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# 58

Kevin Buchan

Senior Coordinator, Bay Area and State Water Issues

**VIA ELECTRONIC MAIL**

August 20, 2012

Chair Hoppin, and Members of the Board  
State Water Resources Control Board  
1001 "I" Street  
Sacramento, CA 95814

Subject: SWRCB June 2012 Proposed Policy on Toxicity Assessment and Control

Chair Hoppin, and Members of the Board

The Western States Petroleum Association (WSPA) is a non-profit trade association representing twenty-six companies that explore for, produce, refine, transport and market petroleum, petroleum products, natural gas and other energy supplies in California, Arizona, Nevada, Oregon, Washington and Hawaii.

WSPA and its members have worked diligently with staff to seek resolve on numerous issues in the Board's previous public review draft of the Proposed Policy on Toxicity Assessment and Control.

Despite these efforts, the revised version of the Proposed Toxicity Policy (*2012 Draft Toxicity Policy*), issued for public comment in June 2012, retains multiple issues of serious concern for our members, including mandating the use of USEPA's Test for Significant Toxicity (TST Method) in measures by all Regional Boards to evaluate and regulate aquatic toxicity.

We do not believe the *2012 Draft Toxicity Policy* can be effectively implemented in its current form for a variety of technical, statistical and legal reasons and recommend the following actions on this matter by the Board:

- Reject the *2012 Draft Toxicity Policy* for adoption consideration.
- Direct EPA IX to issue the TST Method via Federal Register notice.

We detail our specific concerns below.

**58.1 → A. The TST Method Required by the 2012 Draft Toxicity Policy Is Not Approved For Use Under Current Federal Requirements.**

The TST Method creates a new objective (see *2012 Draft Toxicity Policy*, pg. 5) and is not EPA approved. 40 CFR Part 136 contains guidelines establishing test procedures for the analysis of pollutants.

As outlined in the letter by PSSEP and the WATER Coalition, the TST method is new and has not been approved as meeting these guidelines. No federal register notices were released concerning the TST guidance. No estimates were made of inter-laboratory test precision, which is required for any new method. It has not yet been authorized as an alternate test procedure pursuant to 40CFR 136.5 Approval of Alternate Test Procedures.

**58.2 →** Several states across the U.S. have expressed serious concern over the implementation of the TST method and implementation policy (see *Texas Congressional letter to Lisa Jackson, 2011*). To our knowledge, no state has adopted the TST in approved policies governing evaluation of water bodies or NPDES permit limits.

**58.3 → B. The TST Methodology Will Deem Compliant, Non-Toxic Samples As Toxic.**

The TST statistical methodology departs from traditional and widely accepted aquatic toxicology principles by assuming that a sample is toxic unless it is statistically determined that it is not. This is referred to the “null hypothesis” and inappropriately presumes a permit holder in violation until they demonstrate they are not. This is in direct contrast to the reasonable and fair manner in how whole effluent toxicity (WET) policies have been historically implemented in the state.

**58.4 →** Particularly relevant to this is concern is that there are no means by which the discharger can eliminate errors or variability that are unrelated to actual effluent quality (e.g. differing response of test organisms to temperature, trace elements, total dissolved solids, etc). These “false determinations of toxicity” would be unavoidable consequence of making the USEPA TST a consistent requirement in state issued NPDES permits.

**58.5 →** In previously submitted comments<sup>1</sup> WSPA provided an illustration that, if a discharger is required to perform monthly chronic testing for one species, over a 5 year period the

<sup>1</sup> See page A-5 of WSPA’s January 21, 2011 comment letter on SWRCB’s Draft Policy for Toxicity Assessment and Control

58.5 → probability of passing all 60 monthly tests is less than 5% **even if the effluent is chemically identical to the non-toxic control water used by the laboratory.**

58.6 → WSPA also previously provided evidence<sup>1</sup> based on a review of test data using *Ceriodaphnia dubia* that only 1 out of 27 samples would have been falsely determined to be toxic by the current 40 CFR 136 methods, contrasted with 4 of 27 samples by the TST method.

