



**Santa Clara Valley
Urban Runoff
Pollution Prevention Program**



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SUBMITTED VIA E-MAIL on August 21, 2012 (commentletters@waterboards.ca.gov)

August 21, 2012

Ms. Jeannie Townsend
Clerk to the Board
California State Water Resources Control Board
1001 I Street, 15th Floor
Sacramento, CA 95814

Subject: Draft Policy for Toxicity Assessment and Control

Dear Ms. Townsend:

This letter is submitted on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program (Program) regarding the *Draft Policy for Whole Effluent Toxicity Assessment and Control* (Draft Policy). The Program is an association of 13 cities and towns in the Santa Clara Valley, Santa Clara County and the Santa Clara Valley Water District. Program participants are regulated under a common NPDES permit to discharge municipal stormwater to South San Francisco Bay, and therefore the Draft Policy will directly impact Program participants.

In August 2010 and again in January 2011, the Program submitted written comments to the State Board on the Draft Policy. Although some issues identified in our comments have been considered, to date, the State Board has not fully responded to the serious issues presented by the Program and other public agencies and organizations in their comment letters previously submitted. Therefore, these comments are again being resubmitted as part of this comment letter (see Attachments A and B). We also offer the following additional comments and again request that the State Board revise the Draft Policy based on these and previously submitted comments.

As stated a number of times throughout the Draft Policy, the *Policy for the Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP)*, does not apply to the regulation of stormwater discharges. Stormwater is highly variable in terms of flow, pollutant loads and concentrations, and receiving water impacts. In addition, the relationships between stormwater discharges and water quality (including toxicity) can be complex. The State Board acknowledged this fact in its Functional Equivalent Document (FED) that was developed in concert with the SIP in 2000, and, in turn, *excluded* stormwater from SIP in order to address it and its unique context separately. Today, stormwater still remains complex and highly variable. Provisions in the Draft Policy overlook these issues and are inconsistent with the State Board's separate implementation of its stormwater program.

Additionally, the Draft Policy (or SIP) is not an appropriate vehicle for issuing stormwater toxicity testing guidance, which is currently included as Appendix E to the Draft Policy. The current Phase I municipal regional stormwater NPDES permit (MRP) applicable in most of the San

Francisco Bay Area, including the Santa Clara Valley, was adopted in November 2009 by the San Francisco Bay Regional Water Quality Control Board (Regional Board) and contains significant monitoring requirements including limited toxicity monitoring in receiving waters. These requirements were established based on the need to answer high priority management questions, which were developed collaboratively by Regional Board staff and representatives for municipalities in the Bay Area. These management questions form the foundation for monitoring required by the MRP and ensure that scarce public resources are focused on answering the most important questions pertinent to municipal stormwater quality in the Bay Area. The monitoring guidance provided as Appendix E is inconsistent with the locally-derived management questions and effective monitoring approaches implemented in the Bay Area.

To reiterate, stormwater discharges should be removed from the Draft Policy. If the Draft Policy is adopted as written, it will inappropriately include stormwater discharges in the SIP. Additionally, if adopted, the Draft Policy will provide monitoring guidance that will result in significant increases in monitoring costs to municipalities throughout the San Francisco Bay Area and the State. Bay Area municipalities are already subject to the extensive monitoring requirements in their current regional NPDES permit, and additional monitoring requirements recommended by the State Board will have little to no additional benefit in terms of managing municipal stormwater relative to receiving water quality. Appendix E – Toxicity Test Tool for Storm Water Dischargers should therefore be removed from the Draft Policy. Should the State Board wish to provide monitoring guidance for Water Board staff and regulated stakeholders, it should do so outside of the Draft Policy.

We also support the comments on the Draft Policy provided by California Stormwater Quality Association (CASQA).

We look forward to continuing to work with you further on addressing these issues. Please contact me at (510) 832-2852 ext. 115 or Chris Sommers at ext. 109 if you have questions regarding the comments or suggested changes.

Sincerely,



Adam Olivieri, Dr. PH, P.E.
SCVURPPP Program Manager

cc: SCVURPPP Management Committee
BASMAA Board of Directors

Attachment A: SCVURPPP comments on Preliminary Draft Policy for Whole Effluent Toxicity Assessment and Control dated August 5, 2010.

