

Subject Matter Code: I-02 Elliott Memorandum

Comment ID: CTR-001-006

Comment Author: Law Offices of Alan C. Waltner

Document Type: Storm Water Auth.

State of Origin: CA

Represented Org: Alameda Cnty Clean Wtr Pgm

Document Date: 09/22/97

Subject Matter Code: I-02 Elliott Memorandum

References:

Attachments? N

CROSS REFERENCES

Comment: THE ELLIOT MEMORANDUM SHOULD BE RESCINDED, RATHER THAN CODIFIED, IN THE CALIFORNIA TOXICS RULE

As support for much of the problematic language in the preamble to the CTR, EPA cites a January 9, 1991, memorandum from E. Donald Elliot to Nancy J. Marvel, Region 9 ("Elliot memorandum") which concluded that water quality based numeric effluent limitations apply to storm water discharges.

The Elliot memorandum contains a number of critical flaws and should be rescinded. Any attempt to rely on the Elliot memorandum in the proposed CTR, or to codify the Elliot memorandum, would subject the CTR to challenge based on these flaws.

The Elliot memorandum acknowledges that: "Section 402(p)(3) is clearly intended to draw a distinction between the requirements on industrial and municipal storm water discharges." Elliot memorandum at page 3. (*8) However, the memorandum derails by assuming an erroneous and contrary conclusion:

Section 402(a)(1) requires that all NPDES permits comply with the applicable provisions of section 301. This includes compliance with appropriate technology-based standards and effluent limits (sections 301(b)(1)(B), 301(b)(2)). Permits must include "any more stringent limitation" necessary to meet WQS. Section 301(b)(1)(C).

Elliot memorandum at page 2. The critical flaw in this conclusion is that Section 402(p) establishes the applicability of Section 301, making Section 301 applicable only to industrial, and not municipal, storm water systems. Section 402(a) does not override, or conflict with, the applicability provisions of Section 402(p). In fact, by referring only to "applicable requirements under section 301," Section 402(a) acknowledges that not all "requirements" of Section 301 are applicable to all NPDES permits issued under Section 402. Among the limitations on such applicability are those set forth in Section 402(p).

The analysis in the Elliot memorandum also ignores a number of critical rules of statutory construction. First, as discussed above, the Elliot memorandum's reading of the statute would result in the retroactive application of Section 301(b)(1)(C) to municipal storm water systems, despite the absence of any evidence of Congressional intent to have created a retroactive system (and, in fact, despite the evidence in Section 402(p) to the contrary).

Second, the Elliot memorandum ignores the maxim that *expressio unius est exclusio alterius* ("to express one thing is to exclude all others"). Sutherland, *supra*, at S 47.23. The maxim applies to the interpretation of Section 402(p) in at least two ways. First, by making MEP-level control the standard for municipal

storm water systems, other control approaches (such as water quality based effluent limitations) are excluded. Second, by making Section 301 applicable only to industrial storm water discharges, the application of Section 301 to municipal storm water discharges is excluded.

The maxim is closely related to the "plain meaning" rule. Here, Section 402(p) plainly states that MS4s are only subject to MEP-level controls. Section 402(p) does not leave open any possibility that MS4s might be subject to more stringent water quality based effluent limitations.

The Elliot memorandum also violates the plain meaning rule by applying the broad principles of the Act to override the statute's express provisions in Section 402(p). Likewise, extrinsic factors not appearing on the face of a statute cannot be used to override the express statutory language or create an ambiguity. Sutherland, supra, at Section 46.04.

The Elliot memorandum vainly seeks salvation by citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("Chevron") in support of its flawed analysis. However, only where the statute is ambiguous does the doctrine described in Chevron come into play. Yet Section 402(p) is unambiguous and exclusive in its application of MEP-level controls to MS4s.

As summarized by the D.C. Circuit in *American Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119 (D.C. Cir. 1995):

Under the Chevron doctrine, a court reviewing an agency's interpretation of a statute it administers must first determine whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, the review ends there for the court must give effect to the unambiguously expressed intent of Congress. *Id.* at 842-43. If the court determines that Congress has not directly addressed the precise issue, however, it then goes to the second step of the review to determine whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843.

52 F.3d at 1117. Here, the precise issues of: (1) the control technology standard to be met by MS4s, and (2) the applicability of Section 301, have been addressed in the statute. EPA is not, as the Elliot memorandum argues, free to substitute its preferred result for the approach selected by Congress. (*9)

Rather than addressing these critical flaws in its analysis, the Elliot memorandum spends considerable time pursuing a red herring, arguing that the plain meaning of Section 402(p) (limiting MS4 control standards to the MEP level) would impliedly repeal Section 301 (which EPA argues makes all dischargers subject to more stringent water quality based effluent limitations). The Elliot memorandum argues that this would "read Section 402(p)(3)(B) as overriding 301(b)(1)(C)." Elliot memorandum at page 4. Yet Section 402(p) did not "impliedly repeal" or "override" Section 301; Section 402(p) actually confirmed the operation of Section 301 as applied to industrial storm water systems. The fact that Section 402(p) created a distinction between two categories of dischargers is perfectly ordinary. Congress routinely delineates the applicability of statutes without resulting in "implied repeals" of the delineated provisions. EPA's argument (that making MS4s subject to water quality based effluent limitations exceeding MEP-level controls is necessary to avoid an implied repeal of Section 301) is specious.

