

POLICY FOR IMPLEMENTATION OF TOXICS STANDARDS FOR
INLAND SURFACE WATERS, ENCLOSED BAYS, AND ESTUARIES OF
CALIFORNIA (SIP):

PROPOSED AMENDMENTS FOR ADOPTION – STAFF REPORT

Public Comments and Staff Responses

Draft

February 3, 2005

**Comments and Responses to the February 2, 2005 Board Meeting
Draft Final Functional Equivalent Document, Amendment to the Policy for
Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and
Estuaries of California (SIP)**

The State Water Resources Control Board (SWRCB) circulated the draft Final Functional Equivalent Document and amendments to the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP). The comment period closed January 25, 2005 and there was a Public Hearing (Item 4) held on February 2, 2005. The comments received and the SWRCB responses are presented below. A revised draft of Appendix A would within the draft FED, offers the completed amendments.

LOMPOC Regional Waste Water Treatment Plant

Comment 1: We strongly support the two substantial revisions proposed by State Water Resources Control Board (Board). The SIP should allow water effects ratios (WERs) to be established as part of the permitting process.

Response: Comment noted.

Comment 2: In addition, we support the elimination of the reasonable potential trigger for situations when ambient background concentrations of a pollutant are greater than a criterion.

Response: Comment noted.

Bay Area Clean Water Agencies

Comment 3: Commenter supports “revisions to the SIP that would allow (a) Water Effects Ratios (WER) to be established through permitting actions...”.

Response: Comment noted.

Comment 4: Commenter also notes: “recommend adding to the end of the second paragraph in Section 1.1 a statement to capture the fact that WERs are already pre-authorized by the CTR.”

Response: We do not dispute that the CTR allows the use of WERs for metals, as does the SIP. But as the SIP is presently written, all methods for SSO development (which includes WERs for metals) would require a Basin Plan amendment before they could be used to develop effluent limits in an NPDES permit. The proposed amendment will allow discharger-specific WERs for metals to be implemented in a permit instead of through the Basin Plan Amendment Process. All other methods of SSO development will still require a Basin Plan Amendment.

Comment 5: Commenter recommends: “adding to the end of the first (new) sentence in Section 1.2 the clause from the issue description (... “or other scientifically defensible methods adopted by the state”) to allow for the use of other scientifically defensible methods like the biotic ligand model (BLM) or streamlined WERs, where appropriate, in addition to conventional WERs.”

Response: The BLM or streamlined WERs are newer methods for developing SSOs than the proposed method (USEPA guidance – Interim Guidance on the Determination and Use of WERs for Metals – EPA-823-B-94-001). The proposed method has been used successfully through out the United State and has been shown to be protective to water quality for many years. BLM and streamlined WERs may be considered in future SIP amendments, once they have been successfully used in California and other areas.

Comment 6: BACWA support the elimination of the ambient background trigger for the determination of reasonable potential. We do not believe that the current approach provides any additional water quality protection. BACWA recommends that the SWRCB adopt a modified version of Alternative 3 where the ambient trigger (Steps 5 and 6) would be deleted and the rest of the RPA approach in Section 1.3 left as is.

Response: The proposed reasonable potential approach does provide water quality protection. If the ambient background concentration of a pollutant is greater than the criteria and that pollutant **is** found in the discharged effluent (in any amount), the pollution concentration could possibility contribute to additional impairments. If however, the ambient background concentration of a pollutant is greater than the criterion and the pollutant is **not** detected in the discharge, periodic monitoring is necessary. Additionally, the monitoring data of the pollutant can be used to address TMDL requirements.

CASA / Tri-TAC

Comment 7: Commenter requests clarification of the statement “The SIP does not allow discharger-specific WERs for metals to be used in permits.” They go on to state their understanding of the statement and what they believe our intent is.

Response: “Discharger-specific” Water Effect Ratios (WERs) are permit-specific objectives that are developed for a single discharger (i.e. a specific discharge point regulated by a NPDES permit), as opposed to the development of Site-specific Objectives (SSOs) on a watershed basis where the WERs can be applied to several discharge points. Thus, it is our intent with this amendment to modify the language of the SIP to allow RWQCBs to use discharger-specific WERS in a single NPDES permit.

The term “discharger-specific” will be added to the SIP in Appendix 1 – Definition of Terms. The definition language will read: Discharger-specific is a WER that is applied to individual pollutant limits in an NPDES permit issued to a particular permit holder. A discharger-specific WER applies only to the applicable limits in the discharger’s permit. Discharger-

specific WERs are distinguished from WERs that are developed on a waterbody or watershed basis as part of a water quality standards action resulting in adoption of an SSO.

