February 19, 2008

PSSEP
Partnership for Sound Science in Environmental Policy

Chair Doduc and Members
State Water Resources Control Board
c/o Ms. Jeanine Townsend, Clerk
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

commentletters@waterboards.ca.gov

Re: Compliance Schedule Policy for NPDES Permits

Dear Chair Doduc and Members of the Board:

The Partnership for Sound Science in Environmental Policy (PSSEP) is an association of San Francisco area and statewide public and private entities – businesses, municipal wastewater treatment agencies, trade associations and community organizations. PSSEP appreciates the opportunity to provide these comments on the proposed *Compliance Schedule Policy for NPDES Permits* (Proposed Policy).

Unless the State Board makes substantial and significant revisions to the Proposed Policy, PSSEP urges the State Board to reject the staff proposal and instead select "Alternative 1b" as described in the *Draft Staff Report* dated December 4, 2007. For the reasons described more fully below, we are concerned about the possible impacts the Proposed Policy will have on members of the regulated community, who will inevitably receive permit effluent limits in the future with which they cannot feasibly comply within the proposed five year period.

There are four important points PSSEP wishes to underscore as you consider future action on the Proposed Policy:

(1) compliance schedules are *authorized under federal law*, and have been a recognized element of compliance for many years;

(2) federal law imposes *no specific time limit* on the length of approvable compliance schedules (except that the schedule is to require compliance "as soon as possible");

(3) US EPA has *already approved* compliance schedule Basin Plan provisions that are far more flexible than the Proposed Policy – so they are clearly legal;

(4) reasonable periods of compliance to meet future effluent limits for pollutants we don't even *know* about today, as well as lower limits for pollutants we do, are necessary from a practical, as well as economic, standpoint.

Craig S.J. Johns
Program Manager

The Proposed Policy Unreasonably Limits Compliance Periods to Five Years.

PSSEP stresses foremost that there is *nothing* in either the Clean Water Act or the Code of Federal Regulations that dictates maximum allowable time for a compliance period. State Board staff acknowledges this fact in pointing out that US EPA Region IX recently approved the North Coast Regional Board's compliance schedule Basin Plan amendment allowing as much as *ten years* for a compliance period. (*Draft Staff Report at p. 7.*)

Nevertheless, the Proposed Policy limits compliance schedules to ***no more*** than five years, with two extremely limited exceptions. The first exception allows an additional five-year term, but only if "unforeseen circumstances, beyond the control of the discharger" precludes compliance within the first five years. (Proposed Policy ¶5.c.ii, at p. 5.) "Unforeseen circumstances" are defined by example in the Proposed Policy to include natural disasters, failure of a new treatment system to function as expected, or a court ruling arising from a third-party lawsuit. The second exception applies to TMDL-related implementation plans, but only after the TMDL is completed.

There are a number of reasons why the State Board should allow longer compliance schedules. Here are just a few.

1. Five Years is Not Enough Time to Design, Permit, Finance and Construct New or Expanded Treatment Facilities.

A significant problem with the five-year maximum time period is that it does not realistically allow sufficient time to design, permit, finance and construct new or expanded treatment facilities to meet potentially more restrictive effluent limits. In 1994, the State Board's Division of Clean Water Programs determined that the entire timeline for a POTW to process a major treatment plant upgrade or construction project (including the SRF application, project design and environmental review, contracting, construction, and operations inspection and compliance certification) was approximately 11.8 years. (*See,* State Board SRF Loan Program Flow Chart, September 14, 1994, enclosed herewith.) Today, this timeline is probably even longer, due to a variety of factors. But even by the State Board's own calculations, constructing facilities to achieve compliance with a new standard simply cannot be completed within ***ten years***, let alone five. If for no other reason, the State Board should revise the allowed time for compliance schedules to coincide with the practical limitations faced by POTWs and other regulated parties.