The analysis in the Elliot memorandum is flawed and the memorandum's conclusion is only arguably correct as applied to storm water discharges associated with industrial activity. Municipal dischargers need only address water quality standards through MEP-level reductions (*10) The Elliot memorandum should not be relied upon or codified by EPA in the CTR, but instead should be expressly revoked given its demonstrated lack of merit.

(*8) The Elliot memorandum also states that:

Section 402(p) also specified the levels of control to be incorporated into storm water permits. Permits for discharges associated with industrial activity are to require compliance with all applicable provisions of Sections 301 and 402 of the CWA, i.e., all technology-based and water quality-based requirements. Section 402(p)(3)(A). By contrast, permits for discharges from municipal separate storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable" ("MEP"). Section 402(p)(3)(B)(iii).

Elliot memorandum at page 2.

(*9) Moreover, the protection of the Chevron doctrine cannot be invoked without including the agency interpretation in a regulation. In Chevron, the Supreme Court found that Congress had left a gap for EPA to fill through rulemaking on the technical definition of "stationary source" under the Clean Air Act, and that EPA's regulations filling that gap were within the permissible range of discretion intended by Congress. Chevron held that where a statute includes a broad definition, the very breadth of the definition implies a delegation to the agency to fill the gap in a manner consistent with the goals and purposes of the statute. Yet the position in the Elliot memorandum has never been incorporated in a regulation; agency staff pronouncements of lesser stature are ineligible for the deference that Chevron would provide.

Finally, EPA's interpretation is inconsistent, both as between the Elliot memorandum and the Interim Permitting Policy, and even within the Elliot memorandum. In a closing footnote EPA acknowledges that:

There may be some municipal separate storm sewer systems which are unable to meet even the three-year compliance date in their permits. The Agency retains the discretion to issue an administrative order fixing a schedule for compliance if compliance is not achieved in that three-year period.

Elliot memorandum at 5. The basis for this inconsistent position contemplating discharges in excess of water quality based effluent limitations is not stated. More importantly, any deference under Chevron is limited where EPA's own interpretation has been inconsistent.

(*10) The ACCWP also objects to the indirect way in which this issue is being presented. The Elliot memorandum was issued without benefit of any public comment, and no EPA regulation has ever put forward for judicial review the positions taken in the Elliot memorandum. EPA owes it to the state and local agencies that will be affected by this rule to act in a more straightforward manner. If EPA is going to put the position taken in the Elliot memo forward as official policy binding on permit decisions, the agency should do so in a judicially reviewable form so that government agencies that would be affected by the positions taken in the memorandum have a fair opportunity to seek a judicial determination of the validity of that approach.

Response to: CTR-001-006

See response to CTR-040-004.

Comment ID: CTR-031-001b
Comment Author: Fresno Metro. Flood Ctrl Dist.
Document Type: Flood Ctrl. District
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: I-02 Elliott Memorandum
References: Letter CTR-031 incorporates by reference letter CTR-027
Attachments? N
CROSS REFERENCES I-01

Comment: 1. The preamble of the proposed CTR, and therefore the apparent intended application of the rule, is inconsistent with the Clean Water Act.

Several broad, ambiguous statements in the preamble of the proposed rule imply that Clean Water Act section 301 requirements apply to all dischargers, including municipal stormwater systems. These presumptions must be qualified to recognize the clear intent of Congress and plain language of the CWA, section 402(p) which clearly require municipal storm water dischargers only to adopt controls to reduce pollutants in storm water to- the maximum extent practicable and to eliminate non-storm water discharges. The section's intent is demonstrated through the application of section 301 requirements, and related application of numeric effluent limitations or wasteload allocations in NPDES permits, to industrial stormwater discharges only.

EPA is obviously aware of Congress's intent as to municipal storm water discharge requirements. EPA included in its published draft Phase I municipal storm water regulations a quote from the Congressional Record of October 16, 1986, citing that intent.

Without a clear citation of the provisions of CWA section 402(p), the preamble to the proposed rule appears to be an attempt to codify the Elliot memorandum of January 9, 1991, and to create via this rule a result not authorized by Congress.

In order to eliminate this fundamental legal flaw in the proposed CTR, and eliminate the potential for future misinterpretation and controversy, each of the following statements from the preamble (at a minimum) must be clarified and/or qualified so that they do not appear to override or retract CWA section 402(p).

"When these proposed federal criteria take effect, they will create legally applicable water quality standards ... in California ... for all purposes and programs under the CWA." [p. 42160. This statement must include recognition that for municipal storm water dischargers, the CWA objectives can be addressed through best management practices, implemented to the maximum extent practicable (MEP), as established by CWA section 402(p).]