Comment 8: Commenter also notes that they feel “the proposed amendment language does not clearly explain the pollutants to which the proposed amendment applies, the meaning of the term “discharger-specific,” or the conditions under which a Basin Plan amendment would still be required.”

Response: The proposed revision states that “The RWQCB may adjust the criteria/objective for metals with discharger-specific Water Effect Ratios established in accordance with USEPA guidance – Interim Guidance on Determination and Use of Water Effect Ratios for Metals (EPA-823-B-94-001), if appropriate.” Thus, those metals that the proposed guidance (EPA-823-B-94-001) could be used for to develop a WER are the metals which the proposed revision applies. The proposed amendment would allow for WERs for metals to be developed and used in a permit without the additional need for a Basin Plan Amendment. The meaning of the term “discharger-specific” is noted in the response to the previous comment.

Comment 9: Commenter also notes that other scientifically defensible methods should be allowed to be used to develop “discharger-specific” WERs. They also request in the letter that “the biotic ligand model (BLM)” and the “Streamlined Procedure” for determining site-specific values for a WER be allowed as permissible methods.

Response: See comment- response Bay Area Clean Water Agencies

Comment 10: Commenter also proposed that WERs established using EPA approved guidance or other scientifically approved methods be allowed to be “approved by RWQCBs”... “during the adoption of a TMDL rather than through a Basin Plan amendment solely aimed at adopting a SSO.” Also they state that “before adoption of this amendment” an issue “is to clarify either in the SIP or through guidance to RWQCBs that WERs approved through a permitting process should be administratively incorporated into Basin Plans, since the WERs would affect the underlying water quality standard and should be used for other purposes than permitting, such as water quality assessment and preparation of the Section 303(d) List.”

Response: The proposed revision is for “discharger-specific” WERs that relate to a specific permitted NPDES discharge. During the process of permit adoption, the reports supporting the WER and associated environmental and other documents will be subject to a formal adjudicative process that is specific to the discharge. Administratively incorporating WERs into Basin Plans for use for other purposes does not comply with procedural requirements that apply to the adoption of water quality standards. These include, for example, EPA’s public participation guidelines, the rulemaking provisions of the Administrative Procedure Act, and the Water Code provisions on basin planning. The data used to develop the discharger-specific WER is available for use in developing watershed WERs and can then be used to develop a Basin Plan amendment for the watershed.

Comment 11: Support the State Board’s proposed elimination of the ambient background-only trigger for the determination of reasonable potential, which currently leads to the inclusion of an effluent limit even in cases where a constituent is not detected in the effluent. We do not believe that the current approach provides any additional water quality protection.

Response: See comment-response Bay Area Clean Water Agencies

Comment 12: We also would like to point out that, as currently drafted, the proposed amendment to the RPA process will likely not result in reductions in monitoring costs as claimed on p. 33, since monitoring will still be required for pollutants for which the ambient background concentration exceeds the water quality criteria/objective, even if the pollutant is not detected in the effluent. The Economic Considerations section of the FED should be modified to accurately reflect the SWRCB’s intent regarding modification of monitoring requirements as a result of this amendment.

Response: Prior to this proposed amendment, if ambient background concentration is greater than the pollutant criterion an effluent limit would be placed in the permit and with that comes monitoring requirements. The proposed amendment states if the ambient background concentration is greater than the criterion, but the pollutant is not detected in the effluent then periodic monitoring is required. This will likely be less monitoring than when monitoring for an effluent limit. In either case, monitoring will continue to either be the same (prior to the proposed amendment) or be less with periodic monitoring. In any event, the SWRCB is not required to consider economics under either CWC section 13241 or CEQA, in this case. The State Board is not adopting or revising water quality objectives or adopting performance standards or treatment requirements.

Heal the Bay

Comment 13: Commenter states: “Do Not Establish Water Effects Ratios as part of the permit process.” They note that “rigorous studies” are needed to show “that higher-than-CTR levels of a given toxic chemical are not harmful...” and that other variables must be considered. They also note “The NPDES permit process does not involve a working group or technical advisory panel...”.

Response: The establishment of WERs as part of the NPDES permitting process does not alleviate the need for “rigorous studies” that show that the proposed WER will be protective to the beneficial uses of the proposed site. No reduction of the needed proof of the validity of the proposed WER is part of the proposed revision. Only changes to the process as to how the WERs are incorporated into the NPDES permit are proposed. A working group or technical advisory panel can still be used in the process of developing a WER. The revision only shortens the time for the use the WER in development of an effluent limit in an NPDES permit. The public will still have a chance to comment on the proposed WER.