"Alternative 3c" would allow compliance schedule periods of up to fifteen years. (*Draft Staff Report* at p. 50.) The State Board staff rejected Alternative 3c on the grounds that fifteen years "may be so long as to be pointless as a deadline." (Ibid.)

However, this time period more closely approximates the 12-13 year timeframe within which to design, perform CEQA review, fund, construct and test new or substantially expanded treatment facilities. PSSEP urges the State Board to adopt Alternative 3c.

2. The Proposed Policy Should *Not* Exclude Alternative Compliance Strategies.

According to the Proposed Policy, "It is the intent of the State Water Board that compliance schedules for NPDES permits only be granted when the discharger must design and construct facilities or implement new or significantly expanded programs and secure financing, if necessary, to support these activities in order to comply with permit limitations..." (Proposed Policy, ¶9, p. 2.) Further, the Proposed Policy provides that a Regional Board may issue a compliance schedule only where the Regional Board determines that the discharger must design and construct facilities or implement new or significantly expanded programs to comply with a permit limit. (Proposed Policy, ¶2, p. 3.)

By its terms, the Proposed Policy would ***only*** allow compliance schedules where facility construction or other significant program implementation is necessary to achieve compliance with new permit effluent limits tied to new or newly interpreted water quality standards. This restriction is not only ***not*** required under federal law, it would completely prohibit the use of alternative compliance strategies to achieve water quality standards. Some of these alternative strategies could include development of TMDLs and site specific objectives, performance of water effects ratio analyses and similar approaches that better define water quality standards for a specific water body, or even the development and implementation of pollutant offset or trading programs, where appropriate.

This is a critical issue for many dischargers around the state. Forcing construction of capital facilities to achieve a specific effluent limit, instead of allowing the discharger (or watershed group) to pursue these alternative compliance strategies, could result in hundreds of thousands or even millions of dollars wasted. For instance, spending money to achieve an effluent limit based on an inappropriate water quality standard, where it is probable that, for example, a site specific objective or a future TMDL for the pollutant in that specific water body, would result in a *higher* effluent limit (still protective of beneficial uses), would be inefficient, wasteful, and result in no higher level of environmental protection.

PSSEP acknowledges EPA Region IX has opined that granting compliance schedules to dischargers to allow time to pursue these types of alternative compliance

strategies does not meet federal requirements. (Correspondence from James A. Hanlon, US EPA Office of Wastewater Management, to Alexis Strauss, US EPA Region IX Director of Water Division, May 10, 2007.) Nevertheless and with all due respect, this *opinion* is simply that; nothing more. In fact, there is ***nothing*** in the Clean Water Act nor the Federal Regulations which support this opinion.

On the other hand, this very State Board has issued two precedential decisions that go against EPA's *opinion* and supported the use of these alternative compliance strategies to achieve water quality standards.

The first of these decisions was *In re: Tosco*, (WQ Order No. 2001-06, March 7, 2001). In that matter, the Regional Board issued alternative final permit limits that were to be based either on wasteload allocations contained in an approved TMDL or if the TMDL was not completed, final permits were to be based on "no net loading for bioaccumulative impairing pollutants or the objective or criterion applied end-of-pipe for non-bioaccumulative impairing pollutants. (*In re: Tosco*, at p. 21.) The State Board held that these so-called "no net loading" alternative final limits were inappropriate for several reasons, one of which was the Board's stated concern "that the alternative default limits, if imposed, may be technically infeasible ***and, ultimately, unnecessary***." (*In re: Tosco*, at p. 22;emphasis added.)