"CWA section 301(b)(1)(C) ... requires NPDES permits to contain limitations required to implement any applicable water quality standard established in the CWA." [p. 42162. The text should note that section 301 (b) (1) (c) does not apply to municipal storm water dischargers, as established through section 402(p).]

"If a discharge causes, has the reasonable potential to cause, or contributes to an excursion of a numeric or narrative water quality criteria, the permitting authority must develop permit limits as necessary to

meet water quality standards." (P. 42184. Again, for municipal storm water dischargers, the preamble and CTR must make clear the MS4 permits must: address this CWA objective through the MEP requirement.)

"Point source and nonpoint source allocations are established so that predicted receiving water concentrations do not exceed water quality standards." [p. 42185.1; and

"[NPDES] permits for wet weather point source dischargers must include limits necessary to implement applicable water quality standards, through application of water quality-based effluent limitations or WQBELs." [p. 42186. These two statements are only correct as applied to industrial storm water dischargers; numeric effluent limitations or wasteload allocations can not be legally, reasonably, or practically applied to municipal storm water discharges.]

Response to: CTR-031-001b

See response to CTR-040-004.

Comment ID: CTR-040-014a
Comment Author: County of Sacramento Water Div
Document Type: Storm Water Auth.
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: I-02 Elliott Memorandum
References: Letter CTR-040 incorporates by reference letter CTR-027
Attachments? Y
CROSS REFERENCES J

Comment: RECOMMENDED MODIFICATIONS

To address our concerns, we recommend the following modifications which do not undermine the toxic pollutant control actions envisioned in EPA's economic analysis (e.g., BMPs for stormwater and source control). In fact, some of these recommendations would provide incentives for greater movement toward achieving the water quality criteria than would occur under the Rule as it is currently proposed.

I. Recommendation: Modify the Preamble statement that indicates municipal wet weather discharges must comply with water quality standards or WQBELs (Preamble pages 42186-42187).

* It is not a requirement of the CWA or EPA that wet weather discharges must meet water quality criteria. If it were, the adverse economic impact on municipal stormwater programs would be enormous. The CWA, at best, is ambiguous on this issue; EPA regulations do not address it; and the Elliott memorandum, which appears to be the primary basis for EPA's position on this issue, is not a legitimate basis for such a position. The Elliott memorandum is an internal EPA memorandum and; therefore, is not an independent interpretation of the CWA. The Elliott memorandum does not constitute EPA policy and is based upon a false premise and an inaccurate reading of the preamble to EPA's 1988 proposed stormwater regulations. The Elliott memorandum contains other erroneous conclusions that have never been applied to municipal stormwater permits (e.g., that municipal stormwater dischargers must comply with water quality standards within three years of permit issuance).

* EPA has routinely approved municipal stormwater NPDES permits that have not included requirements to comply with water quality standards (e.g., Tulsa, OK; Greensboro, NC; Denver, CO; Portland, OR; Cedar/Green (Seattle), WA; Sarasota County, FL; and Phoenix, AZ).

* If EPA does not modify the Preamble statement to clarify that municipal stormwater dischargers are not required to comply with these water quality standards, then EPA must include the cost of the structural controls necessary for compliance in its economic analysis and, using these costs, address the requirements of Presidential Executive Order 12866, the Unfunded Mandates Reform Act, and the Regulatory Flexibility Act.

Response to: CTR-040-014a

See response to CTR-040-004.

Subject Matter Code: I-02a Applying QBELs, Stormwater

Comment ID: CTR-001-002

Comment Author: Law Offices of Alan C. Waltner

Document Type: Storm Water Auth.

State of Origin: CA

Represented Org: Alameda Cnty Clean Wtr Pgm

Document Date: 09/22/97

Subject Matter Code: I-02a Applying QBELs, Stormwater

References:

Attachments? N

CROSS REFERENCES

Comment: I represent the Alameda Countywide Clean Water Program ("ACCWP") in a variety of matters regarding the ACCWP Storm Water Management Plan ("SWMP") and associated National Pollutant Discharge Elimination System ("NPDES") permit. The ACCWP is a consortium of the fourteen cities in Alameda County, the County, the Alameda County Flood Control and Water Conservation District, and Zone 7 of the Alameda County Flood Control District. Those agencies have joined together in a coordinated approach to storm water management and control, and are the co-permittees under an NPDES permit that recently was reissued by the San Francisco Bay Regional Water Quality Control Board ("RWQCB").

This letter provides comments of the ACCWP on legal issues raised by the August 5, 1997, proposed rule regarding "Water Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of California." 62 Fed. Reg. 42160 ("California Toxics Rule" or "CTR"). By copy of this letter to the State Water Resources Control Board ("SWRCB"), we also provide comments on the SWRCB's parallel implementation rule, proposed September 12, 1997. Comments on the scientific and technical issues raised by the proposed CTR will be submitted separately. (*1)

BACKGROUND

Local governments recognize that they have a key role in addressing the contribution of municipal storm water discharges to water quality problems and the ACCWP takes that role very seriously. During the first five years of the program, for example, ACCWP members adopted comprehensive storm water management ordinances and have undertaken a broad range of initiatives to reduce storm water pollution. This program has won numerous awards, including EPA's 1994 National Second Place Award for the Outstanding Municipal Storm Water Control Program.