58.7 → Further, this data also showed that an additional three blank samples passed the TST method test but exhibited greater than a 10% difference in response compared to the control samples. Thus, under the *2012 Draft Toxicity Policy*, 7 of 27 samples, or 26% of the USEPA **blank** samples, would have failed the reasonable potential analysis (RPA) test.

58.8 → This review showed that a false determination of toxicity error rate of 15% would mean that a discharger who is required to conduct a monthly test using one species (60 tests for a permit period of five years), will face a 95% probability of having a false determination of toxicity at least once every year during the 5-year permit period.

This also means they have a 99.99% probability of having a false determination of toxicity at least once during the 5-year NPDES permit term. Dischargers would incur significant liability under the Clean Water Act and state law for these false determinations of toxicity.

58.9 → **C. The TST Precludes Confirmation Of A Valid Dose-Response Relationship.**  
A central tenet of toxicology is that valid dose-response determinations are essential to confirm the presence of toxicity, and multiple concentration tests are required to evaluate the dose-response. The simple, one-concentration/one blank test specified in the TST is inadequate for this purpose and inhibits the regulated community's ability to determine non-toxic variability without engaging the need for additional monitoring.

58.10 → In fact, determining compliance using one in stream waste concentration (IWC) does not meet the minimum number of four samples and of two species required under Title 40 § 122.21<sup>2</sup>.

58.11 → **D. Numeric Objectives Are Currently Being Effectively Used and Enforced In Regions Within The State.**

WSPA has worked most closely with the San Francisco Regional Water Quality Control Board (SFRWQCB). The SFRWQCB has been regulating whole effluent toxicity since the 1960s and has consistently implemented numeric objectives for both chronic and

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<sup>2</sup> 40 CF 122.21(g)(7) .... the minimum of four (4) grab samples will be a representative sample of the effluent being discharged.... (j)(5) (v) Applicants must conduct tests with multiple species (no less than two species; e.g., fish, invertebrate, plant), and test for acute or chronic toxicity, depending on the range of receiving water dilution.

58.11 → acute toxicity from its Basin Plan in discharger permits. Current NPDES Permit requirements for WSPA members with NPDES Permits in this Region include:

- Weekly flow through acute testing using 15-30 day old rainbow trout (*O. mykiss*) with numeric effluent limits requiring an eleven sample median of 90% survival and 90<sup>th</sup> percentile survival of 70%.
- Quarterly chronic tests with limits generally (and becoming more stringent) requiring a statistically determined non-toxic effects in 10% effluent.

As a requirement for NPDES Permit renewal, the regulated community is also required to perform multiple chronic toxicity tests to determine the most sensitive species to their discharge in chronic tests. These tests must be conducted by highly qualified and regulated laboratories with many of the species essentially invisible to the untrained eye without magnification.

According to years of monitoring data compiled by the San Francisco Bay Regional Monitoring Program (RMP), there are *de minimus examples of* toxicity-related water quality problems in the San Francisco Bay. The RMP data demonstrates that the approach by the SFRWQCB to implementing 40 CFR 122.44(d) has been successful.

58.12 → **E. Use of the USEPA's TST "Test Drive" Demonstrated Statistical False Determinations of Toxicity.**

Several San Francisco Bay Area dischargers used the TST "Test Drive" tool to evaluate historic toxicity data that indicated compliance with their NPDES limits adopted per current SFRWQCB policy.

As shown in Table 1, in contrast with all the reviewed tests indicating full compliance with all applicable numeric WET effluent limits, the pass/fail determination varied across the board.