The State Board's *Tosco* Order was subsequently challenged in court. The invalidation of the no net loading approach was not appealed and remains current State Board precedent. Furthermore, the Court of Appeals in the *Tosco* matter specifically upheld the inclusion of a future wasteload allocation derived from a TMDL as an appropriate WQBEL, noting that the Regional Board, the State Board and US EPA Region IX all concurred with the approach. (*See, Communities for a Better Environment v. SWRCB*, 109 Cal.App.4th 1089, 1107 (2003) and 132 Cal. App. 4th 1313 (2005).) Thus, if relying on a final TMDL wasteload allocation as a legal final permit limit is legal, doesn't it make sense to allow the development of the TMDL before imposing a more restrictive, treatment-based final limit? Furthermore, the court specifically found that the "rigorous schedule of compliance," requiring the permittee to comply with interim limits and support TMDL development, was adequate, although it did not require installation of new treatment equipment before TMDLs are completed. (109 Cal. App. 4th at 1106.)

The second instructive State Board decision on this issue was *In re: City of Vacaville*, WQ Order No. 2002-0015 (October 3, 2002). One of the many issues in contention was whether the Central Valley Regional Board was justified in imposing a copper limit based on a Delta objective, without calculating dilution that occurred prior to the City's effluent reaching the Delta. The State Board held that there was insufficient

evidence in the record to determine whether the City's discharge had reasonable potential to cause or contribute to an exceedance of the Delta copper objective. (*In re: City of Vacaville*, at p. 58.) Of particular note is that the State Board decision recognized the preliminary results of an informal "translator study" to determine if the City's effluent exceeded a reasonable potential trigger, where "an effluent limit might not be necessary." (*In re: Tosco*, at p. 59.) Concluding its discussion of this issue, the State Board went so far as to "urge Vacaville to formally submit a proposal to the Central Valley Regional Board ... to develop a defensible site-specific translator", knowing that it could take years to complete and obtain Regional Board approval of these final studies (Ibid.)

Taken together, these two decisions are just an example of the State Board's historical recognition that "alternative compliance strategies" have a place in water quality compliance efforts, and by extension, that these efforts should be given appropriate time periods within which to be pursued. PSSEP sees no reason for the State Board to abrogate this historical approach to water quality compliance. PSSEP urges the State Board to reject staff's recommendation that would preclude permit holders from pursuing alternative compliance strategies, where appropriate, to meet water quality standards.

3. The Proposed Policy Would Conflict With Other State Board Policies and Strategies.

Another concern PSSEP has with the five-year time period for compliance schedules is the potential for conflict it would inevitably have with other State and Regional Board policies and strategies. For instance, the State Board is currently developing a new statewide Recycled Water Policy that would, in certain circumstances, require Regional Boards to develop "salt management plans" to ensure that application of recycled water does not negatively impact groundwater quality. (*See*, *Draft Recycled Water Policy*, §III at p. 7, February 15, 2008.) Recognizing that developing these salt management plans will take several years, continued application of recycled water would continue to be allowed for five years without imposition of newly-adopted or revised salt or nutrient standards. (*Draft Recycled Water Policy*, §III.A. 1 and 2, at p. 7.) Moreover, these compliance periods may be extended for an additional five years (for a maximum of ten years) if the Regional Board "finds that significant progress has been achieved but that additional time is necessary for [salt management] plan adoption. (*Draft Recycled Water Policy*, §III.A.3 at p. 7.) Thus, the maximum compliance period under the *Draft Recycled Water Policy* would conflict with the proposed five-year compliance period contemplated in the Compliance Schedule Policy.

In the Central Valley, the Regional Board is developing a basin-wide salinity management plan that is expected to result in new water quality standards for many dischargers. Recognizing that the salinity issues in the Central Valley have developed over many decades, the management plan is expected to be implemented over a ten-year period. This expected regional policy would conflict with the five-year maximum compliance period allowed under the Proposed Policy.

The Compliance Schedule Policy Should Apply to NTR and CTR Constituents.

The Proposed Policy specifically prohibits compliance schedules related to effluent limits established for National Toxics Rule and California Toxics Rule constituents. (Proposed Policy ¶2.b and c at p. 3.) However, an exception exists, and a compliance schedule would be allowed, for permit limits implementing ***only*** CTR criteria "that are revised by [US EPA] after the effective date of this Policy." (Ibid.)