However, important practical constraints are faced by municipal dischargers which, unlike most industrial sources, cannot simply cease discharging. First is the chronic problem of limited resources, which has been exacerbated by the recent passage of Proposition 218 in California constraining the fee-based revenue sources upon which the ACCWP members generally have relied.

Second, municipal discharges have limited authority over the products and activities that contribute to storm water pollution. For example, home garden care pesticides have been identified as a significant contributor to toxicity in storm water runoff, but municipalities are preempted from regulating those pesticides directly and must rely instead on public information campaigns. Similarly, copper from brake linings is also of concern, but local governments cannot direct the formulation of brake linings.

Third, there are limited opportunities for end-of-pipe storm water discharge controls, and such controls would be both costly and environmentally damaging. See, *In re Citizens for a Better Environment, et al*, SWRCB, WQ 91-03, at 51-52 ("Treatment techniques such as wet-detention basins also require large land areas to contain high volume, variable storm flows. These techniques therefore result in extremely high costs The impacts of holding large amounts of storm water for treatment may also pose potential adverse environmental impacts".)

Since such storm water treatment plants generally would need to be constructed at the downstream end of storm water flows, they would need to be located adjacent to the San Francisco Bay. However, many of the undeveloped sites adjacent to the Bay are constrained by wetland and endangered species concerns, as well as presenting potentially significant open space, energy, visual, odor, noise and other impacts. Given siting constraints in the substantially developed inner San Francisco Bay Area, it may not even be possible to site the substantial storm water collection, transportation, storage and treatment facilities that might be needed to produce pollutant reductions of the magnitude assumed by EPA in the proposed rule.

As a result of the constraints faced by municipal storm water systems, existing water quality criteria in the San Francisco Basin Plan historically have been implemented in the context of NPDES permits for storm water systems through escalating best management practices ("BMPs"), rather than through numeric effluent limitations ("NELs") or wasteload allocations ("WLAs"). The reason for this is that NELs and WLAs currently are infeasible for municipal separate storm sewer systems ("MS4s").

This implementation policy was first embodied in the 1986 Basin Plan, which retained considerable permitting discretion for nonpoint source controls, and did not require municipal permittees to meet numerical water quality objectives. See, *In re Citizens for a Better Environment, et al*, SWRCB, WQ 91-03, at ii.

The 1995 Basin Plan, at pages 4-14 and 4-15, continued and clarified this implementation policy, stating that:

Since both the sources of pollutants in stormwater discharges and the points of discharge are diffuse, and the methods of reducing pollutants in stormwater discharges are in the development stage, water quality-based numerical effluent limitations are not feasible at this time. Instead, stormwater permits will include requirements to prevent or reduce discharges of pollutants that cause or contribute to violations of water quality objectives If this first phase does not result in attainment of water quality objectives, the Regional Board will consider permit conditions that may require implementation of additional control measures.

This implementation policy has also been recognized by the State Board, "Storm water permits for MS4s must achieve compliance with water quality objectives, but they may do so by requiring the implementation of BMPS." SWRCB Order 96-13 at 11.

The Basin Plan's approach is consistent with EPA policy, reflected in EPA's August 26, 1996, "Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm water Permits" published at 61 Fed. Reg. 43761 et seq. ("EPA Interim Permitting Policy"). The EPA Interim Permitting Policy:

uses best management practices (BMPS) in first-round storm water permits, and expanded or better-tailored BMPs in subsequent permits, where necessary, to provide for the attainment of water quality standards.

Numeric effluent limitations are not required under the EPA Interim Permitting Policy (*2)

The current NPDES permit for the ACCWP was developed under this approach, by requiring the dischargers to carry out the SWMP while providing for annual improvements through a work plan process.

Any attempt to make water quality standards for San Francisco Bay directly applicable to municipal storm water dischargers as numeric effluent limitations would conflict with these carefully considered provisions of the Basin Plan and State Board implementation policy.

(*1) As you know, several storm water systems have requested additional time to comment on the proposed rule, a request in which the ACCWP has joined. Additional time is particularly important given the interdependence between the CTR and the recently proposed "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California," ("State Implementation Policy" or "SIP") released by the SWRCB on September 12, 1997, just two weeks before the comment deadline on the CTR. The way in which the CTR is implemented is central to its effects on storm water dischargers, as discussed below. Unfortunately, the State Implementation Policy does not fully correct or moderate the critical problems created by the proposed CTR.

(*2) See also, EPA, May 3, 1996, "Draft Language for Interim Permitting Approach for Water Quality-Based Effluent Limitations in Storm Water Permits." EPA also indicates in the draft policy that neither the statute nor EPA regulations require numeric effluent limitations in municipal storm water permits, and that BMPs can substitute for such numeric limitations.

Response to: CTR-001-002

See response to CTR-040-004.