**TABLE 1**

	SAMPLE (All Compliant with Current SFRWQCB WET Policy)			
Concentration	1	2	3	4
2.5%	Passed	Passed	Passed	Failed
5%	Failed	Passed	Failed	Passed
10%	Passed	Passed	Passed	Failed
20%		Failed		
25%	Passed		Passed	Passed
40%		Passed		
50%	Passed		Failed	Passed
100%	Failed		Failed	Failed

**58.12** → These analyses indicate that the use of the TST method will lead to an increase in false determinations of toxicity, resulting at a minimum in unnecessary additional monitoring. This in turn will lead to the unnecessary expenditures of additional resources and an increased burden by State and Regional Water Boards, Accredited Laboratories, and the discharger community to respond to non-toxic, false indications of toxicity. In addition, potentially unwarranted enforcement actions would be expected.

**F. The TST Method Changes Acute Toxicity Testing Requirements and Limits.**

As indicated above (paragraph D) the current acute permit limits for most SFRWQCB dischargers are:

- 11 sample median: 6 tests out of 11 showing less than 90% survival is a violation
- 90th percentile: 2 tests out of 11 tests showing less than 70% survival is a violation

**58.13** → The USEPA's Test Drive protocol for the TST statistical method (comparison of calculated t-value to table t-value) requires the use of 4 replicate chambers per test. Assuming 100% control survival and 4 replicates with 10 – 15 fish each, the test will FAIL in some instances of 90% - 91.7% effluent survival.

58.14 → Part III.3 - Test Methods - of the *2012 Draft Toxicity Policy* states “Dischargers required to monitor acute toxicity shall follow the toxicity test methods established in *Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms, Fifth Edition (EPA-821-R-02-012)*”.

Table 15 of this Fifth Edition protocol requires a minimum of 10 test organisms per chamber and a minimum of 2 replicate chambers per test. The TST statistical method **will always result in a value of FAIL** if the required minimum number of test chambers and organisms are used.

Therefore, the *2012 Draft Toxicity Policy* does in fact change the acute toxicity testing procedures that dischargers are required to follow. This demonstrates that the 2012 draft Toxicity Policy does not adequately evaluate acute toxicity testing, and is a new method which must be EPA approved under 40 CFR Part 136.

58.15 → The *2012 Draft Toxicity Policy* also recommends using “invertebrate” species for any future acute RP analyses (Policy, pg. 6). To our knowledge, this is unprecedented in the state and has not been validated by the toxicity expert community.

As outlined in Pacific EcoRisk’s comment letter, originally dated January 21, 2011, serious concerns exist with respect to feasibly implementing the method per the *2012 Draft Toxicity Policy* that has yet to have been addressed. No alternative species for *M. pyrifera* exists. Additionally, the issue of species only being available during a portion of the year is a logistical concern that burdens the lab and introduces more variability in the test results.

58.16 → **G. Reasonable Potential Analyses (RPA) Conditions Specified by the *2012 Draft Toxicity Policy* Will Result In Unnecessary Effluent Limitations.**

The *2012 Draft Toxicity Policy* results in a finding of reasonable potential under either of two conditions: (1) if an effluent sample fails the TST method or (2) if the percent effect (i.e., the difference between responses of the effluent sample and the control) is greater than 10%. Because of the variability inherent in toxicity testing, particularly for sublethal, chronic toxicity endpoints, the second condition would be expected to be frequently exceeded.

Analyses conducted by WSPA demonstrated a false failure rate of the RPA of 25% for chronic toxicity tests using *C. dubia* for reproduction from USEPA WET **blank** data.

58.17 → **H. No Rationale for Percent Effect Regulatory Management Decisions Are Provided.**

During the determination of reasonable potential under the *2012 Draft Toxicity Policy*, a test that passes with a percent effect of at least 10% is deemed to have reasonable potential. In addition, if a routine monthly test fails the TST and the ‘percent effect’ (i.e., percent difference) is less than 50% (chronic test) or 40% (acute test), 2 additional tests

58.17 → must be completed within the calendar month. However, no scientific rationale or relationship to actual toxicity are provided to support the levels chosen.