The problem with this aspect of the Proposed Policy is that it would affirmatively prohibit compliance schedules for new, more restrictive effluent limits based on NTR and CTR criteria that currently exist. For example, some dischargers in San Francisco Bay have permit limits for selenium. If in the future, new analytical techniques are developed that result in lower detection limits for selenium, it is possible that the Regional Board will further reduce the effluent limits. And because selenium is an NTR and CTR constituent, the Proposed Policy would not allow the Regional Board to grant a compliance schedule for any more stringent permit limit.

Such a result is clearly unreasonable and unfair, and should not be the policy of the State Board.

The Proposed Policy Does Not Accommodate Situations of New Reasonable Potential for CTR Constituents.

Another, problem similar to the one identified above is that the Proposed Policy would not allow a compliance schedule for a discharger who, for the first time after May 18, 2010, shows "reasonable potential" for a given CTR pollutant in its waste stream. As such, the discharger would be required to comply immediately with the effluent, which may be technologically infeasible to do. The Proposed Policy provides no accommodation for such a situation.

However, the *Draft Staff Report* offers an alternative to the State Board that would contemplate and address this type of situation, and PSSEP urges the State Board to adopt "Alternative 6.b.3." (*Draft Staff Report* at p. 60.) If this alternative is preferred by

the State Board Members, a simple revision to Paragraph 1.e (which defines "newly interpreted water quality standard") of the Proposed Policy could be made as follows:

> "**Newly interpreted water quality standard** means a narrative or numeric water quality objective that, when interpreted during NPDES permit development . . . to determine the permit limitations necessary to implement the objective, results in a new or more stringent ~~numeric~~ permit limitation ~~more stringent~~ than the limit in the prior NPDES permit issued to the discharger."

PSSEP believes it would be unreasonable and unfair to force a permit holder to immediately comply with a new permit limit that the permit holder could have no reason to expect would be imposed prior to the then-current reasonable potential analysis. The whole point of the compliance schedule provision in federal law, and presumably the Proposed Policy, is to recognize that dischargers should be given a reasonable amount of time to come into compliance with these new permit limits.

The "Functional Equivalent Document" Supporting the Proposed Policy Fails to Consider Important CEQA Impacts.

The State Board staff's *Draft Staff Report* is intended to serve as a "functional equivalent document" under CEQA and is thus required to analyze various environmental impacts associated with the Proposed Policy. The *Draft Staff Report* (and CEQA Environmental Checklist appended thereto) fails to consider any potential air quality, energy or greenhouse gas emissions impacts, and instead simply concludes that "Staff found that there would be no adverse environmental impacts resulting from the actions proposed in the policy." (*Draft Staff Report* at p. 73.) This analysis is woefully inadequate under CEQA and court decisions interpreting the agency's obligations, thus rendering the Proposed Policy susceptible to legal challenge.

Specifically, if the Proposed Policy is adopted in its current form, Regional Boards would be prohibited from issuing compliance schedules *except* "when the discharger must design and construct facilities or implement new or significantly expanded programs . . . to comply with [new] permit limitations...." (Proposed Policy, ¶9 at p. 2.) By limiting compliance schedules thusly, the State Board is creating a *de facto* policy preference for construction-based compliance solutions, to the exclusion of the alternative compliance strategies such as those described above.

PSSEP recognizes that such a policy choice is appropriately left to the State Board Members. However, before the State Board Members make such a choice, it is incumbent upon staff to present ***all*** of the potential environmental impacts associated

with it. The current *Draft Staff Report* and FED fail to present *any* information on the types of impacts associated with the construction-based compliance solution. As such, PSSEP will attempt to provide that information using the following hypothetical example.