Attachment B: SCVURPPP Comments on Preliminary Draft Policy for Whole Effluent Toxicity Assessment and Control dated January 21, 2011.



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Submitted via email on August 6, 2010

August 5, 2010

Paul Hann
Chief, Planning Standards and Implementation Unit
California State Water Resources Control Board
Division of Water Quality
1001 I Street, 15th Floor
Sacramento, CA 95814

Subject: Preliminary Draft Policy for Whole Effluent Toxicity Assessment and Control

Dear Mr. Hann:

This letter is submitted on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program (Program) regarding the Preliminary *Draft Policy for Whole Effluent Toxicity Assessment and Control* dated July 7, 2010 (Draft Policy). The Program is an association of 13 cities and towns in the Santa Clara Valley, Santa Clara County and the Santa Clara Valley Water District. Program participants are regulated under a common NPDES permit to discharge municipal stormwater to South San Francisco Bay. Since its inception, the Program has been a recognized leader¹ in stormwater management and water quality monitoring in the San Francisco Bay region, and continues to be dedicated to improving the quality of our water bodies.

The Program appreciates the opportunity to submit preliminary comments. The Program can not support the Draft Policy as currently written. Most importantly, the Program does not support the inclusion of proposed provisions that are applicable to municipal stormwater into the *Policy for the Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP)*². Our comments below summarize the Program's most central issues of concern and provide recommended revisions to the Draft Policy. The Program also has additional technical concerns³ with Draft Policy, some of which are described in comments provided by the City of San Jose and the California Stormwater Quality Association (CASQA).

¹ The Program has twice (1993 and 2006) been awarded the US EPA's National Clean Water Act Recognition Award for Outstanding Stormwater Management

² As noted on Page 3, footnote 1 of the SIP, the SIP does not apply to the regulation of stormwater discharges.

³ Additional technical and legal concerns may be raised at a latter date during the formal public hearing process on the draft Policy depending on how current concerns have been addressed.

Issue #1: By adopting the Draft Policy, the applicability of the SIP will be expanded to include stormwater for the first time without justification or reason

As stated on Page 3, footnote 1 of the SIP, the SIP does not apply to the regulation of stormwater discharges. In general, stormwater was not included in the SIP because stormwater discharges are highly variable in terms of flow, pollutant load, and concentrations. In addition, the relationships between stormwater discharges and water quality (including toxicity) can be complex. The State Water Resources Control Board (State Board) acknowledged this fact in its Functional Equivalent Document (FED) that was developed in concert with the SIP in 2000 (SWRCB 2000), and, in turn, *excluded* stormwater from SIP in order to address it and its unique context separately. Today, stormwater still remains complex and highly variable. Provisions in the Draft Policy overlook these issues and run contradictory to the State Board's separate implementation of its stormwater program. Specifically, for the first time the State Board intends to include stormwater-specific requirements in an appendage to the SIP, with no justification or reasoning provided to the public or dischargers.

Recommendation: Revise the Draft Policy to delete the proposed inclusion of stormwater in the SIP. Specifically, remove Part III-B of the Draft Policy.

Issue #2: Adoption of the Draft Policy will undermine the successful work that MS4 monitoring programs have established through implementation of regionally-specific monitoring plans

Based on its determination that stormwater is complex and highly variable, the SWRCB provided the following additional insight in the FED on how stormwater requirements (including monitoring requirements issued via NPDES permits) should be developed:

“As the State agencies responsible for the protection of water quality, the SWRCB and the Regional Boards are responsible for the issuance of NPDES permits as well as the implementation of the stormwater program....existing NPDES stormwater permits contain narrative objectives, rather than the numeric limits found in the more conventional NPDES permits....the specific narrative language and requirements relative to [water quality] standards compliance is developed on a permit-by-permit basis. This allows the permit writer to consider the developmental state of the programs to be implemented, as well as other area-specific considerations.”

