



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Indian Wells
(760) 568-2611

Irvine
(949) 263-2600

Los Angeles
(213) 617-8100

Ontario
(909) 989-8584

500 Capitol Mall, Suite 1700, Sacramento, CA 95814
Phone: (916) 325-4000 | Fax: (916) 325-4010 | www.bbklaw.com

Riverside
(951) 686-1450

San Diego
(619) 525-1300

Walnut Creek
(925) 977-3300

Washington, DC
(202) 785-0600

William J. Thomas
(916) 551-2858
william.thomas@bbklaw.com
File No. 82231.00003

August 21, 2012



VIA EMAIL
Jeanine Townsend, Clerk to the Board
comment.letters@waterboards.ca.gov

Charlie Hoppin, Board Chair
Frances Spivy-Weber, Vice Chair
Tam Doduc, Board Member
Steven Moore, Board Member
Felicia Marcus, Board Member
State Water Resources Control Board
1001 I Street, 15th Floor
Sacramento, CA 95814

Re: Comments Policy for Toxicity Assessment and Control

Dear Chair, Vice Chair and Board Members:

On behalf of the Southern San Joaquin Valley Water Quality Coalition, we submit these comments as to the SWRCB's draft toxicity policy.

I. As the State Board should recognize, the Central Coast and Central Valley Regions have had those farm and ag water communities and the coalitions who represent them, completely immersed in ag waivers/general orders. These extensive new regulations deal with water quality, toxic contaminants, water quality monitoring, etc. Those presently emerging regulatory programs have been advanced in coordination with California Department of Food and Agriculture, California Department of Pesticide Regulation, State Water Board, etc. Now, out of left field, the State Board advances this new policy that is, in many respects, inconsistent with those other similar programs. This has been done with no discussion in these other proceedings. This either needs to all be slowed down or amended by clarifying that none of these provisions will apply to agriculture, if inconsistent with an existing regulatory water quality program.

II. This should not be considered an extreme suggestion, as the purpose of the policy is to amend provisions in the state's Policy for Implementation of Toxics Standards for Inland



BEST BEST & KRIEGER
ATTORNEYS AT LAW

August 21, 2012

Page 2

Surface Waters, Enclosed Bays, and Estuaries of California (SIP), which is a toxicity policy that applies only to point source dischargers subject to federal NPDES permit requirements.

This regulatory overreach to non-point source agricultural drainage is further apparent as the project is to develop “effluent limitations,” which do not apply to agriculture. Further, the referenced resolution is to amend the state’s SIP, which itself does not apply to agricultural discharge.

III. The new proposed policy attempts to wrongfully expand its regulatory authority by advancing an entirely new definition of discharges and then advancing regulations to apply to those additional defined waters in “channels.” Most all ag return flows into channels. Most of those channels are not waters of the U.S., and many are not waters of the state. That is particularly true of many areas in our coalition.

IV. A fundamental inconsistency with the Central Valley Irrigated Lands Program is that this suggests requiring monitoring of all discharges (this means monitoring field water directly off the field, as opposed to monitoring the waters of the state).

V. There are also technical problems with this proposed policy.

A. The Null hypothesis is an entirely backward way to approach a regulatory program. Its very purpose is to assume all waters are quality and compel an almost impossible burden to prove otherwise. It is a regulator’s dream and violates our entire system of regulation. Assuming all waters are toxic and all farmers are violators, unless proving otherwise under the false banner of “Null hypotheses,” is fundamentally improper. Furthermore, even with sampling data, there is a guaranteed false positive rate of five percent, which means that some completely non-toxic water samples will indicate toxicity.

B. The suggestion of shifting to or additionally adding long term chronic toxicity to all the historic acute testing that has been required since the regions started to deal with non-point source is meritless, and merely a staff attempt to increase very costly chronic testing. Ag return flow to waters of the state have both temporary source contribution (from treatment for a pest in a growing crop) and passes by the monitoring point rather fast. In no way does a multi-year constant exposure situation occur that could give rise to a chronic exposure. The costs are projected to increase by many fold for no purpose whatsoever.

C. All scientific consultants with whom we have discussed this have indicated that this TST testing methodology is a faulty methodology, as it has many false positives, which needlessly drives further costs and regulatory impacts.

BBK
BEST BEST & KRIEGER
ATTORNEYS AT LAW

August 21, 2012
Page 3

D. The proposed policy is incorrectly centered on penalizing dischargers who are truly attempting to reduce toxicity. Simply making test failures enforceable and imposing a system that repeatedly punishes dischargers without solutions to toxicity reduction, diverts important limited resources.

Sincerely,



William J. Thomas
for BEST BEST & KRIEGER LLP

WJT:lmg