

COALITION FOR PRACTICAL REGULATION

ITEM 4

February 2, 2005 Workshop/Board Meeting

Hrd cys: Board, DI, DWQ

E-mail to: Bd, CC, KS, HMS, TH, etc.

Via Fax and U.S. Mail

January 25, 2005

Debbie Irvin, Clerk to the Board
Executive Office
State Water Resources Control Board
1001 "I" Street, 24th Floor
Sacramento, CA 95814

Re: Draft Functional Equivalent Document (FED) and Proposed Revisions to the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP)

Dear Ms. Irvin and Members of the Board:

I am writing on behalf of the Coalition for Practical Regulation (CPR) to provide comments on the Draft Functional Equivalent Document (FED) for the Proposed Revisions to the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) and on the red-line strike-out draft of the proposed revisions to the SIP. CPR is an ad-hoc group of 43 cities within Los Angeles County that have come together to address water quality issues.

CPR's comments relate to the third of the three issues listed in the Notice of Public Hearing, the clean-up of non-regulatory language. We are extremely disappointed that staff chose to disregard the comments in our letter of November 15, 2004 and the comments of our consultant at the November 12, 2004 Scoping Meeting concerning an important item that has not yet been "cleaned-up" properly. Footnote 1 of the Introduction to the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP)* states, in part, "This Policy does not apply to regulation of stormwater discharges." The proposed changes, intended to clarify that the SIP does not apply to nonpoint sources nor to stormwater, do not sufficiently clarify the situation. The only change related to stormwater is the addition of a citation to Order WQ 2001-15. Unless revised further, one interpretation of current language would require additional economic and environmental analysis by the State Board.

The current lack of clarity is recognized in the Draft FED, which states on page 31,

- ARCADIA
- ARTESIA
- BALDWIN PARK
- BELL
- BELLFLOWER
- BELL GARDENS
- BRADBURY
- CERRITOS
- COMMERCE
- COMPTON
- COVINA
- DIAMOND BAR
- DOWNY
- GARDENA
- HAWAIIAN GARDENS
- INDUSTRY
- IRVINDALE
- LA CAÑADA FLINTRIDGE
- LA MIRADA
- LAKELWOOD
- LAWDALE
- MONEOVI
- MONTEBELLO
- MONTEREY PARK
- NORWALK
- PALOS VERDES ESTATES
- PARAMOUNT
- PICO RIVERA
- POMONA
- RANCHO PALOS VERDES
- ROSEMEAD
- SANTA FE SPRINGS
- SAN GABRIEL
- SIERRA MADRE
- SIGNAL HILL
- SOUTH EL MONTE
- SOUTH GATE
- SOUTH PASADENA
- TEMPLE CITY
- VERNON
- WALNUT
- WEST COVINA
- WHITTIER

Ms. Debbie Irvin, Clerk to the Board
CPR Comments on Draft FED and Draft SIP Amendments
25 January 2005
Page 2 of 6

"RWQCB permit writers and the regulated community have indicated that some provisions in the SIP are unclear, which makes the permit-writing process more complicated. Where such a lack of clarity exists, it is possible that SIP provisions could be applied incorrectly. The lack of clarity could also result in permit requirements being inconsistent among Regions. The changes that are necessary to improve the clarity of the SIP involve adding references to applicable sections of the SIP, rephrasing sentences, and clarifying words with incorrect, vague, or multiple meanings."

The Introduction to the CTR states that "this rule is not self-implementing; rather it establishes ambient conditions that the State of California will implement in future permit proceedings." EPA states that these ambient water quality criteria alone "have no impact or effect." In addition, the introduction to the SIP reinforces EPA's position by clarifying that:

"This Policy establishes: (1) implementation provisions for priority pollutant criteria promulgated by the U.S. Environmental Protection Agency (U.S. EPA) through the National Toxics Rule (NTR) (promulgated on December 22, 1992 and amended on May 4, 1995) and through the California Toxics Rule (CTR), and for priority pollutant objectives established by Regional Water Quality Control Boards (RWQCBs) in their water quality control plans (basin plans) ..."

As noted on page 4 of the Draft FED, "the SIP contains implementation provisions for 126 priority toxic pollutant criteria found within the National Toxics Rule, the CTR, and for priority pollutant objectives found in Basin Plans established by the RWQCBs. The SIP applies to discharges of toxic pollutants and allows for a standardized approach for permitting and maintaining statewide consistency." In adopting the SIP, the State Board attempted to make clear that the CTR does not apply directly to stormwater discharges by stating in Footnote 1 that the policy establishing implementation provisions for CTR priority pollutant criteria does not apply to stormwater.