Comment ID: CTR-001-004
Comment Author: Law Offices of Alan C. Waltner
Document Type: Storm Water Auth.
State of Origin: CA
Represented Org: Alameda Cnty Clean Wtr Pgm
Document Date: 09/22/97
Subject Matter Code: I-02a Applying WQBELs, Stormwater
References:
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CROSS REFERENCES

Comment: THE REGULATION SHOULD MORE CLEARLY CONFIRM THE CURRENT IMPLEMENTATION POLICY, AND CONFLICTING LANGUAGE IN THE PREAMBLE SHOULD BE REMOVED

At the outset, we note that the actual language of the proposed regulation appears to be appropriately qualified, stating that:

The criteria established in this section are subject to the State's general rules of applicability in the same way and to the same extent as are other Federally-adopted and State adopted numeric toxics criteria when

applied to the same use classifications

Page 42206, Proposed Section 131.38(c). As discussed above, State Board decisions in California and the San Francisco Basin Plan have made clear that MS4s need address WQS only through the implementation of escalating BMPS, all within the framework of the MEP standard.

Unfortunately, the recently proposed State Implementation Policy ("SIP") is inconsistently drafted regarding this point. The state policy does, in Section 5.1, state that:

It is the intent of the SWRCB, in adopting this Policy, that the implementation of priority pollutant criteria/objectives and other requirements of this Policy through NPDES permits for storm water shall be consistent with the requirements of the existing SWRCB and RWQCB storm water program.

Draft State Implementation Policy at 5.1. In Chapter 5.1 of the Functional Equivalent Document ("FED") supporting the SIP, existing policy is correctly described as follows:

The RWQCBs have adopted NPDES storm water permits for MS4s . . . The MS4 permits require the discharger to develop and implement a Storm Water Management Plan whose goal is to reduce the discharge of pollutants to the maximum extent practicable (MEP). MEP is the performance standard specified in Section 402(p) of the Clean Water Act. Components of the storm water management plan address public education and outreach; illicit connection/illegal discharge detection and elimination; fiscal resources; monitoring; and the best management practices (BMPS) which will be utilized. To date, the efforts of the municipalities subject to MS4 permits have been focused on implementation of BMPs to reduce pollutants, rather than on treatment of storm water to remove pollutants.

FED at V-117 (Emphasis Added, Italics in Original). The FED goes on to state that:

Because of the nature of storm water discharges and the typical lack of information on which to base numeric water quality based effluent limitations, it has not been feasible for the SWRCB to establish numeric effluent limitations for storm water permits.

FED at V-118. The policy alternative selected in the proposed SIP is described as follows:

The existing NPDES storm water permits contain narrative objectives, rather than the numeric limits found in the more conventional NPDES permits. Compliance with these narrative objectives is a function of the dischargers' timely and effective implementation of the management practices and programs identified in the storm water management plan (MS4 permits) or the storm water pollution prevention plan (industrial/construction permits).

FED at V-119.

Despite this carefully drafted language in the FED, general statements included in the SIP suggest that WQS may need to be translated into NELs or WLAS, regardless of whether those NELs or WLAs can be satisfied by MEP-level controls. Draft SIP at 2, 910. This would violate the approach of Clean Water Act Section 402(p), as well as requirements of the Porter Cologne Act described below. (*5)

We request confirmation of the statements in the proposed rulemaking that MS4s only need to address WQS through the adoption of BMPs reflecting MEP-level controls, and that EPA does not intend that the state apply the proposed WQS as numeric effluent limitations or as the basis for wasteload allocations. Specifically, we request that EPA include language similar to that quoted above from the FED in the final

rule, and/or the preamble to the final rule.

(*5) The SIP at page 10 has particularly problematic language which states that:

Regardless of which method is used for deriving water quality-based effluent limitations, the calculated water quality-based effluent limitations shall be compared to the technology-based effluent limitations for the pollutant, and the most protective of the two types of limitations shall be included in the [permit].

This language could be read to suggest that NELS or WLAs could override the MEP standard of Section 402(p), which would violate both the Clean Water Act and Porter-Cologne Act.

Response to: CTR-001-004

See response to CTR-040-004.

Comment ID: CTR-020-001

Comment Author: City of Stockton

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/24/97

Subject Matter Code: I-02a Applying WQBELs, Stormwater

References:

Attachments? Y

CROSS REFERENCES

Comment: City of Stockton, California Comments on the Proposed "California Toxics Rule" 62 Fed. Reg. 42160-42207 (August 5, 1997)

The City of Stockton (the "City" or "Stockton") operates both wastewater and storm water facilities which discharge to waters of the United States. Consequently, the City is directly impacted by the Environmental Protection Agency's ("EPA" or the "Agency") proposed rulemaking. The following provides the City of Stockton's comments on the California Toxics Rule ("CTR" or the "rule") (62 Fed. Reg. 42160-42207).