Comment 14: Do Not Eliminate the reasonable potential trigger from SIP section 1.3 when ambient background pollutant concentrations are greater than the water quality criterion. The

proposed revision would allow discharges to merely monitor such pollutants without imposing an effluent limit on them.

Response: The proposed amendment to reasonable potential continues to impose an effluent limit when background is greater than criteria and the pollutant is detected in the effluent. The changes made are for situations where ambient background is greater than criteria and the pollutant is not detected in the dischargers' effluent. However, in these cases periodic monitoring is still required. This monitoring data can be used for future TMDL efforts. In order to ensure a discharge does not contribute to an existing impairment, the proposed language requires either a continued effluent limit placed in the permit or additional monitoring for that pollutant.

Coalition for Practical Regulation

Comment 15: The proposed changes, intended to clarify that the SIP does not apply to non-point sources or 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 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.

The draft FED states, "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.

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 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.

Response: This Commenter did not discuss proposed revisions to the SIP, but rather focused on changes that staff did not make with regards to the applicability of the policy to storm water discharges.

The California Toxics Rule (CTR) and the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) make separate but clear statements regarding how they are to be applied. The final paragraph of the CTR Summary states "These Federal criteria are legally applicable in the State of California for inland surface waters, enclosed bays and estuaries for *all* purposes and programs under the

Clean Water Act” (emphasis added). The Introduction of the SIP states that the Policy applies to NPDES discharges or other regulatory approaches, as outlined in Footnote 1. Footnote 1 states that the Policy does not apply to regulation of storm water discharges. In other words, the criterion in the CTR (and NTR) apply to waterbodies rather than to specific types of discharges, and the SIP establishes implementation provisions on how the NTR, CTR, and basin plan objectives are to be implemented in permits.

The Commenter provides the following suggested language for Footnote 1: “...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 addition of such language to the SIP is inappropriate because the SIP clearly states that it does not apply to regulation of storm water discharges; the SIP cannot make statements on how discharges outside its purview are to be regulated. Since the CTR applies to all purposes and programs under the CWA, it is possible for the CTR to be used under other regulatory programs (e.g., storm water). The appropriate agency for suggestions on how the CTR and NTR should apply is USEPA.

California Regional Water Quality Control Board – Central Valley Region

Comment 16: Commenter notes several comments on establishing WERs as part of the permitting process.

Response: Most of these comments concern the process of developing a WER. The proposed SIP revisions do not change the scientific process of developing a WER or the level of proof needed to insure that the proposed WER is protective. As the SIP presently allows the development of SSOs using WERs, no response to these comments is needed as the scope of the comments is limited to proposed changes to the SIP.

Comment 17: Concerned about the method in EPA Guidance for deriving WERs. Notes that guidance may be inconsistent with the Porter Cologne Water Quality Control Act (Porter Cologne), especially for effluent-dominated water bodies.

Response: As this guidance is noted in the current SIP as one of the methods that is allowed for SSO development and the scope of comments is on changes in the SIP, no response is necessary. Nevertheless the SIP, as written, notes that all SSOs must be derived in accordance with the Porter Cologne. No changes are proposed to this provision of the SIP and thus any discharger-specific WERs must be consistent with Porter Cologne.

Comment 18: Concerns about appearance of major differences between developing a SSO through the basin planning process and establishing a WER in a permit. How processes are different needs to be explained.

Response: The proposed SIP revisions do not change the scientific process of developing a WER or the level of proof needed to insure that the proposed WER is protective for discharger-specific WERs. The proposed revision only changes the process of “adopting the

WER". Instead of going through a Basin Plan Amendment, the WER is established in the NPDES permit and is specific to the permitted discharge. Findings in the permit and the Fact Sheet for the permit will note the methods used to develop the WER and address any other applicable requirements e.g. antidegradation requirements. Public advisory groups can continue to be used in the development of the WER, if desired. Permits are sent out for public comment. Staff envisions that the process will be shorter in time, but will not be any less scientifically rigorous.

Comment 19: Concerns about how adoption of WERs in NPDES permits complies with Porter Cologne and CEQA

Response: See comment-response California Regional Water Quality Control Board, Central Valley

Comment 20: Concerns about the costs of determining WERs and that the economic analysis of the revisions noted that there would be no economic impacts.

Response: The SIP, as written, allows for the use of WERs, so the cost of developing WERs does not change as the results of the proposed revisions to the SIP.

Comment 21: Concerned that the SIP revision does not address anti-degradation and/or anti-backsliding concerns, since many dischargers currently meet CTR receiving water limitations

Response: The revisions to the SIP do not change the need for complying with anti-degradation and/or anti-backsliding requirements.

Comment 22: There is a need for further clarification on relationship between discharger-specific WERs and TMDL watershed allocations.