Despite EPA's explicit statement that the CTR is "not self-implementing," we understand that State Board attorneys have concluded that since the SIP does not apply to stormwater, the CTR applies by default. This was not the general understanding when the CTR and the SIP were adopted. The State Board needs to amend Footnote 1 to clarify that the State has chosen to apply priority pollutant criteria to the receiving waters for stormwater discharges, but not directly to stormwater discharges in order to avoid underground regulation through attorney conclusions and interpretations. Otherwise, the Board will have to perform the economic and environmental analyses that were not done by USEPA.

CPR recommends the following amendment to Footnote 1 of the SIP:

Ms. Debbie Irvin, Clerk to the Board
CPR Comments on Draft FED and Draft SIP Amendments
25 January 2005
Page 3 of 6

This policy does not apply to discharges of toxic pollutants from combined sewer overflows. These discharges will continue to be regulated in accordance with the federal "Combined Sewer Overflow (CSO) Control Policy," published April 19, 1994 (59 Fed. Register 18688-18698). This policy does not apply to regulation of stormwater discharges; therefore, the priority pollutant criteria promulgated by USEPA through the California Toxics Rule (CTR) are not to be used to regulate storm water discharges. The SWRCB has adopted precedential decisions addressing regulation of municipal storm water discharges in Orders WQ 91-03, 91-04, 96-13, 98-01, 99-05, and 2001-15. The SWRCB has also adopted two statewide general permits regulating the discharge of pollutants contained in storm water from industrial and construction activities. See SWRCB Orders 99-08-DWQ and 97-03-DWQ. This Policy does not apply to regulation of nonpoint source discharges.

CPR's proposed language amendment incorporates the revisions suggested by staff and adds language to clarify what is meant by the phrase "does not apply to stormwater." We believe it means that neither the SIP nor the CTR applies to stormwater. The CTR is not self-implementing, and the State policy that establishes implementation provisions for the CTR's priority pollutant criteria does not apply to stormwater. Therefore, the CTR does not apply to stormwater discharges.

Environmental Affects/ Economic Considerations

The Economic Considerations section of the Draft FED notes,

"The SWRCB is required to consider the economic impacts of water quality planning decisions under certain circumstances. When the SWRCB adopts or revises a water quality objective, it must consider several factors, including economics, under CWC section 13241."

It also states,

"...The CEQA Guidelines provide that a project's economic effects shall not be treated as significant environmental effects but that they may be used to determine whether a project's physical changes are significant (California Code of Regulations, title 14, section 15131)."

The draft FED states that "in these SIP revisions, the SWRCB is not proposing to adopt or revise water quality objectives." However, unless Footnote 1 is revised to clarify that the CTR does not apply to stormwater, the SWRCB will, in effect, be revising water quality objectives. This is demonstrated by footnote 4, which states, "if a water quality objective and a CTR criterion are in effect for the same priority pollutant, the more stringent of the two applies." In other words, if a CTR criterion for a particular pollutant in a Basin Plan is more stringent than the existing water quality objective for that pollutant,

Ms. Debbie Irvin, Clerk to the Board
CPR Comments on Draft FED and Draft SIP Amendments
25 January 2005
Page 4 of 6

the CTR criterion supercedes the existing water quality objective. That is an indirect modification of a water quality objective, and, due to such modification, the SWRCB must consider several factors, including economics, under California Water Code Section 13241. The Draft FED statement that these "revisions are minor and will not have associated economic impacts" is invalid.

EPA's Economic Analysis (EA) of the California Toxics Rule states that "until the State implements these water quality standards, there will be no effect of this rule on any entity." It also notes, "The State of California has significant flexibility and discretion as to how it chooses to implement the CTR with the NPDES permit program." The EA focuses on 184 major point sources, including POTWs and industries that discharge to California's inland waters, enclosed bays, and estuaries. It does not focus on stormwater.

In fact, EPA states that the Agency "did not include benefits or costs of controlling nonpoint sources or stormwater discharges in its estimates of benefits and costs of the CTR." (See EPA response to CTR-034-014e.) EPA is a Federal Agency, and not subject to the requirements of the Porter-Cologne Act, which is a State law. As such, they did not perform the Economic Analysis, environmental analyses, or other analyses required by Porter-Cologne. They were deferring to the State to implement the CTR.

Further, EPA did not perform an Economic Analysis for small communities; however, Phase II of the municipal NPDES program, which impacts many small communities, is now being implemented. Therefore, if the State Board follows the interpretation we understand the attorneys have made, the Board will be applying these criteria to small communities, and will have to conduct the required analyses regarding economic impacts, as the EPA clearly did not do so.