58.18 → **I. Unsupported Use of the TST and Expanded Toxicity Testing of Stormwater Discharges Will Result in a Significant Increase in Enforcement Actions and Related Appeals.**

The *2012 Draft Toxicity Policy* recommends an expansion of toxicity testing to stormwater dischargers using the TST even though it is unsupported by appropriate studies or data collection. This expansion would be expected to result in a significant increase in enforcement actions and related appeals due to the inherent challenges of collecting and testing meaningful representative samples of runoff – further compounded by false determination of toxicity rates inherent in the TST method.

The State and Regional Water Boards regulate stormwater via the Construction General Stormwater Permit, the Industrial General Stormwater Permit, and other permitting requirements. Due to the intermittent and inconsistent nature of storm events, the TST is an additional and inappropriate method for evaluating stormwater discharges.

58.19 → **J. The 30 Calendar Day Requirement For Chronic Follow Up Testing Is Not Achievable.**

If a routine monthly test fails and the 'percent effect' (i.e., percent difference) is less than 50%, 2 additional tests must be completed within the calendar month. A chronic toxicity test is performed over a 7 day period and a few extra days are necessary for the lab to review and QA (quality assure) the data before reporting it to the discharger. It is likely unachievable to complete and report 3 chronic toxicity tests in a 30-day period. If the chronic toxicity test begins after the 1st of the month, it will likely be impossible to complete and report 3 chronic toxicity tests by the end of the month.

58.20 → **K. The 2012 Draft Toxicity Policy Will Increase The Need For Additional State Water Board Resources.**

Due to the increased stringency under the TST statistical method, the discharger community expects to have increased frequency of exceedances when no toxicity is being demonstrated. Such erroneous exceedances would mandate accelerated monitoring and require extensive oversight and review by agency staff.

Dischargers who believe the TST has inaccurately deemed their discharge in violation will also need to appropriately engage agency staff to resolve the discrepancy. In addition, multiple exceedances will require a Toxicity Reduction Evaluation, which will require further staff resources to review, approve and track for completion.

58.21 → **L. The 2012 Draft Toxicity Policy Will Lead To Unnecessary 303(d) Listings and TMDLs**

Another significant concern related to the "false determination of toxicity" conundrum caused by the mandated use of the TST by the *2012 Draft Toxicity Policy* is the potential



**58.21** → impacts it will have to both the regulated community and to the limited resources of the Water Boards staff. In previously submitted comments, WSPA and others have provided evidence that use of the TST method will lead 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 to the State Board, the probability of any given discharger with a monthly toxicity monitoring requirement having a “false determination of toxicity” toxicity violation is approximately 15% over the course of the five-year permit term. This false failure rate could potentially mean a full year of investigative actions with no tangible toxicity source and therefore no added environmental protection. Using this “15% false determination of toxicity rate,” the chances of every water body in California being designated as “impaired for toxicity” is approximately 89%.

**58.22** → **M. The USEPA Test of Significant Toxicity Technical Document Specifically Incorporates a Legal Disclaimer.**

The USEPA “Test of Significant Toxicity Technical Document” published in 2010 by U.S. EPA mandated by the *2012 Draft Toxicity Policy* 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 disclaimer, the *2012 Draft Toxicity Policy* would impose such legally binding requirements on California permittees.

**58.23** → **N. The Cost Analysis Underestimates The Economic Impacts.**

The economic analyses contained in the Staff Report for the *2012 Draft Toxicity Policy* include measurable factual errors and underestimate the likely monitoring costs. Neither the economic and environmental impact analyses considered the reasonably foreseeable costs of compliance.

In order to comply with the provisions in the *2012 Draft Toxicity Policy*, we are additionally concerned that additional treatment facilities may be required (potentially including nitrification, disinfection by UV/ozone, activated carbon, and/or reverse osmosis, and new testing laboratories to run the revised acute TST method), even if the findings of toxicity are false. These are in addition to the measurable increase in laboratory analysis costs that will be necessary for standard monitoring and accelerated monitoring when required.



