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Public Works Department

August 20, 2012

Via email: commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

SUBJECT: DRAFT POLICY FOR TOXICITY ASSESSMENT AND CONTROL

Dear Ms. Townsend:

The City of Benicia appreciates the opportunity to comment on the State Water Resource Control Board's (State Water Board) Draft Policy for Toxicity Assessment and Control (Policy). The City of Benicia Wastewater Treatment Plant serves a population of approximately 28,000 and treats primarily domestic sewage. The treatment plant won the CWEA Redwood Empire Section Plant of the Year award for plants under 5 MGD in 2005. The City is an active participant in the annual Coastal Cleanup event. Volunteer turnout in Benicia is the highest in Solano County.

Our agency appreciates the State Water Board's goal of state-wide consistency in toxicity monitoring and enforcement, as well as the efforts that have already gone into this Policy. However, this Policy, if adopted in its current form, will have significant impacts on our agency. We support the letter submitted by the Bay Area Clean Water Agencies, which comments on region-wide impacts of the Policy, and would like to share our concerns about the specific burdens that will fall on our agency pertaining to increased costs and increased violations.

Violations based on a single test result: Permit violations impose significant costs on public agencies such as ours: financially, legally, and in the public's trust. The current draft policy contains a Maximum Daily Effluent Limit that would assess a permit violation as a result of a single test result. Even though the MDEL involves a higher effect level, our agency believes that the use of a single toxicity test result to assess a permit violation is inappropriate.

The result of a single bioassay is not a conclusive demonstration that a sample is toxic, since there are numerous sources of uncertainty in toxicity testing. EPA guidance and approved methods note the variability and occasional anomalous results inherent in biological testing, and the TST method itself has a built-in allowance for a 5% false positive rate. Analysis of past EPA inter-laboratory data by the TST method indicates that the false positive rate may be even higher for some test species.

Therefore, our agency strongly recommends that the WET Policy, if it must include numeric effluent limits, include average, median, or other percentile limits that require more than one test result to assess a permit violation.

Increased costs of routine testing: We understand that the Policy will result in required monthly chronic toxicity testing, rather than quarterly monitoring. This modification alone will cost an additional $54,050 in laboratory costs over our 5-year permit cycle. These costs assume additional monthly monitoring 3 times per 5-year permit cycle due to the minimal false determination of toxicity rate of 5%, which is built into the TST method.

While the Policy only requires testing at a single concentration, performing additional test replications can help us avoid false determinations of toxicity. If our agency determines that additional replicates are needed to avoid falsely determined violations, then the routine monitoring will cost our agency an additional $38,520 in laboratory costs over a 5-year permit cycle. Costs for reference toxicant tests to assure data quality are not included in the Staff Report, and are in addition to this amount.

Savings resulting from termination of acute toxicity testing requirements are not assured by this proposed policy. The Economic Impacts analysis in Appendix H of the Staff report relies a large part of the estimated cost saving on the assumption that acute toxicity will no longer be required. However, since this is ultimately left to the discretion of the Regional Boards, we have to assume that Region 2 could continue to require acute testing. Furthermore, we have already invested significant resources into developing acute toxicity testing capability in-house, so even if the acute toxicity testing is not required, we will not realize the savings described in the Staff report.

Increased costs due to violations: The cost of increased violations were not considered in the Economic Impacts Analysis in the Staff Report. A major difference between this Policy and how toxicity is currently managed is that exceedences of acute and chronic toxicity limits are Clean Water Act violations subject to State penalties of up to $10,000 per day or $10.00 per gallon, and federal penalties of up to $37,500 per day per violation. The Policy does not dictate over what time period these penalties are assessed. For example, in a worst-case scenario, the penalty could be assessed over the time period of accelerated monitoring and TRE/TIE investigations, which is 6 months under the Policy. In addition, our agency would still be subject to third party lawsuit and attorney fee liability, particularly if regulators decide to take no enforcement actions.

Even though we have had excellent compliance with acute and chronic testing over the last 10 years, we are concerned that the rate of false determination of toxicity that is built in will lead to a possible violation within the 5-year NPDES permit cycle that is not related to actual toxicity.

The City of Benicia hopes that the State Water Resources Control Board will take these comments under serious consideration. The additional costs associated with the proposed policy changes will be burdensome for our agency. Even in the absence of these cost increases, we are concerned about the increase of violations that are corollary to this Policy. Thank you for your consideration of our comments.

Sincerely,

Jennifer Harrington
Water Quality Supervisor

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cc: Melissa Morton, Interim Public Works Director/City Engineer