity determination" episodes. Aside from needlessly having to spend enormous sums of money to upgrade or

- 34.4 → replace treatments systems, these 1-3 permit violations render every permitted entity susceptible to specious third-party enforcement actions in federal court.
- 34.5 → Another significant concern related to this “false toxicity determination” conundrum is the potential impacts it will have to both the regulated community and to the limited resources of the Water Boards staff due to erroneous findings of toxicity impairment to individual water bodies throughout California, and the resulting need to develop “Toxicity TMDLs” for those waters. Under the State Board’s TMDL Listing Policy, a Regional Board would have to designate a given water body as being “impaired” under Section 303(d) of the Clean Water Act if two or more receiving water samples (out of 24 taken) are identified as “toxic.” As noted in the CASA letter, the probability of any given discharger with a monthly toxicity monitoring requirement having a “false toxicity determination” violation is approximately 15% over the course of the five-year permit term. Using this “15% false toxicity determination rate,” the chances of ***every water body in California*** being designated as “impaired for toxicity” is approximately 89%.
- 34.6 → The staff report for the draft policy includes a consultant’s report on the economic impacts if it is adopted entitled **Economic Considerations of Proposed Whole Effluent Toxicity Control Policy for California**. Cost estimates in this report are highly suspect and should be carefully questioned by Board members. From just a cursory review, PSSEP found the consultant’s report erroneously concluded that adoption and implementation of the *Proposed Toxicity Policy* would actually ***decrease*** the costs for permit required acute and chronic toxicity testing at two Bay Area petroleum refineries. In fact, these costs are expected to ***increase*** substantially.
- 34.7 → PSSEP respectfully urges the State Board to refrain from dictating that one specific tool of many afforded by the science of aquatic toxicology be used to in the name of “statewide consistency”. Contrary to staff presumptions regarding the “need” for the proposed policy there are actually outstanding examples of constructive approaches using such tools from its own Regional Boards. Notably, the San Francisco Regional Board has employed WET requirements, including numeric effluent limits since the early 1960s. These requirements have progressed to include increasingly stringent acute toxicity limits in the ensuing decades and chronic toxicity effluent limits since the early 1990s.

According to years of monitoring data compiled by the discharger supported and highly respected San Francisco Estuary Institute, there are *de minimus* examples of toxicity-related water quality problems in the San Francisco Bay. This data clearly indicates that the San Francisco Regional Board’s Basin Plan approach to implementing 40 CFR 122.44(d) has been successful. It also serves as a glowing

Charles Hoppin, Chair  
and State Board Members  
August 21, 2012  
Page 4

34.7 → example of what can continue to be achieved by the constructive collaboration of technical and regulatory professionals from both public and private institutions.

In sum, toward our shared goal of protecting precious resources, we strongly urge the State Board direct staff to “shelve” this proposed prescriptive approach and continue to work with USEPA professionals and various stakeholders to develop effective collaborative ways to use aquatic toxicity measurements in all the Regions that are scientifically sound, reasonable, effective, and fairly implementable.

Sincerely yours,



Craig S.J. Johns  
Project Manager