As a stormwater program, we agree with the SWRCB's reasoning provided in the FED and have worked collaboratively for more than two decades with the San Francisco Bay Regional Water Quality Control Board (Regional Board) to effectively develop and implement water quality monitoring and assessment programs in the Bay Area. Most recently, the Program, Regional Board, and other Bay Area MS4s spent significant resources developing and adopting a regional municipal NPDES permit, which includes a robust water quality monitoring program based on high priority management questions specific to the Bay Area. This monitoring program is currently being coordinated through a Regional Monitoring Coalition in the Bay Area, which includes all Bay Area Phase I MS4s. Part III-B of the Draft Policy would undermine the successful work that has been conducted to-date in developing region-specific data needs and building a consensus among MS4s and the Regional Board with regard to appropriate and prioritized monitoring for stormwater-related impacts. Instead of this much more sensible approach, the Draft Policy would essentially mandate that future NPDES municipal stormwater permits include blanket, inflexible, and extremely costly monitoring requirements that include very specific Whole Effluent Toxicity (WET) testing provisions and follow up studies (e.g., Toxicity Reduction Evaluations).

Recommendation: Revise the Draft Policy to exclude stormwater, or, at a minimum, its application to Phase 1 MS 4 permits. Specifically, remove Part III-B of the Draft Policy or add a footnote rendering it inapplicable to Phase 1 MS4s. Continue to allow Regional Boards the flexibility to develop monitoring requirements for MS4 permits, particularly where the Regional

Board and municipalities in question are able to reach a consensus on more appropriate local monitoring requirements and priorities.

Issue #3: The Draft Policy will put an undue burden on local municipalities with no improvement to water quality

The technical appendices appended to the CASQA comment letter⁴ submitted to the State Board on preliminary draft WET Policy, as well as the regulatory concerns expressed in the CASQA comment letter, provide a significant body of evidence that undermines the technical basis for the Draft Policy. Comments provided by the City of San Jose⁵, although geared to POTW discharges, also provides additional technical concerns regarding the basis used to support the Draft Policy WET. Because the Draft Policy's approach with regard to stormwater suffers from the technical and regulatory flaws cited by CASQA and San Jose (among others), the State Board should not proceed in adopting it without the changes recommended in this letter. Otherwise, MS4s will be required to provide precious limited public resources to implement a WET based monitoring program that will provide no better understanding and improvement of water quality and could well lead to numerous misguided and expensive future investigations. Given the state of the economy and its effect on fiscal conditions faced by local governments (which face serious constraints in their ability to raise funds for these types of programs due, in part, to Proposition 218 as interpreted in the *Salinas* decision, such a misguided policy approach could have disastrous implications on implementation of other, more important, aspects of municipal stormwater programs in California.

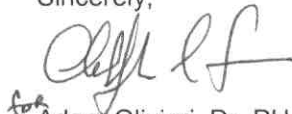
Recommendation: Revise the Draft Policy to exclude stormwater. Specifically, remove Part III-B of the Draft Policy or, at a minimum, add a footnote making it inapplicable to municipal stormwater.

* * * * *

We hope you find these comments useful and that you incorporate our recommendations into the Draft Policy. We understand that the State Board intends to utilize these preliminary comments to guide their efforts in developing the proposed WET policy and that the State Board will provide further opportunity to comment on any proposed WET policy as part of a formal State Board policy hearing process. We look forward to participating in that formal process and ask that these comments be made part of the official record for that proceeding.

Please contact me at (510) 832-2852 if you have questions regarding the comments or suggested changes. We look forward to continuing to work with you further on these issues.

Sincerely,



^{for} Adam Olivieri, Dr. PH, P.E.
SCVURPPP Program Manager

cc: SCVURPPP Management Committee
BASMAA Board of Directors

⁴ The technical appendices submitted by CASQA on August 7, 2010 and are incorporated by reference.

⁵ The comments submitted by the City of San Jose on August 7, 2010 and are incorporated by reference.



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SUBMITTED VIA E-MAIL on January 21, 2011 (www.commentletters@waterboards.ca.gov)

January 21, 2011

Ms. Jeannie Townsend
Clerk to the Board
California State Water Resources Control Board
1001 I Street, 15th Floor
Sacramento, CA 95814

Subject: Draft Policy for Whole Effluent Toxicity Assessment and Control

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In August 2010, the Program submitted written comments to the State Board on the Draft Policy. To date, the State Board has not responded to the serious issues presented by the Program and other public agencies and organizations in their comment letters previously submitted. Therefore, these comments are being resubmitted as part of this comment letter (see Attachment A). We also offer the following additional comments and again request that the State Board revise the Draft Policy based on both sets of comments.