Assume that the San Francisco Bay is newly-listed for some pollutant in 2010, but the Regional Board determines that (due to insufficient resources) no TMDL for that pollutant will be completed within twelve years. After the new pollutant listing, the Regional Board completes a "reasonable potential analysis" and determines on that basis that Discharger X must receive an effluent limitation for the pollutant. As is the custom because Discharger X cannot immediately comply with the new effluent limit, the Regional Board assigns "interim performance-based limits" and couples that with a compliance schedule, requiring Discharger X to meet a final limit at the end of the five year permit term. Based on some preliminary studies and modeling, it is expected that once the Regional Board completes the TMDL for the pollutant, Discharger X's waste load allocation could result in a permit limit approximately 50-80% ***higher*** than the final effluent limit imposed at the end of the compliance period. In practical terms, building new treatment processes in order for Discharger X to achieve the new effluent limit could cost hundreds of millions of dollars, require untold amounts of additional energy, and produce ***substantial*** greenhouse gas emissions. Yet, if a compliance schedule were granted for a reasonable period of time within which to complete the TMDL, Discharger X could both comply with the new effluent limit as well as save millions of dollars of taxpayer dollars, millions of Kilowatt hours of energy, and avoid the needless discharge of thousands or millions of tons of greenhouse gases.

Perhaps the best example of this type of situation is the site-specific objectives adopted for copper and nickel in South San Francisco Bay, a process endorsed and supported by dischargers, environmental groups and US EPA alike. That process, in the end, avoided the construction of new wastewater treatment plants at a cost of hundreds of millions of taxpayer and ratepayer dollars, which would have required billions of Kilowatt hours of energy to operate into the future, and would have discharged untold millions of tons of greenhouse gases over their lifetimes. The State Board staff should contact the City of San Jose or Clean Estuary Partnership (the primary project sponsors of the South San Francisco Bay site specific objectives project) to determine the relative energy demands and GHG production if the SSO project had not gone forward, and include this information in its CEQA analysis.

Compliance Schedules in Existing Permits May Be in Jeopardy.

Although we do not believe this is the intent of the drafters of the Proposed Policy, PSSEP is concerned that certain provisions could be interpreted to eviscerate existing compliance schedules contained in permits already adopted by Regional Boards.

Our concern derives from two separate provisions of the Proposed Policy which, when read together, could lead some to conclude that previously-adopted compliance schedules under then-existing and approved Basin Plan provisions, are no longer valid.

First, "new, revised, or newly interpreted water quality standard" is defined in the Proposed Policy to mean any such standard adopted "after the effective date" of the Proposed Policy, ***except*** in those Regions where pre-existing Basin Plan provisions for compliance schedules were adopted. In those instances, such standards are defined to mean new, revised or newly interpreted water quality standards adopted after the specific dates those respective Regional Boards adopted their compliance schedule Basin Plan amendments. (*See*, Proposed Policy, ¶1.d, at p. 2.)

Second, by its terms and excepting only compliance schedules in TMDLs effective before the effective date of the Proposed Policy, the Proposed Policy "supersedes all existing provisions authorizing compliance schedules in Basin Plans." (Proposed Policy, ¶10, at p. 6.)

When read together, these two provisions of the Proposed Policy *could* be interpreted to mean that a compliance schedule issued in a permit adopted *after* a Regional Board's Basin Plan provisions were amended to allow such schedules is no longer valid because the Proposed Policy supersedes those Basin Plan provisions. We believe this issue could easily be resolved in one of two manners: (1) adopt "Alternative 1b" which makes the Proposed Policy applicable *only* to those Regions that have not yet adopted compliance schedule provisions into their Basin Plans; or (2) add a separate section that specifically provides the Proposed Policy is applicable *only* to permits adopted by Regional Boards after the Proposed Policy is adopted by the State Board.

The Proposed Policy Applies Only to Newly-Interpreted *Narrative* Standards.

