

TESTIMONY OF INDUSTRIAL ENVIRONMENTAL ASSOCIATION

Little Hoover Commission

Thursday, April 24, 2008

Sacramento, California

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Thank you to the Little Hoover Commission for taking up this critical topic of water quality regulation and its affect on businesses in California. And thank you for this opportunity to present the comments of the Industrial Environmental Association (IEA). It is greatly appreciated. I am currently employed as a Vice President Government Relations for a biotechnology company located in San Diego and I have a strong technical environmental operations background and degree in biochemistry. I previously served for three years as a member of the San Diego Regional Water Quality Control Board and am a current appointee to the California Colorado River Board as one of its public members. I am here today solely representing the IEA and to share some of my own personal experiences as an industry member of the San Diego RWQCB. We have structured our comments along the lines of the questions in the letter confirming my attendance today that I received from this Commission and I would be happy to try and answer any additional questions you may have.

First, I would like to acknowledge that the challenges facing water quality regulators are technically complex and difficult. Scientific innovation has given us the ability to learn more and more about water quality challenges and the complexities and specific limitations of our scientific knowledge and engineering solutions are being discovered every day. Additionally, there has been a fundamental shift in the focus of water quality regulatory programs, with the regulatory paradigm changing dramatically over the last few years from point source regulation to that of non-point sources. As such, there are fundamental structural changes to State Water Resources Control Board (SWRCB) and Regional Water Quality Control Board (RWQCB) governance that should be considered.

The example of how stormwater requirements and numeric limits are applied are of particular concern.

HOW STORMWATER REGULATIONS HAVE AFFECTED INDUSTRY:

Industrial facilities for many years have operated under the general industrial stormwater permit, a permit that is adopted by the state and applied uniformly to all businesses statewide. Businesses have adopted sophisticated Best Management Practices that prevent any facility discharges from reaching the stormwater conveyance system. However, businesses, through the re-issuance of the National Pollution Discharge Elimination System (NPDES) permitting system or through Total Maximum Daily Load (TMDL) programs, are now being held responsible and accountable for urban runoff from their site.

Following are a few examples of compliance challenges some IEA members have had to face:

(1) Stormwater numeric toxicity limits have been applied to companies with NPDES permits in San Diego that are impossible to meet. The basis cited for the toxicity standard in the permit was the SWRCB's Water Quality Policy for the Enclosed Bays and Estuaries of California. However, this policy, originally adopted in 1974, was never intended to apply to storm water discharges and specifically states "This policy does not apply to wastes from vessels or land runoff." There were no scientific studies, testing or modeling, when the decision was made by the RWQCB to impose this very stringent storm water toxicity limit, based on this policy, into permits. Further they did not consider the impacts on facilities that will be required to spend millions of dollars in an attempt to meet a standard that was not shown to be supported by any scientific data or analyses.

The full impact of the past and future stormwater regulatory framework, as it is proceeding today, has not had the benefit of full and reasoned analysis. For example, urban runoff from just one inch of rainfall over a 10-acre industrial site generates 265,000+ gallons of stormwater. Costs for compliance at a typical 10-acre site include \$5 per linear foot for berming, three-to-five treatment units at \$30,000 per unit and \$10,000 per unit annual operational and maintenance costs per treatment unit. This example only reflects the costs of one small facility (>\$100K), and the cost grows exponentially as the acreage of the site increases. It is also important to note that while treatment units have been relatively successful, these units do not guarantee compliance.

(2) The California Toxic Rule (CTR) numeric limit criteria has been applied to stormwater in the Chollas Creek TMDL, although the CTR specifically states that the standard should not be applied to land runoff. The San Diego City Attorney's office provided the SWRCB with an analysis of the effects of application of stringent numeric criteria for stormwater for the 25-square mile Chollas Creek watershed. They determined compliance requires condemnation of land for large treatment facilities that would displace thousands of homes and businesses at a cost of approximately \$1.7 billion – and this is for only one drainage basin in San Diego. A 2002 study estimated the cost for Los Angeles County to catch and treat just 70% of their stormwater runoff at approximately \$44 billion and six times that amount to catch and treat 97% of the stormwater runoff.

Permit or TMDL conditions that have been applied for purposes for which they were never intended result in unattainable and unreasonable requirements on businesses and have resulted in significant compliance challenges for industry. This places businesses in a position of automatically being in non-compliance, leaves them subject to significant fines and penalties and opens the door for citizen lawsuits, even though the business has taken every possible measure and used all technology available to comply within their control.

While it is expected that industrial facility requirements will expand to encompass additional measures to contain runoff from their own site, the greatest contributing factor to stormwater pollution today is and will remain general urban runoff. Requiring industry to take on the responsibility and bear the burden of containment and clean-up costs for management of urban runoff, beyond their property boundaries, or outside of their control (such as the ambient condition of the receiving water) is unreasonable. When general urban runoff, rainwater or even drinking water do not meet water quality standards, businesses should not shoulder the burden to address what is a publicly-mandated responsibility and concern.

