

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

RESPONSE TO WRITTEN COMMENTS

on the Tentative Order for
the City of San José, City of Santa Clara,
San José/Santa Clara Water Pollution Control Plant and sanitary sewer systems
Santa Clara County

The Regional Water Board received written comments from the City of San José (City) and San Francisco Baykeeper (Baykeeper) on a tentative order distributed for public comment on June 5, 2025. The comments are summarized below in *italics* (paraphrased for brevity) and followed by a staff response, except for City comments 2, 5, 6, 7, and 8, which requested minor editorial and formatting changes that we incorporated into the Revised Tentative Order. For the full content and context of the comments, refer to the comment letters. To request a copy of the comment letters, see the contact information in Fact Sheet section 7.7 of the Revised Tentative Order.

This document also contains staff-initiated revisions in addition to those arising from the response to comments. Revisions are shown with underline text for additions and ~~strikethrough~~ text for deletions.

City of San José

Comment 1: *The City comments that Finding 2.3 of the tentative order, Fact sheet section 3.2, Fact Sheet section 5.3.4.2, and Fact Sheet section 5.4 should refer to Provision 5.3.4.2 instead of Provision 5.3.4.2.1.*

Response: We did not make changes in response to this comment. Finding 2.3 of the tentative order, Fact sheet section 3.2, Fact Sheet section 5.3.4.2, and Fact Sheet section 5.4 refer specifically to Provision 5.3.4.2.1, which implements state law only. The other parts of Provision 5.3.4.2 (Provisions 5.3.4.2.2 and 5.3.4.2.3) implement the federal regulations in 40 C.F.R. section 122.41(d).

Comment 3: *The City requests that we require it to revert to monthly routine chronic toxicity monitoring only after an exceedance of the chronic toxicity MDEL or MMEL, not a single “fail” test result.*

Response: We agree and revised Monitoring and Reporting Program Table E-3 footnote 11 as follows:

The monitoring frequency shall become 1/Month after any ~~result of “fail”~~
exceedance of the MDEL or MMEL at the instream waste concentration.

We also revised Monitoring and Reporting Program section 5.1.3.1 as follows:

The routine monitoring frequency shall immediately revert to once per month after any ~~result of “fail”~~ exceedance of the MDEL or MMEL at the IWC.

Comment 4: *The City requests that we extend the Annual SMR due date to March 1 each year.*

Response: We agree and revised the Monitoring and Reporting Program section 9.2.2.2. as follows:

Annual SMRs shall be due ~~February~~ March 1 each year, covering the previous calendar year.

Baykeeper

Comment: *Baykeeper recognizes the robust Reasonable Potential Analysis that ensures discharges authorized by the tentative order will not impair receiving waters. Baykeeper suggests there may be data gaps for permittees under certain regional NPDES permits, specifically the Municipal Regional Stormwater NPDES Permit. Baykeeper recommends that the Regional Water Board require municipal stormwater permittees to collect more data during the remainder of the Municipal Regional Stormwater NPDES Permit term.*

Response: Comments concerning the Municipal Regional Stormwater NPDES Permit are beyond the scope of this permit reissuance. We have shared Baykeeper’s suggestions with staff responsible for overseeing the Municipal Regional Stormwater NPDES Permit.

Staff-Initiated Changes

In addition to minor editorial and formatting changes, we revised the tentative order to provide additional background and applicability for the *State Policy for Water Quality Control: Toxicity Provisions* (Toxicity Provisions).

We revised Fact Sheet section 3.2 as follows:

California Environmental Quality Act (CEQA). Under Water Code section 13389, this action to adopt an NPDES permit is exempt from the provisions of the California Environmental Quality Act (CEQA), Public Resources Code division 13, chapter 3 (commencing with § 21100). ~~This Order includes two provisions—Provision 5.3.4.2.1 and Attachment G Provision 1.9.1 are state law requirements that—under Water Code section 13389. However, the are retained from the previous order imposed these requirements. To the extent Water Code section 13389 does not~~

apply to these state law requirements. As such, retaining them these requirements is not a project subject to CEQA because they will not cause a direct or indirect physical change in the environment (Public Resources Code §§ 21065, 21080).