The current Phase I municipal regional stormwater NPDES permit (MRP) applicable in most of the San Francisco Bay Area, including the Santa Clara Valley, was adopted in November 2009 by the San Francisco Bay Regional Water Quality Control Board (Regional Board) and contains significant monitoring requirements including limited toxicity monitoring in receiving waters. These requirements were established based on the need to answer high priority management questions, which were developed collaboratively by Regional Board staff and representatives for municipalities in the Bay Area. These management questions form the foundation for monitoring required by the MRP and ensure that scarce public resources are focused on answering the most important questions pertinent to municipal stormwater quality in the Bay Area. In contrast, the Draft Policy proposed a less strategic and, from a public resource perspective, fiscally inefficient approach – it contains specific monitoring requirements, such as the minimum number of sites and samples, but provides no justification for this level of effort and does not include guiding management questions that the State Board believes the monitoring will assist in answering.

Additionally, even if public resources were not scarce, the Draft Policy was adopted as written, and the additional toxicity data required by the Draft Policy were collected by municipalities, it is unclear from a

stormwater management perspective what useful new information will be gained. The State Board's own assessments of receiving water and sediment toxicity throughout the State (State Board 2010) have indicated that pesticides are responsible for toxicity in 99% of samples collected. In this regard, management actions are currently underway in the Bay Area and Statewide to address pesticide-related toxicity. Therefore, it is highly unlikely from a practical perspective that the additional monitoring required by the Draft Policy would provide any new useful information to protect or improve water quality, let alone justify its considerable cost.

In fact, coupled with the likely lack of useful management information that would be obtained through stormwater toxicity monitoring required by the Draft Policy, municipalities would bear significant increases in monitoring costs. The costs of complying with monitoring requirements contained in the MRP are already roughly \$1 million a year for Program participants, i.e., nearly *twice* as much of a fiscal burden as the previous MS4 permit monitoring requirements imposed. This increase in monitoring costs is obviously challenging for all Bay Area local agencies to absorb, especially given current economic conditions. *If the State's Draft Policy is adopted as written, monitoring costs could increase by more than an additional 20%.* These further proposed increases in municipal stormwater monitoring costs are unacceptable and unjustified, at least with respect to the Bay Area municipalities covered by the MRP.

Finally, review of the staff documentation in support of the draft Policy indicates that an analysis of potential increases in monitoring costs for municipal stormwater programs along with a balancing against the anticipated benefits, if any, is absent (and, as stated above, for the Bay Area municipalities subject to the MRP's extensive monitoring requirements, we doubt that any such benefits exist). From the public's perspective, it would seem necessary and prudent to conduct such an analysis prior to consideration of adopting such a costly policy – indeed, section 13241 of the Water Code appears to us to require it.¹

In summary, if the Draft Policy is adopted as written, it will significantly increase the monitoring costs to municipalities throughout the State, especially those in the San Francisco Bay Area already subject to the extensive monitoring requirements in the MRP, while providing little to no additional benefit in terms of managing municipal stormwater relative to receiving water quality. We recommend that the Draft Policy be revised to address these concerns and those set forth in our prior comments and would also encourage the State Board develop a stakeholder group, including representatives of MS4 programs, to assist in this effort.

We look forward to continuing to work with you further on addressing these issues. Please contact me at (510) 832-2852 ext. 115 or Chris Sommers at ext. 109 if you have questions regarding the comments or suggested changes.

Sincerely,

Adam Olivieri, Dr. PH, P.E.
SCVURPPP Program Manager

cc: SCVURPPP Management Committee
BASMAA Board of Directors

Attachment A: Preliminary SCVURPPP comments on Preliminary Draft Policy for Whole Effluent Toxicity Assessment and Control, dated August 5, 2010.

References State Board (2010). Summary of Toxicity in California Waters:2001 – 2009. Prepared for the Surface Water Ambient Monitoring Program by J. Hunt, D. Markiewicz and M. Pranger. November.

¹ We also note that even if justified under the Water Code, to the extent these monitoring requirements exceed those the Clean Water Act imposes on MS4's, or define them more specifically, they are likely to constitute unfunded state mandates under the California Constitution.