**58.24 → O. The Need for the 2012 Draft Toxicity Policy Has Not Been Demonstrated**

The Staff Report fails to set forth why the 2012 Draft Toxicity Policy is necessary. Statements in the Staff Report regarding toxicity in waterbodies and effects of the same are qualified with phrases such as “potential,” “may be,” “might be,” or “could be.” Examples in the Staff Report include page 35 (beneficial uses “might be compromised”), page 38 (“will likely persist”), page 41 (“would likely prove challenging” and “potential impacts to aquatic life beneficial uses”), and page 44 (“may help reduce the effects of toxicity”).

There are no specific examples of water quality benefits provided. The Staff Report on page 42 includes only conclusory statements that are not supported by references to any evidence in the record; namely that “*numeric toxicity objectives... will assure the protection of aquatic life beneficial uses.*”

The Surface Water Ambient Monitoring Program (SWAMP) report entitled ‘Toxicity in California Waters’ (“Toxicity Report”), which was released in October 2011, indicates that 49% of the sampled streams, river, canals, and lakes in California show no toxicity; 70% show no to some toxicity ; and 30% show moderate to high toxicity. Further, 100% of sampled harbors and bays show no water column toxicity. See Figure 7 in the Toxicity Report.

The Toxicity Report also **indicates that pesticides (especially pyrethroid pesticides) are a primary cause of surface water toxicity in California.** Various TMDLs have been developed for waterbodies impacted by the pesticides, and USEPA and the California Department of Pesticide Regulation (CDPR) have been developing regulations for pesticides (p. 19 in the Toxicity Report). The findings of the Toxicity Report indicate that surface toxicity is an issue for certain waterbodies, but toxicity does not appear to be a state-wide issue.

Further, a wide range of efforts are already underway to enhance surface water quality and reduce toxicity in California waterbodies. Based on these findings, it is unclear what benefits the 2012 draft Toxicity Policy will have in terms of enhancing the water quality of waterbodies in California.

**58.25 → P. Unavailability and Inadequacy of Peer Reviews Conducted by EPA IX and the SWRCB**

A very limited portion of the USEPA peer review materials from the first and the 2012 Draft Toxicity Policy have been made available, however we have several concerns after reviewing them and the lack of transparency is troubling.

The detailed individual peer review comments from the USEPA peer review are not yet available.<sup>3</sup> . In addition, the summary of the peer review comments indicates several serious issues with the TST method.<sup>4</sup>

<sup>3</sup> USEPA has not released the entire peer review comments. Instead, USEPA released a summary of the peer review comments prepared by a contractor. Further responses to the peer review comments (released on March 28, 2012)

58.25 → The USEPA peer reviews did not address several important aspects of the State Board's proposed policy, namely the peer-reviewed USEPA TST document did not include the additional components that are unique to the State Board's proposed Policy (e.g., RPA procedures, application of the TST method to stormwater discharges). These aspects of the State's proposed Policy were never reviewed by the USEPA peer reviewers.

The State Board peer review was based in large part on the USEPA TST Technical Document. Although USEPA maintained that this June 2010 guidance was peer reviewed, USEPA released only a summary report describing its peer review and not the peer review comments themselves (as noted above).

Because the full peer reviews were not made available by USEPA, the State Board initiated its own peer review of the State's *2012 Draft Toxicity Policy* (focused on use of USEPA's TST), and received peer review comments from two (2) reviewers.

were not USEPA's own responses but responses prepared by Tetra-Tech [Tetra Tech, Inc. 2009 'Responses to Peer Review Comments: Evaluation of the Test of Significant Toxicity as an Alternative to Current Recommended Statistical Approaches for Acute and Chronic Whole Effluent Toxicity'; originally submitted to USEPA by Tetra Tech in Jan 13, 2009 and re-submitted on Jan 26, 2012; this summary was released on March 28, 2012 for public viewing). A memorandum cover letter which was prepared for the resubmission of the Response to Peer Review Comments by Tetra Tech states that "[p]lease note that the attached draft document does not include the many EPA decisions and changes made subsequent to external peer review comments, which are reflected in EPA's final TST document released in June 2010." EPA Disclaimer in the Responses to Peer Review Comments states that "[a]lthough it [i.e., EPA] did not develop a separate Response to Comments document, EPA considered all of the peer review comments, and the final TST document reflects the Agency's consideration of those comments." USEPA has not provided its own explanations and rationales for which peer review comments they accepted (or rejected) and what changes they made accordingly in the final TST document. Further, TT's responses are brief and do not include sufficient detail.