In some circumstances, permit conditions are adopted to drive new technologies, called technology-forcing rules. However, the wholesale clean-up of bay or ocean water placed on individual businesses cannot be considered technology-forcing rules but rather are technologically infeasible and impossible for a single business, or group of businesses to achieve, alone.

KEY CHALLENGES FACING BOTH REGULATORS AND THE REGULATED COMMUNITY IN DEVELOPING EFFECTIVE AND FAIR STORMWATER REGULATIONS:

Businesses need to have certainty and in place, a body of regulation and a known framework for application of that regulation into permits, in order to allow for continuing operation of their facilities, as well as for planning purposes for expansion of their facilities. Unfortunately, the way the system is working today there is no certainty. Stormwater permit limitations are decided regionally, board-by-board, on a case-by-cases basis or permit-by-permit basis. In addition, the water quality standards that are being applied have not been scientifically researched or tested for the particular circumstance but rather are randomly selected, such as cited above in the compliance examples.

Consistent application of permit requirements and uniformity in regulation is needed statewide and must be firmly in place in order that RWQCB and SWRCB member turnover does not cause random or very disparate deviations in application of regulations based on regional board member make-up.

The SWRCB needs to provide more guidance and oversight to the RWQCB decision-making process, setting forth specific criteria for them to follow and scientifically-based parameters they must work within to set standards.

The RWQCB needs to be more receptive to thoroughly analyzing appeals to ensure that regional board decision-making process was sound and adhered to state guidelines and giving adequate time for review and comment on peer reviews.

RWQCB board members typically serve only one day a month. The extent of the material to read, as well as the degree of complexity of that material, is immense. As a past member of the board with a highly technical background, I had to do additional research at times to try and fully understand the permits we were being asked to review. A framework for guidance in analyzing that material and data and decision-making tools should be

developed to aid in the decision-making process, including technical support and recommendations for a range of options that can be considered.

Along these lines, another significant concern is the inability of the state to attract technically-qualified, scientific or experienced individuals to serve on regional boards because of the 10% limitation on income from any regulated source, which eliminates most qualified individuals from contributing to the process. Many board members have had no prior experience in the application of complicated legal requirements to environmental systems. The effect of the new stormwater programs has basically disqualified almost anyone who is employed in the state, as the municipal permits apply to almost all industrial sites. This results in a serious void in the board makeup by not allowing for the most qualified industrial representatives to participate.

THE PROS AND CONS OF A STATEWIDE STORMWATER POLICY:

The IEA believes that a statewide stormwater policy is critically necessary. Stormwater policy has far-reaching consequences to California's businesses and needs to have a higher level of attention at the statewide level. Municipal, industrial and construction site stormwater runoff regulation is emerging as one of the most complicated and burdensome environmental programs in the State of California. Yet, instead of a statewide planned and comprehensive approach to address storm water, precedents are being set, conditions for permits are being developed and numeric limits are being imposed in a fragmented case-by-case, permit-by-permit manner. In particular, the imposition of numeric limits has been shown to be unrealistic and unachievable, resulting in unfair and unreasonable storm water regulation. The state's existing overreaching water quality regulatory approach, in some cases, lacks common-sense and cost-effective solutions to improve water quality.

We see an urgent need to:

- Engage in the development of a uniform and consistent statewide stormwater policy;
- Continue with the work and further develop the findings of the Blue Ribbon Panel on Numeric Effluent Limits (NELs) and use the findings to support development of a statewide stormwater policy;
- Consider the overall impacts of stormwater regulation on the development, testing and validation of advanced treatment systems, the impacts of massive land-based detention basins, the limitations on sanitary sewer systems capacities to accept stormwater and other available options for diversionary stormwater disposal measures. To date, we are unaware of any coordination or planning between the water quality boards and sanitary sewer agencies to address stormwater diversions on a large-scale basis.

Under Porter Cologne, the SWRCB should be balancing environmental protection while still allowing the state to prosper economically. However, recent experience is that overreaching regulatory mandates from RWQCBs have resulted in the imposition of some arbitrary and unreasonable water quality requirements. The process for the development of a statewide stormwater policy needs to include a full understanding and consideration of the many technical and scientific factors necessary to make informed decisions about stormwater management, including the role of atmospheric deposition, effects of storm flow 'run-on' from adjacent lands, naturally occurring erosion, storm event variations and diversity in watersheds, such as hydrologic conditions and pollutant fate and transport.

The SWRCB should have a dedicated scientific, technical, and research staff unit that develops parameters for water quality requirements and standards, similar to the way statewide rules are developed at the California Air Resources Board (CARB), with set minimum guidelines on processes/protocols on how to apply those standards. Regional boards would then have definitive guidance but also could take into account regional differences. This process has been proven effective and manageable at CARB, and it allows for a consistent statewide approach, while still giving regions enough flexibility to address individual area requirements.