The Proposed Policy narrowly defines a "newly interpreted water quality standard" to mean only those situations where *narrative* standards are replaced with *numeric* limits. (Proposed Policy, ¶1.e, at p. 3.) As pointed out in the *Draft Staff Report*, this would prohibit compliance schedules for permits in which: (1) previously unregulated pollutants in a discharge are newly regulated because new data indicates reasonable potential for that pollutant; (2) improved analytical techniques result in new detections of a given pollutant in an existing discharge; (3) point of compliance for a receiving water limitation is changed; or (4) the dilution allowance for an existing discharge is changed. (*Draft Staff Report* at p. 60.)

All of the examples above are situations where a specific discharger would either receive an effluent limit for the first time, or a more restrictive limit than in its existing permit. In neither circumstance has the discharger been given an opportunity to achieve compliance with the newly-interpreted ***numeric*** limit, and it is both reasonable and fair to provide a compliance period to enable the discharger to meet it. Not allowing a compliance schedule for these situations is akin to adopting a new standard altogether, and expecting the discharger to meet it immediately. PSSEP urges the State Board to select either Alternative 6.b.1 or 6.b.3.

The Proposed Policy Should Allow Compliance Schedules For New Narrative Standards Imposed Through Industrial Storm Water Permits.

As noted in the *Draft Staff Report*, industrial storm water permits are subject to all requirements of Clean Water Act Section 301. (*Draft Staff Report* at p. 56.) The Proposed Policy would therefore apply to storm water permits issued with new or revised permit limits. An issue of concern to PSSEP is that most industrial storm water permits are based upon "best management practices" to achieve permit limits. These permits are customarily not expressed in terms of storm water dischargers meeting a numeric limit at a given discharge point. However, the definition of "newly interpreted water quality standard" in the Proposed Policy would mean that a storm water discharger would be eligible for a compliance schedule *only* for a permit limit where a narrative standard results in a numeric permit limit. (Proposed Policy, ¶1.e, at p. 3.)

On the other hand, if a revised storm water permit were to include newly-interpreted standards that resulted in more stringent *narrative* standards - - including imposition of new BMPs to achieve those standards - - it seems appropriate for the discharger to receive a reasonable amount of time to develop, construct, implement and confirm effectiveness of those new measures.

The Proposed Policy *Should* Apply to Prohibitions if They are Imposed to Achieve Water Quality Standards.

The *Draft Staff Report* recommends that the Proposed Policy *not* apply to prohibitions that may be imposed on a discharger, despite the fact that both the Clean Water Act and Porter-Cologne recognize that prohibitions imposed by a Regional Board in a permit are, by nature, limits that are intended to protect or meet water quality standards. Although the *Draft Staff Report* implies that this issue would only affect dischargers in the North Coast, this is simply not the case.

At issue is whether the Proposed Policy should apply to ***prohibitions*** imposed via permit requirement, or only to effluent limitations issued by a Regional Board. It is true that only the North Coast Regional Board has a Basin Plan provision that specifically mentions "prohibitions" in the context of various types of limitations to which the compliance schedule period could apply. However, any Regional Board that has current Basin Plan compliance schedule provisions could reasonably interpret its imposition of a given prohibition to implement or protect new or revised water quality standards. For this reason, this issue has widespread application and import.