As was the case with the prior National Toxics Rule ("NTR"), this proposal only addresses toxic pollutants listed pursuant to Section 307(a) of the Clean Water Act ("CWA") (approximately 126 pollutants). Conventional and non-conventional pollutants (such as ammonia, chlorine, iron, aluminum and color) are not addressed under this rule proposal. In addition, this proposal does not address whole effluent toxicity. The CTR addresses not only applicable water quality criteria (acute, chronic and human health) but also implementation methodologies such as the appropriate design instream flows to apply in developing permit limits (e.g., 7/Q/10, 30/Q/5, harmonic mean). Based upon the preamble to the proposed rule, the proposed water quality criteria will apply to both point source and non-point source discharges such as storm water. Due to the qualifying language contained in the rule, it is not apparent that criteria application will be uniform throughout the state and will depend somewhat on existing Basin Plan provisions.

Contrary to the rule preamble, the City does not believe that this regulatory proposal reflects the latest scientific information regarding proper application of the proposed criteria. Due to the expansive application of human health-related criteria to all streams designated as MUN (which is a default use designation under the Basin Plans) and the failure to allow site-specific modification to reflect actual use conditions, the potential receiving waters classified as exceeding human health criteria will be greatly exaggerated (e.g., stringent water ingestion and fish consumption-based criteria will be applied to ditches and intermittent streams). Consequently, the cost impact associated with this rule will be significantly greater than it otherwise should be.

In particular, the application of the criteria to storm water discharges will produce widespread non-compliance with the proposed criteria for common metals such as zinc, copper, and lead and will trigger the need for extensive implementation of costly technologies, unrelated to actual environmental needs. Therefore, the City respectfully submits that the CTR needs to be restricted in scope, updated to include more recent information regarding the expected impact of pollutants on the environment, and revised to allow utilization of relevant site-specific information to avoid misapplication of limited local resources. The following presents an overview of the proposed rule and identifies issues of concern from both storm water and wastewater discharge perspectives.

Response to: CTR-020-001

See response to CTR-040-004.

Comment ID: CTR-020-022

Comment Author: City of Stockton

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/24/97

Subject Matter Code: I-02a Applying WQBELs, Stormwater

References:

Attachments? Y

CROSS REFERENCES

Comment: VI. Application of Criteria to Wet Weather Flows is Inappropriate

The CTR specifically states that all toxics criteria apply to wet weather flow events and storm water discharges. EPA further states that it is unlikely that specific effluent limits will be established because such limits are "infeasible." Regardless of EPA's position concerning the ability to establish specific effluent limits, it is apparent that application of the proposed criteria to storm water discharges either through effluent limits or receiving water limits will place virtually all storm waters in violation of the CTR. Thus, municipalities and water conservation districts will be exposed to citizen suits and civil penalties under state and federal law. As a result, major expenditures of local resources would be required to eliminate violations of the proposed criteria, even where it is apparent that there is no actual environmental harm. Because the rule fails to assess the significant economic impact associated with application of the criteria to storm waters and there is no information in the record supporting that it is necessary to meet the criteria in storm waters to adequately protect the environment, the CTR should specifically exempt storm waters from the criteria application. The legal and technical basis for this request is discussed below.

Few, if any, of the EPA criteria were designed to apply to storm water-related events. The criteria assume that extended exposure to the pollutants of concern will occur, that sensitive organisms are present, and that the form of pollutant and water chemistry used to conduct the laboratory studies underlying the criteria are similar to the receiving water conditions. All of these assumptions are known to be in error for storm water discharges, as follows:

- * Exposures will be intermittent, variable and generally far shorter than the exposure used to establish the acute criteria (96 hours) and certainly far less than any chronic or human health based criteria (30 days to 70 years). EPA's "fast acting toxicant" evaluations confirm that short duration exposures may often be an order of magnitude higher than longer term exposures without causing adverse impacts (see, Section II.A.4.a.1 above). Thus, direct application of the criteria (with or without a mixing zone) will produce unnecessarily restrictive requirements.

- * Water chemistry in storm water is dramatically different than the typical pristine water used to assess pollutant impacts in the criteria tests (e.g., Lake Superior water). EPA has routinely acknowledged that water chemistry significantly impacts the effect of pollutants in the environment, and elevated TOC and TSS levels will significantly mitigate the toxicity of a wide range of metals and organics. (See, 62 Fed. Reg. 42175). The National Guidelines require modification of the criteria when it is apparent that the criteria will be overprotective as is the case in this circumstance.

- * Sensitive organisms such as daphnids and salmonids, which often drove the criteria document calculations (e.g., metals criteria) cannot inhabit most receiving waters and certainly will not be present in intermittent streams. Turbulent high flow conditions alone would destroy fragile daphnids. Applying criteria to protect species that cannot possibly exist in the receiving waters is clearly unnecessary.

- * Guidance documents related to the translation of water quality criteria into permit limitations are not designed to address intermittent wet weather conditions. Criteria modification procedures mandated to apply to metals (WER Guidance) cannot be applied to short term, highly variable, intermittent exposure conditions without a major restructuring of the guidance documents.