Response: In cases where a TMDL is being developed, a watershed based SSO is a more effective way to proceed. However, data developed during a discharger-specific WER could be used to assist in the development of a watershed SSO for TMDL development. A discharger-specific WER only applies to the specific NPDES permit in which it is adopted. A watershed-based SSO applies to the watershed for which it was developed and will apply to all discharges, whether point or no-point.

Comment 23: Wastewater is sampled infrequently. Some constituent exceedences are rarely found but at high values, possibly from slug load discharges. The likelihood of sampling being conducted when a slug load is being discharged is statistically low, so the existing SIP language to include an effluent limitation when the receiving water exceeds criteria provides protection in the event that effluent may periodically contain that constituent. The proposed revision removes that protection.

Response: It is important to note that the use of any additional information still applies. Step 7 was unintentionally stricken from the draft revisions. Step 7 (any additional

information) will be replaced within the reasonable potential analysis steps. It should also be noted that this rationale can be used to require effluent limits for an unlimited number of pollutants that have not been detected in effluent. This is unreasonable.

Comment 24: The SIP should allow consideration of additional information for both cases of Step 7.

Response: We agree with this comment. The language was unintentionally stricken from the draft revision and should be corrected. Step 7 will be added for all cases within Step 6.

Comment 25: Amend Appendix 2 (2-1) flow diagram Step 7 to allow the determination that an effluent limitation is required, as is indicated in the narrative text of Section 1.3.

Response: We agree with this comment. Step 7 will be added to Appendix 2 (2-1) diagram.

Comment 26: The proposed SIP revision includes a new footnote that says that the SIP does not apply to non-point sources. It also deletes language about how waivers and WDRs can be used to implement the SIP for non-point sources. This appears to be a substantial, regulatory modification that needs clarification. The SIP should be clarified to explain how addition of the footnote influences how we regulate non-point source discharges.

We strongly oppose any provisions in the SIP that would suggest that non-point source discharges do not have to meet current CTR, NTR and Basin Plan water quality objectives. In addition the Regional Board Basin Plan requires that the Board consider other standards, including the CTR and NTR, in implementing its narrative water quality objectives. If this revision is included, it should be clarified that it does not affect the implementation of Basin Plans if those are more stringent.

Response: The water quality criteria contained in the CTR and NTR apply to waterbodies and therefore may be applied to other regulatory programs, such as the nonpoint source program, via other state policies. Nonpoint source discharges are currently addressed in the *SWRCB Policy for the Implementation and Enforcement of the Nonpoint Source Pollution Control Program* (NPS Implementation and Enforcement Policy) (2004) and the *Plan for California's Nonpoint Source Pollution Control Program* (NPS Program Plan) (1999). The policy recognizes that all NPS discharges must be regulated under either WDRs, a conditional waiver, or a prohibition. In addition, NPS discharges, like point source discharges, must meet water quality standards, including NTR and CTR criteria. We are proposing to revise the section of the SIP that applies to nonpoint source discharges (Section 5.1) because the NPS Implementation and Enforcement Policy now covers nonpoint source issues. The revision to the SIP in no way implies that the provisions in the CTR and NTR cannot be used to regulate nonpoint source discharges. To avoid confusion on this topic, we will add language to direct the reader to the NPS Implementation and Enforcement Policy.

Verbal Comments – Official Transcripts will not be available until the end of February. Therefore we will answer verbal comments by commenter and subject.

Bay Area Delta Keepers – Bill Jennings

Comment 27: Deletion of non-point source language

Response: See comment-response California Regional Water Quality Control Board, Central Valley

Comment 28: Loss of agricultural waivers

Response: See comment-response California Regional Water Quality Control Board, Central Valley

Comment 29: WERs and backsliding

Response: See comment-response California Regional Water Quality Control Board, Central Valley

Comment 30: WERs and Permit Gridlock/burden on Regional Board staff

Response: We do not believe that establishing WERs as part of the NPDES permitting process would use more staff time than would establishing a WER through the basin planning process, although it would require using different staff resources (i.e., permitting staff vs. basin planning staff). The Commenter should note that this would be an option available to the Regional Boards and not a requirement. The Regional Boards could opt to continue to implement WERs thorough the basin planning process. Furthermore, a discharger-specific WER would not necessarily delay adoption of a permit. Regional board staff could include a re-opener to allow for studies to be completed within the life of the permit, and include appropriate modifications based on the WER at a later date. The intent of this modification is to free staff resources by allowing for a shorter administrative process.

Comment 31: Reasonable Potential and Slug loads

Response: See comment-response California Regional Water Quality Control Board, Central Valley