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- a) Peer reviewers were critical of the selection of b (the value of what used for what), and recommended presenting the decision criteria for the selection of b in the TST method (0.75 for chronic toxicity test and 0.85 for acute toxicity test). Peer reviewers stressed that the selection of b should be by consensus. USEPA never provided a scientific justification for the value of b used in the TST but simply called it a regulatory management decision ("RMD").
- b) The peer reviewers criticized the fact that the TST is based on a statistical method (i.e., Welch's t-test) which works only for normally distributed data, and that the simulation was conducted only using normally distributed test data. The peer reviewers recommended conducting simulations using various non-normal distributions. USEPA does not appear to have conducted the recommended simulations.
- c) The peer reviewers pointed out that the true toxicity of samples was unknown, and the comparison of NOEC (one of the current WET methods) and the TST was just a methods comparison that was performed without an objective standard of evaluation (i.e., without knowing the toxicity of samples): "You don't know 'truth' in this empirical exercise. This comparison simply tells you how often the 2 methods lead to similar/dissimilar decisions." One of the peer reviewers also stated that "it is important to note that the effluent is DECLARED toxic or not-toxic. You don't know truth. You only know the outcome of this decision."
- d) One of the peer reviewers warned USEPA that reversing the null hypothesis was tantamount to "innocent until proven guilty" and that considerable effort would be required to convince stakeholders of the benefit of such a paradigm shift.

58.25 → Important aspects of the *2012 Draft Toxicity Policy* have not been subjected to the peer review. The State Board Staff's request to peer reviewers was limited to four specific topics. The State Board Staff did not ask for peer review of other important and fundamental aspects of the *2012 Draft Toxicity Policy* such as,

- the use of numeric objectives to assess toxicity in permits;
- the proposed methodology for conducting RPA; or
- the scientific basis for requiring chronic toxicity tests for stormwater discharges<sup>5</sup>.

Two toxicologists conducted the review, and one of the two reviewers may not be sufficiently qualified. One of the reviewers is a molecular toxicologist whose research focuses on toxicological effects at a cellular/molecular level. This review is two pages in length and does not discuss in detail many important aspects of the *2012 Draft Toxicity Policy*.

The reviewers appear to have limited their review to the benefit of the TST approach "in theory" (i.e., the conceptual approach of the TST) but do not appear to have examined whether values selected for parameters in the TST approach were scientifically defensible.

Both the reviews were strongly supportive of the TST approach, apparently because it was designed to control both the error rate of determining toxic samples non-toxic and the error rate of determining non-toxic samples toxic, and also because it incorporates the concept of effect size.

However, it does not appear that the reviewers evaluated the scientific basis of the selected values for the error rates and the effect size<sup>6</sup>. Peer reviewers for USEPA's draft TST Technical Document, by contrast, were very critical of the values selected to describe the effect size and recommended additional analysis for the selection of the effect size.

The value that was criticized by the USEPA peer reviewers was carried forward into the State's *2012 Draft Toxicity Policy* on the basis of "best professional judgment" and

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<sup>5</sup> Both reviewers reside on the East Coast and may be unaware of the nature of storm drain systems and the unique nature of storm events in California. It is not clear from the peer reviews whether the infrequent, short-duration nature of storm events in California was considered during the review process; e.g., whether the reviewers explicitly considered the appropriateness of applying 7-8 day chronic toxicity tests to storm event discharges that typically last less than 24 hours.

<sup>6</sup> For example, it does not appear that the peer reviewers comments upon the effect size (i.e., difference between control and effluent sample) of 20% for acute tests and 25% for chronic tests.