- * Permitting guidance recommended for usage with the CTR (e.g., (1991) TSD) does not have a wet weather analysis component and the statistical procedures are not applicable due to the lack of continuous discharge and infrequency of discharge conditions. The only comparable information contained in the TSD relates to mixing zones wherein the TSD states that environmental impacts cannot be properly assessed unless the time period of exposure is accurately considered due to the known dose/response relationships of various pollutants. EPA has also acknowledged that "[T]he human health risks of a substance cannot be determined with any degree of confidence unless a dose/response relationship is quantified" (62 Fed. Reg. 42175). As data on the short term dose/response is not included in the published criteria and the TSD procedures do not specify how to assess intermittent short term pollutant exposures to compare such exposures to longer term criteria, there is no objective basis upon which to apply even the acute criteria to storm water events.

Given the lack of experience of permitting authorities in properly applying water quality criteria to short term events, it is essential that EPA clarify that the proper application of criteria to wet weather events must account for the time period of exposure, the organisms present, and the different characteristics of the water in comparison to EPA laboratory studies. Absent the establishment of specific procedures to ensure that the criteria will be properly applied to the unique circumstances of storm events, EPA should not extend application of the criteria to wet weather events.

Application of metals criteria to storm water discharges will be particularly problematic as EPA is now recommending that the actual hardness of the receiving water be used and there is no assurance that dilution with receiving waters will be considered. Most of EPA's metals criteria assume that a metal becomes infinitely toxic as hardness approaches zero. This is not based on a detailed database of organism sensitivity at low hardness but is an artifact of the hardness/toxicity model that reasonably reflects the toxicity of metals under typical hardness conditions (50-200 mg/l). Storm water events, however, do not fit within the typical conditions that formed the basis of the current metals criteria.

The hardness of rain water is quite low and will result in extremely low limits if applied to storm waters. Hardness levels increase as the storm water contact time with the ground increases. However, prior to mixing with surface waters, it is not unusual to encounter hardness values in the 20 mg/l range. This produces extremely low acute and chronic criteria for a host of metals, most notable copper, zinc, and lead. For these parameters, the calculated criteria will range from less than 1 ppb to 30 ppb. Thus, application of the CTR criteria to storm waters would lead to the conclusion that most storm waters are an acute toxicity threat to the environment even though a more accurate application of the criteria would lead to an opposite conclusion for metals. This is not a minor difference in results and, unless corrected, will trigger the need for expensive biological testing to prove the obvious -- metals in storm waters are not toxic.

In addition to the concerns regarding application of metals criteria, it is apparent that there is no rational basis for applying long term human health criteria to short term storm water events. EPA should clarify that long term human health-based criteria (which assume 30 day to 70 year exposures) often based on long term bioaccumulation do not apply to short term storm water discharge events. This will prevent misapplication of the criteria that would otherwise occur under the Agency's proposal.

In summary, EPA should revise the scope of the CTR to specify that the criteria do not apply to storm water situations and that site-specific decisions on the need for reduction of pollutants in storm waters will be conducted.

Response to: CTR-020-022

See response to CTR-040-004.

Comment ID: CTR-087-002

Comment Author: Morrison & Foerster LLP

Document Type: Storm Water District

State of Origin: CA

Represented Org: SCVURPPP

Document Date: 09/24/97

Subject Matter Code: I-02a Applying WQBELs, Stormwater

References: Letter CTR-087 incorporates by reference letters CTR-001 and CTR-027

Attachments? N

CROSS REFERENCES

Comment: Moreover, the Agency's position on the application of WQBELs to municipal stormwater discharges rests on a flawed internal opinion circulated from the General Counsel's office to Region 9's legal counsel in January 1991 (the so-called "Elliot Memo") which ignores the plain language of the statute and simply assumes that Congress's clear language was ambiguous. It has never before been

endorsed by the Administrator or been subjected to public comment process or the potential for judicial review. Therefore, if EPA wishes to try to make the Elliot Memo the law through the CTR, it first needs to go to Congress to amend the Act's unambiguous NPDES permitting requirements for municipal stormwater discharges.

Response to: CTR-087-002

See response to CTR-040-004.

Subject Matter Code: I-03 Applicability of Criteria

Comment ID: CTR-007-003
Comment Author: Port of San Diego
Document Type: Port Authority
State of Origin: CA
Represented Org:
Document Date: 09/24/97
Subject Matter Code: I-03 Applicability of Criteria
References:

Attachments? N

CROSS REFERENCES

Comment: 2. Under the proposed rule, it is unclear whether Best Management Practices or the water quality criteria will be used to assess stormwater discharges.

Response to: CTR-007-003

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria with regard to WQBELs and storm water discharges, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTR-013-005
Comment Author: County of Los Angeles
Document Type: Storm Water Auth.
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: I-03 Applicability of Criteria
References: Letter CTR-013 incorporates by reference letter CTR-027

Attachments? N

CROSS REFERENCES

Comment: In addition, we would like to emphasize the following concerns which greatly impact the Los Angeles County Stormwater Program:

5. The proposed criteria were established based on typical, steady flow wastewater discharges, and may not be applicable to wet weather flows. The USEPA in Washington is currently reviewing the applicability of present water quality criteria to wet weather discharges. Given the quantity of stormwater discharges, flow conditions in the receiving waters, the numerous discharge points, and variability in discharge quality, there is no published scientific approach for assessing the impacts of such discharges on designated uses.

