

SECTION II EXISTING REGULATORY CONDITIONS

Current regulatory requirements for the control of toxic pollutants and toxicity to inland surface waters, enclosed bays, and estuaries are found in both Federal and State law. These requirements, which include applicable standards and implementation of those standards, are briefly discussed below.

A. Applicable Standards

In California, water quality criteria for toxic pollutants applicable to inland surface waters, enclosed bays, and estuaries are found in both the NTR and in water quality control plans (basin plans) adopted by the RWQCBs. As the "Background" discussion in Section I indicates, criteria for about 40 priority pollutants covered in the NTR are currently in effect in the State.

In addition, water quality objectives, which are equivalent to federally-adopted water quality criteria, for some priority pollutants are found in some of the RWQCB basin plans. Under the Porter-Cologne Water Quality Control Act (Porter-Cologne Act)¹, the RWQCBs are required to adopt basin plans, containing beneficial use designations, water quality objectives, and a program to implement the water quality objectives for their hydrologic basins.² Each RWQCB must "establish such water quality objectives . . . as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance. . ."³ In response to this mandate, several of the RWQCBs have adopted water quality objectives for some priority toxic pollutants. In addition, all of the RWQCB basin plans contain narrative toxicity objectives, which generally prohibit the discharge of toxic pollutants in toxic amounts.

In sum, in California, approximately 40 criteria for priority toxic pollutants promulgated by the U.S. EPA in the NTR and numeric objectives for some of these pollutants contained in a few of the RWQCB basin plans (see Appendix E), as well as narrative toxicity objectives in all of the basin plans, currently apply to inland surface waters, enclosed bays, and estuaries.

B. Implementation

Pollutants can be discharged to a water body from either point or nonpoint sources. A point source⁴ refers to a discernible, confined, and discrete conveyance, such as a pipe, whereas

¹ See Water Code §13000 et seq.

² See Water Code §§13240, 13050(j).

³ See Water Code §13241.

⁴ See 33 U.S.C. §1362(14); 40 C.F.R. §122.2.

pollutants from nonpoint sources generally enter the water body in a diffuse manner. These two types of pollutant discharges are generally regulated differently.

In general, the CWA prohibits the point source discharge of pollutants to surface waters without an NPDES permit.⁵ In California, NPDES permits are issued and administered by the SWRCB and RWQCBs, in accordance with regulations adopted by the U.S. EPA implementing the NPDES permit program.⁶

The regulations require that NPDES permits include numeric effluent limitations controlling all pollutants, including toxic pollutants, that are or may be discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an excursion above any numeric criteria.⁷ In addition, permits are required to include numeric effluent limitations for specific chemical pollutants, for which there are no applicable numeric criteria, if their discharge could cause or contribute to an excursion above a narrative criterion, such as a narrative toxicity criterion or objective.⁸ In the latter case, the effluent limitation may be based on, among other options, U.S. EPA criteria guidance, published under Section 304(a) of the CWA⁹, supplemented with other appropriate information.

Consequently, at the present time, NPDES permits issued by the SWRCB or RWQCBs must include effluent limitations for priority toxic pollutants if discharge of the pollutants could cause or contribute to an excursion above applicable NTR criteria or water quality objectives contained in the relevant basin plan. In addition, permits must include numeric criteria for the remaining priority toxic pollutants, if their discharge could cause or contribute to an excursion above a narrative toxicity objective.

The U.S. EPA water quality standards regulations provide that state water quality standards can include policies affecting their application and implementation, such as mixing zones, low flows, and variances.¹⁰ All of the RWQCB basin plans contain a program of implementation for achieving water quality objectives.¹¹ In general, most of the implementation programs do

⁵ The term "point source" does not include agricultural stormwater discharges and return flows from irrigated agriculture. 33 U.S.C. §1362(14).

⁶ See generally Water Code §3370 et seq.; Cal. Code Regs., Tit. 23, §§2235-2235.4.

⁷ 40 C.F.R. §122.44(d)(1)(iii).

⁸ 40 C.F.R. §122.44(d)(1)(vi).

⁹ 33 U.S.C. §1314(a).

¹⁰ 40 C.F.R. §131.13.

¹¹ See Water Code §13242. A program of implementation must include a description of actions which are necessary to achieve objectives, a time schedule for the actions, and a description of surveillance to be undertaken to determine compliance with objectives.

not contain specific guidance on developing effluent limitations implementing water quality objectives, including toxic pollutant objectives, for NPDES permits. There are exceptions, however.

For example, the basin plan for the San Francisco Bay region addresses the selection of pollutants for which effluent limitations are required in NPDES permits and the method of calculating those limits, when ambient background concentrations are less than or equal to the applicable criterion or objective. The basin plan also lists ambient background concentrations for selected metals for use in calculating the effluent limitations. The basin plans for the Los Angeles, Central Valley, and San Diego regions contain general provisions allowing mixing zones on a case-by-case basis. In contrast, the San Francisco Bay Basin Plan specifies an allowable dilution ratio for deepwater outfalls and does not generally allow dilution for shallow water outfalls. Additionally, the basin plans for the San Francisco Bay and Central Valley regions allow compliance schedules and interim limits in NPDES permits under certain circumstances. The San Francisco Bay Basin Plan also has fairly detailed provisions addressing implementation of the narrative toxicity objective.

Unlike point source discharges, nonpoint source discharges of pollutants to surface waters are not subject to regulation under an NPDES permit. They are generally regulated under State law. Under the Porter-Cologne Act, the SWRCB and RWQCBs can issue or waive waste discharge requirements for these discharges.¹²

The SWRCB has adopted a Nonpoint Source Management Plan (NPS Plan) to address nonpoint source pollution problems. The NPS Plan contains a three-tiered management approach. The first tier relies on the voluntary implementation of best management practices by property owners or managers. Best management practices are methods, measures, or practices selected by an agency to meet its nonpoint source management needs.¹³ In the second tier, the RWQCBs can use their regulatory authorities, by waiving waste discharge requirements or entering into management agency agreements with other regulatory agencies, to encourage the implementation of best management practices by dischargers. Finally, in tier three, the RWQCBs can adopt and enforce waste discharge requirements regulating the nonpoint source discharge of pollutants.

Hence, at the present time, nonpoint source pollution problems are addressed through application of the management approach contained in the NPS Plan. Under this approach, the

¹² See Water Code §§13263, 13269. Waste discharge requirements are issued for both point and nonpoint sources. For purposes of the NPDES permit program, the term “waste discharge requirements” is the equivalent of the term “permits”. Water Code §13374. Therefore, an NPDES permit is a type of waste discharge requirement.

¹³ 40 C.F.R. §130.2(m). Best management practices can include, for example, both structural and nonstructural controls and operation and maintenance procedures.

least stringent option that successfully protects or restores water quality is used, with more stringent measures considered if timely water quality improvements are not achieved.

ADDITION OF THE CTR

The U.S. EPA adoption of the proposed CTR will augment the existing NTR criteria that are applicable in California, with criteria for the remaining priority toxic pollutants. The proposed CTR will supersede some existing water quality objectives for priority pollutants contained in a few of the RWQCB basin plans. The proposed rule will also authorize a compliance schedule of up to five years in permits.