58.25 → **without** the analysis recommended by the USEPA peer reviewers. None of the State Board reviewers commented on this issue.

Further, the State Board reviewers asserted that it is advancement in environmental regulation to put the burden of proof on dischargers, which may be a policy decision and therefore outside of their technical expertise.

58.26 → **Q. The Policy is Complicated, and Does Not Provide A Pathway to Conclude Accelerated Monitoring.**

Lastly, the *2012 Draft Toxicity Policy* is complicated. Additionally, it is unclear what criteria must be achieved for the discharger to no longer be required to conduct accelerated monitoring.

We have provided our interpretation of the chronic statistical methodology of the *2012 Draft Toxicity Policy* in a flow chart, labeled Attachment A.

### **SUMMARY OF RECOMMENDATIONS**

Based on these comments and those from others WSPA recommends the SWRCB Board direct staff to take the following action:

- Reject the *2012 Draft Toxicity Policy* for adoption consideration.
- Direct EPA IX to issue the TST Method via Federal Register notice.

We appreciate your consideration of our comments on this matter of tremendous importance, and look forward to the Board's direction to staff.

Sincerely,

*Kevin Buchan*

Enclosures: Texas Congressional Delegation Letter to Lisa Jackson, 2011 ← 58.29  
Attachment A, Flow Chart of the 2012 Draft Toxicity Policy

**Congress of the United States**  
**Washington, DC 20515**

June 13, 2011

The Honorable Lisa P. Jackson  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW  
Washington D.C., 20460

Dear Administrator Jackson:

For almost two decades, the EPA has required permit applicants to conduct whole effluent toxicity (WET) tests and has required that permits issued in accordance with the National Pollutant Discharge Elimination System (NPDES) comply with Title 40 Code of Federal Regulations Part 122.44(d) with respect to WET. There has been no change in this regulation. However, EPA Region 6 has recently made significant changes in its requirements with respect to how the WET program is implemented pursuant to this regulation. The changes are a requirement to include a sublethal WET permit limit based on the results of sublethal WET tests and a requirement to do studies to identify the cause of failures and corrective programs when only sublethal effects are present.

While we understand, and share, EPA's goal of protecting our waterways from instream toxicity caused by pollutant discharges, we are concerned that the costs and regulatory burden of implementing EPA's policy with regard to sublethal WET test failures is not justified given the apparent lack of environmental benefits based on the following:

- Implementing this policy could cost Texas communities in excess of \$20 million per year.
- EPA's own studies indicate that there is no demonstrated correlation between sublethal WET testing in the laboratory and actual instream impacts.
- Toxicity investigations attempting to identify the causes of test failures when only sublethal effects are present can cost hundreds of thousands to millions of dollars, and to the limited extent that such studies have been attempted; they have typically been unsuccessful in identifying, and eliminating the causes of sublethal WET test failures.
- Sublethal WET permit limits subject a permit applicant to potential enforcement by state agencies, EPA and to third-party citizen suit liability for test failures that may simply be the result of the statistical error rate of the test.



Given that the regulatory burden imposed in meeting a sublethal WET limit can be substantial, we urge you to revisit this EPA policy and work with representatives of the regulated community and the Texas Commission on Environmental Quality to refine the policy in a manner that meets the requirements of the federal Clean Water Act but provides more flexibility to the State and takes into consideration the environmental significance and the technical challenges posed by sublethal WET permit limits.

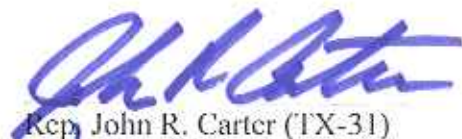
Possible approaches include the following:

- Suspend the imposition of sublethal WET limits until additional studies are conducted that clearly demonstrate a correlation between sublethal test results and instream sublethal toxicity
- Only impose a sublethal WET limit after a permit applicant has conducted a successful study to identify the cause of, and corrective measures to eliminate, test failures.