The overall issue of numeric effluent limits (NELs) for stormwater discharges continues to be a source of great controversy in California. The SWRCB had a good start when they convened a group of scientific experts on the "Blue Ribbon Panel on Numeric Limits (panel)." The panel was to evaluate the feasibility of NELs. Although there was considerable debate on some of the Panel's report findings, the report should serve as a starting point for further work to address NELs and to support the development of a statewide policy on stormwater regulation. One of the

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findings in the report concluded the state's current industrial stormwater data base is inadequate for purposes of developing and enforcing numeric limits. A statewide stormwater policy could help to address this deficiency by setting clear guidelines on data regional boards must collect to enhance the state's data base and support decisions based on NELs. But since the initial findings of the Panel were published, the SWRCB has taken no further proactive steps to develop an overall statewide stormwater policy. Instead, RWQCBs are still proceeding with a patchwork of policy-via-permit decisions.

The scientific validity of stormwater requirements, the costs of full compliance and the ability of a permittee to come into compliance, as well as whether compliance is infeasible or impossible, all need further study. Whether the imposition of compliance requirements (such as using large tracts of already developed urban lands as detention basins) may cause unintended consequences with the potential for overall harm rather than benefit should be considered.

Currently, the SWRCB Draft Strategic Plan does not even address the need for a uniform and consistent statewide storm water policy. The environmental priority is focused on the development of TMDLs. However, TMDLs are only a portion of the bigger picture. This "no statewide stormwater policy" option will result in a continuing maze of patchwork requirements, unreasonable and unattainable permit conditions and failure of the program. A statewide stormwater policy should be developed and thoroughly vetted in order to attain incremental and reasonably-achievable progress of a stormwater regulatory framework and management system for California. Statewide standardization, with flexibility in parameters to adjust to local conditions, and clear coordination and consistency of policy implementation between state and regional boards should be developed to set forth a stormwater regulatory framework and management system for California.

DOES THE STATE BOARD HAVE SUFFICIENT ACCOUNTABILITY MEASURES AND AUTHORITY TO ENSURE THAT CALIFORNIA CAN PROTECT AND IMPROVE WATER QUALITY THROUGH THE ACTIONS OF THE NINE REGIONAL BOARDS? SHOULD IT HAVE MORE POWER TO DIRECT THE REGIONAL BOARDS' ACTIONS? WHAT IS THE APPROPRIATE RELATIONSHIP?

The relationship between the SWRCB, their statewide requirements and their direction to RWQCBs needs to be enhanced.

A model that could be examined is that of the California Air Resources Board (CARB) system and their role and relationships with local air quality districts. CARB has a sophisticated scientific, research, and modeling division that develops the basis for new rules and then provides expertise, technical support and interaction with the districts. CARB sets up the overarching state program, then districts can localize on an as-needed basis but still stay within the framework of the statewide rule.

CARB also has extensive capability to monitor, benchmark and report ambient air quality improvements.

HOW CAN THE STATE AND REGIONAL BOARDS IMPROVE CONSISTENCY, TIMELINESS AND TRANSPARENCY IN PERFORMING DUTIES, SUCH AS BASIN PLANNING, ADOPTING TOTAL MAXIMUM DAILY LOAD (TMDL) PROJECTS AND PERMITTING? HOW CAN THE BOARDS INCREASE RESOURCES AND REVENUES TO IMPROVE THEIR PERFORMANCE? WHAT OTHER PROCESSES OR STRUCTURES NEED TO BE RE-EXAMINED TO ENSURE EFFECTIVE AND EFFICIENT WATER QUALITY REGULATION?

In just the past few years, there has been a major paradigm shift of boards using point source standards on non-point sources. Reasonable standards need to be developed that will result in efficient and cost-effective ways to improve surface water quality.

The water boards need the resources to respond to increasingly complex needs, moving away from the traditional engineering focus on point sources to a broadly expanded set of skills to address the non-point sources causing water quality degradation. The sheer volume of addressing non-point sources requires additional analytical work, technical knowledge, and the ability to provide for additional staff support.

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Currently, basin planning updates are being conducted as a routine, housekeeping type of function instead of a true analysis of current conditions. Emphases, and appropriate resources, have to be placed on meaningful basin plan updates processes to examine how conditions have changed and to update water quality objectives.

The basis for establishing TMDLs and the application to watersheds has substantial oversight guidance due to the multi-year review and adoption of a statewide TMDL policy, which encompassed careful review and was thoroughly-vetted from a wide stakeholder community. The development and application of a TMDL policy, as well as stakeholder buy-in to the process, should serve as an example for development of a stormwater policy.

The SWRCB needs to develop increased funding mechanisms, for operations, for staff resources, for scientific and technical research and for better monitoring data coordination and analysis. The regulated community is already paying substantial fees and cannot bear the full burden of an effective and successful water quality management program, when the largest contributing factors are unrelated to business sources but rather to non-point source pollution. The air quality districts, for example, receive funding ranging from \$2-\$7 per vehicle on the Department of Motor Vehicle (DMV) registration fee. Some type of public goods charge, A DMV fee, or water/sewer bill dedicated charges, must be developed to adequately fund the program.

I thank you again for this opportunity to present this testimony on behalf of the Industrial Environmental Association. I hope this has been helpful and I will try my best to answer any questions you may have.

Thank you.