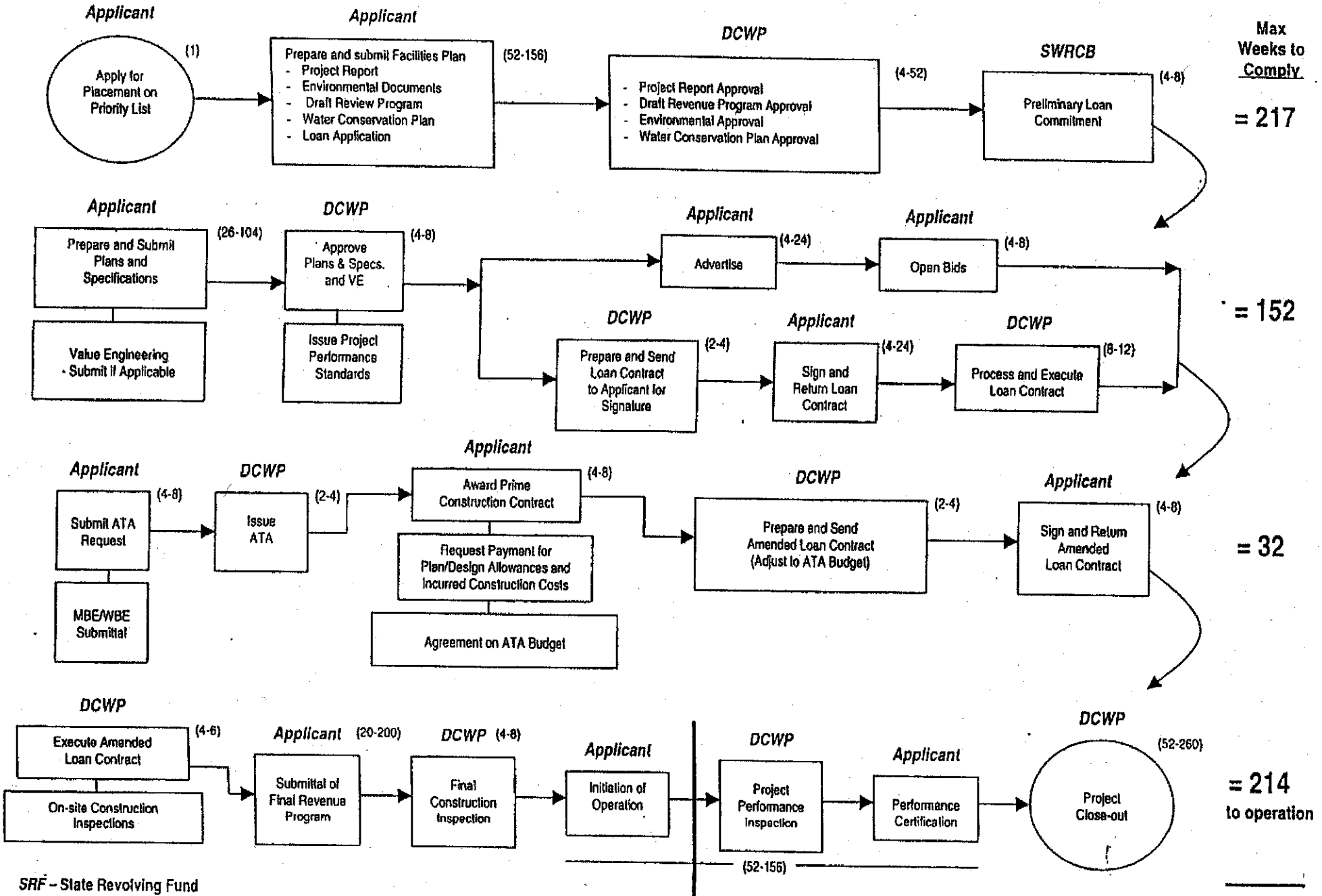
There really is no compelling reason to exclude prohibitions from the application of the Proposed Policy, and the rationale offered by staff - - because it "is most similar to already existing regional compliance schedule provisions and is more conservative" - - is hardly persuasive. (*See*, *Draft Staff Report* at p. 61.) PSSEP urges the State Board to select Alternative 7b.

PSSEP appreciates the opportunity to submit these comments, and will be available to answer any questions Board Members may have at the March 18, 2008 State Board workshop.

Sincerely,

Craig S.J. Johns
Program Manager

CALIFORNIA STATE WATER RESOURCES CONTROL BOARD
Division of Clean Water Programs
SRF LOAN PROGRAM FLOW CHART



SRF – State Revolving Fund
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( ) Approximate time to complete task in weeks.

Date: 09/14/94