The deficiency of suitable economic information is carried forward into the CEQA environmental checklist, which indicates that there would be "no impact" with regard to the economic implications of requiring stormwater dischargers to comply with the California Toxics Rule. This is not true. Municipalities have underfunded, overstrained budgets; if CTR criteria were to be applied to stormwater, cities and counties would likely have to take money away from other important programs. If the language remains unchanged, the CEQA checklist would have to be corrected to account for what would, in fact, be a real economic impact on municipal stormwater dischargers. Resources would be diverted away from other services.

Erroneous application of CTR standards would have a substantial impact on municipalities' ability to provide public services. If the State Board accepts the interpretation of its attorneys, municipal dischargers will be required to spend vast sums of money to treat stormwater discharges to meet CTR criteria. It is likely under those conditions that municipalities would not be able to construct facilities needed to maintain acceptable service ratios and response times for key public services.

Ms. Debbie Irvin, Clerk to the Board
CPR Comments on Draft FED and Draft SIP Amendments
25 January 2005
Page 5 of 6

MEP is the Appropriate Standard for Municipal Discharges

The CTR expressly allows application of maximum extent practicable (MEP) standards and does not apply any numeric standards to stormwater. In the *CTR Response to Comments* document EPA states, "The purpose of the CTR is to fill the current gaps in water quality criteria in inland surface waters, enclosed bays, and estuaries." (See EPA response CTR-036-004a.) EPA also acknowledges that neither the CTR nor EPA regulations require numeric effluent limitations in municipal stormwater permits, and that BMPs can substitute for numeric limitations. EPA notes,

"...the CTR language allows the practice of applying maximum extent practicable (MEP) to MS4 permits, along with best management practices (BMPs) as effluent limits to meet water quality standards where infeasible or insufficient information exists to develop WQBELs [water quality based effluent limits].

Section 402(p)(3)(B) requires municipal separate storm water systems to 1) prohibit non-storm water discharges, and 2) reduce the discharge of pollutants in storm water to MEP. The Agency has purposely not defined MEP to allow municipalities flexibility in designing pollution control measures. MEP is a dynamic performance standard which requires the municipality to demonstrate permit compliance in many ways including the use of BMPs, proper maintenance of their BMPs, and ongoing assessment of BMP performance in reducing pollutant discharges." (See EPA response to CTR-040-004.)

Furthermore, the State Water Resources Control Board (SWRCB) has determined that it is not feasible to establish numeric effluent limitations for stormwater. The new Fact Sheet for Water Quality Order 99-08 DWQ notes that, "The reasons why it is not feasible to establish numeric effluent limits are discussed in detail in SWRCB Order Nos. WQ 91-03 and WQ 91-04." In SWRCB Order WQ 91-03, the SWRCB determined that the use of BMPs to achieve both the technology-based effluent limitations and the water quality-based effluent limitations complies with the CWA and the Porter-Cologne Act. In SWRCB Order No. WQ 91-04, the State Board found that numeric effluent limitations, including toxic substance limitations, should not be applied to stormwater.

If the State Board does not clarify the current footnote 1 in the SIP, Regional Boards are likely to require in TMDLs that iterative BMPs be installed "to the CTR" instead of "to the MEP" as stated by the current Executive Officer of the Los Angeles Regional Water Quality Control Board at a scoping session for the Los Angeles River Metals TMDL.

In conclusion, CPR strongly believes that "cleaning up" the footnote language to clarify that neither the SIP nor the CTR applies to stormwater is a necessary revision to maintain the integrity of the stormwater program as it is implemented in California. If this

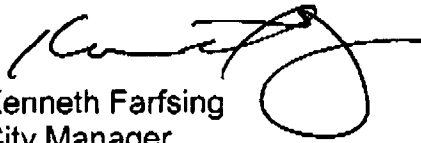
Ms. Debbie Irvin, Clerk to the Board
CPR Comments on Draft FED and Draft SIP Amendments
25 January 2005
Page 6 of 6

important revision is not made, the State must revise the CEQA environmental checklist to accurately reflect impacts of the revised SIP, and must also comply with the requirements of Section 13241 of the California Water Code.

Thank you for the opportunity to comment on the Draft Functional Equivalent Document (FED) and on the Proposed Revisions to the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California. CPR looks forward to continuing to work with the State Board to clarify and strengthen stormwater policy in our state.

Sincerely,

COALITION FOR PRACTICAL REGULATION



Kenneth Farfsing
City Manager
City of Signal Hill
On Behalf of the Coalition for Practical Regulation (CPR)

Cc: CPR Members