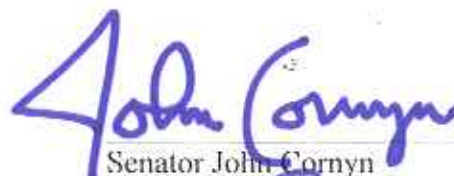
It is our understanding that TCEQ is supportive of alternatives such as these. In addition, there may be other approaches that reflect the unique challenges of sublethal WET testing while providing adequate protection against instream sublethal toxicity.

We see this not as a request to lessen the regulatory commitment to clean water, but rather an opportunity to refocus our public entities' limited resources in a manner that will most effectively protect water quality. In this challenging economic time of budget cuts and identification of cost-saving opportunities, we seek your help in ensuring that tax-payer and rate-payer funded scientific investigations and capital investments go to measures that clearly result in water quality protection and enhancement.

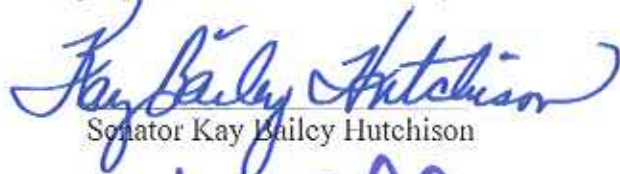
Thank you for your attention to this matter.



Rep. John R. Carter (TX-31)



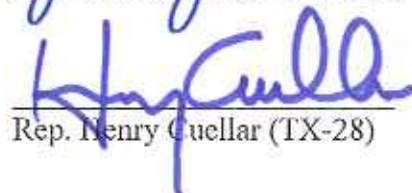
Senator John Cornyn



Senator Kay Bailey Hutchison



Rep. Silvestre Reyes (TX-16)



Rep. Henry Cuellar (TX-28)



Rep. Mike Conaway (TX-11)

  
Rep. Louie Gohmert (TX-01)

  
Rep. Lamar Smith (TX-21)

  
Rep. Pete Sessions (TX-32)

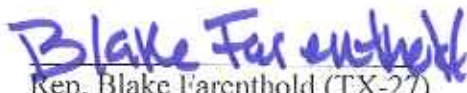
  
Rep. Sam Johnson (TX-03)

  
Rep. Randy Neugebauer (TX-19)

  
Rep. Ted Poe (TX-02)

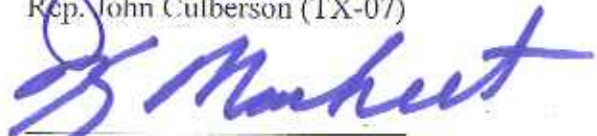
  
Rep. Michael T. McCaul (TX-10)


  
Rep. Kay Granger (TX-12)

  
Rep. Blake Farenthold (TX-27)

  
Rep. Bill Flores (TX-17)

  
Rep. John Culberson (TX-07)

  
Rep. Kenny Marchant (TX-24)

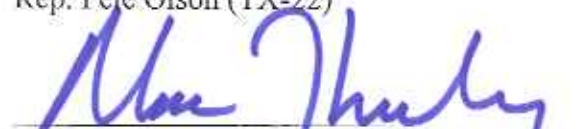
  
Rep. Ralph M. Hall (TX-04)

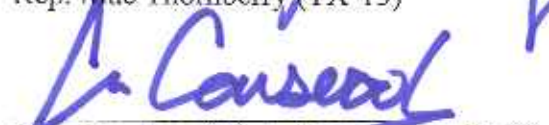
  
Rep. Kevin Brady (TX-08)

  
Rep. Joe Barton (TX-06)

  
Rep. Jeb Hensarling (TX-05)

  
Rep. Pete Olson (TX-22)

  
Rep. Mac Thornberry (TX-13)

  
Rep. Francisco "Quico" Canseco (TX-23)



# ATTACHMENT A

## Flow Chart of the 2012 draft Toxicity Policy

Revised Draft Policy  
(an example of a chronic test)