We revised Fact Sheet section 3.5.5. as follows:

Toxicity Provisions. The State Water Board adopted the State Policy for Water Quality Control: Toxicity Provisions (Toxicity Provisions) on December 1, 2020, and confirmed it as state policy for water quality control on October 5, 2021. The Office of Administrative Law approved the Toxicity Provisions on April 25, 2022. U.S. EPA approved the Toxicity Provisions on May 1, 2023. Toxicity Provisions sections II.C.1 and II.C.2 establish numeric chronic and acute toxicity water quality objectives that apply to all inland surface waters, enclosed bays, and estuaries in the State with aquatic life beneficial uses. The Toxicity Provisions include related implementation provisions and require that compliance with the chronic toxicity water quality objectives be assessed using U.S. EPA's Test of Significant Toxicity (TST) (U.S. EPA, National Pollutant Discharge Elimination System Test of Significant Toxicity Implementation Document [EPA/833-R-10-003], June 2010). This Order implements the Toxicity Provisions. In accordance with Water Code sections 13146 and 13247, the Regional Water Board must include the requirements specified in the Toxicity Provisions for NPDES permits issued, reissued, renewed, or reopened after the effective dates of the Toxicity Provisions for non-stormwater NPDES dischargers, unless otherwise directed or authorized by statute or where contrary to a binding judicial order or decision.

On July 18, 2022, the Camarillo Sanitary District, City of Simi Valley, City of Thousand Oaks, Central Valley Clean Water Association, and Clean Water SoCal (formerly known as Southern California Alliance of Publicly Owned Treatment Works) (Petitioners) filed a petition for writ of mandate in Fresno County Superior Court challenging the State Water Board's adoption of the Toxicity Provisions. One of the Petitioners' claims was that the Toxicity Provisions was inconsistent with the Clean Water Act. On October 9, 2023, the superior court denied the petition in its entirety.

On December 19, 2023, Camarillo Sanitary District, Central Valley Clean Water Association, and Clean Water SoCal filed a notice of appeal of the Fresno Superior Court's decision upholding the Toxicity Provisions. On August 5, 2025, the Fifth District Court of Appeal issued a published opinion finding that the TST statistical approach, which is an integral component of the Toxicity Provisions, cannot be utilized in NPDES permitting to evaluate whole effluent toxicity (WET) data because the Court of Appeal concluded that the TST is not an approved method under 40 C.F.R. Part 136. The Court of Appeal did not, however, disturb the Toxicity Provisions' use of the TST as a part of its water quality objectives.

The State Water Board prevailed on all other claims in the litigation. The Court of Appeal's decision became final on September 4, 2025.

On December 19, 2024, the Second District Court of Appeal largely rejected the Petitioners' position on the TST in *Camarillo Sanitary District v. California Regional Water Quality Control Board – Los Angeles Region*.

On September 15, 2025, the State Water Board filed a petition for review of the Fifth Circuit Court of Appeal's decision with the California Supreme Court. On November 12, 2025, the California Supreme Court granted review. The issues to be briefed and argued are limited to the issues raised in the State Water Board's petition for review. Pending review, the opinion of the Fifth Circuit Court of Appeal is not binding on the Water Boards. However, the opinion may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority.

On December 14, 2023, the State Water Board applied for U.S. EPA Region IX review and approval of a limited-use alternative test procedure for the use of one-effluent concentration when conducting whole effluent toxicity (WET) testing pursuant to 40 C.F.R. section 136.5 (Aug. 28, 2017). The application is specific to acute or chronic WET tests in Table 1 of the application when using the TST statistical approach (U.S. EPA, 2010) for analyzing the data. The request is being sought for all dischargers or facilities in the State of California and their associated laboratories. The application is still pending with U.S. EPA.

In accordance with Water Code sections 13146 and 13247, the Regional Water Board must continue to comply with the portions of the Toxicity Provisions that remain in effect. The Regional Water Board must fully implement the water quality objectives and their implementation procedures in the Toxicity Provisions. The numeric water quality objectives for chronic and acute toxicity established by the Toxicity Provisions, which are based on the TST, were approved by U.S. EPA and remain in effect. As such, the numeric water quality objectives continue to serve as the applicable federal water quality standards in California.

The Regional Water Board must also continue to comply with federal Clean Water Act NPDES regulations for determining reasonable potential and establishing applicable water quality-based effluent limitations (WQBELs). NPDES regulations (40 C.F.R. § 122.44(d)(1)(vii)(A)) require that all WQBELs be derived from and comply with all applicable water quality standards. Moreover, although the Toxicity Provisions left in place narrative water quality objectives for aquatic toxicity the Basin Plan, the Toxicity Provisions did supersede Basin plan provisions and portions of the *Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California* (SIP) for implementing

narrative water quality objectives. As such, there are currently no Basin Plan or SIP procedures in effect for implementing narrative water quality objectives to determine reasonable potential as required by 40 C.F.R. section 122.44(d)(1)(ii). As a result, the Regional Water Board must fully implement all of the Toxicity Provisions.