We recommend that the rule not apply to MS4s until the USEPA has completed its study on the applicability of water quality criteria to MS4 discharges.

Response to: CTR-013-005

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of the scientific validity of CTR criteria, see response to CTR-031-004c. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTR-027-006

Comment Author: California SWQTF

Document Type: Storm Water Auth.

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-03 Applicability of Criteria

References: Letter CTR-027 incorporates by reference letters CTR-001, CTR-036 and CTR-040

Attachments? N

CROSS REFERENCES

Comment: 6. The proposed criteria were established based on typical, steady flow wastewater discharges, which may not be applicable to wet weather flows. USEPA in Washington is currently reviewing the applicability of present water quality criteria to wet weather discharges. Given the quantity of stormwater discharges, flow conditions in the receiving waters, the numerous discharge points, and variability in discharge quality, there is no published scientific approach for assessing the impacts of such discharges on designated uses.

Recommendation: The rule should not apply to MS4s until USEPA has completed its study on the applicability of water quality criteria to MS4 discharges.

Response to: CTR-027-006

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria with regard to WQBELs and storm water discharges, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTR-031-003b

Comment Author: Fresno Metro. Flood Ctrl Dist.

Document Type: Flood Ctrl. District

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-03 Applicability of Criteria

References: Letter CTR-031 incorporates by reference letter CTR-027

Attachments? N

CROSS REFERENCES C-21

Comment: If the proposed rule is carefully and sufficiently modified to affirm a commitment by EPA to effect only its Congressional authorization as established by CWA section 402(p), then EPA's failure to assess municipal storm water dischargers' ability to attain the proposed standards and associated economic and environmental impacts may be set aside at this time. However, if EPA persists in maintaining the CTR as drafted in this regard, the ambiguities presented in the preamble demand serious consideration and analyses as follows.

a. Many of the criteria are not attainable or scientifically valid with regard to municipal stormwater dischargers, nor is the proposed approach consistent with an appropriate delegation of authority to the State.

i. Attainability of Standards

The statutory premise of the CWA is to provide water quality for protection and propagation of aquatic life, wildlife, and recreation wherever attainable. The CWA therefore establishes a reality test in that objectives must be attainable.

The proposed CTR criteria can not be attained by municipal storm water dischargers. The District treats through detention and retention all but 1% of its urban runoff on an annual average basis. Nonetheless, its urban runoff discharges, after detention, would exceed proposed dissolved copper, lead, and zinc criteria. Concentrations would need to be reduced by 67%-95% to meet the proposed chronic criteria. No storm water best management practices, including conventional end-of-pipe storm water treatment facilities (i.e., detention systems), are believed to be able to achieve these levels of reductions for these constituents.

Response to: CTR-031-003b

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004. For a discussion of the scientific validity of CTR criteria, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a.

Comment ID: CTR-037-008

Comment Author: Hampton Roads Sanitation Dist.

Document Type: Sewer Authority

State of Origin: VA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-03 Applicability of Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: 8. EPA states that NPDES permits for wet weather point source discharges must include limits in order to implement water quality standards, and that the water quality criteria presented in the rule will be used to develop WQBELs in NPDES permits for these sources. EPA does not address the exposure issues associated with using surface water quality standards developed using tests lasting 2-60 or more days to draw conclusions on discharges lasting minutes to hours. WERF has conducted research recently which shows clearly that the impact due to exposure of minutes is orders of magnitude less than the impact observed following days of exposure. Use of water quality standards to regulate most stormwater discharges is overly stringent and protective, which will ultimately result in the expenditure of resources on controls which offer no benefit. EPA should be responsible for justifying the use of water quality standards with stormwater discharges with data and illustrating why they are necessary to protect and support designated uses. The use of these standards under these conditions is arbitrary, at best.

Response to: CTR-037-008

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria with regard to WQBELs and storm water discharges, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTR-061-005a
Comment Author: G. Fred Lee & Associates
Document Type: Academia
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: I-03 Applicability of Criteria
References:
Attachments? Y
CROSS REFERENCES C-17

Comment: Additional Comments

Presented below are some specific comments on statements made in the proposed CTR Federal Register.

Page 42160, third column, near the bottom, municipal stormwater dischargers should be added to the list of NPDES dischargers who have an interest in this rule. If anything, they probably will be affected more than any other entity.

Page 42161, third column, first paragraph, states,

"Numeric criteria for toxic pollutants allow the State and EPA to evaluate the adequacy of existing and potential control measures to protect aquatic ecosystems and human health. Numeric criteria also provide

a more precise basis for deriving water quality-based effluent limitations in National Pollutant Discharge Elimination System (NPDES) permits to control toxic pollutant discharges."

That statement is somewhat unreliable and misleading.

While it is bureaucratically simpler for regulatory agencies to numerically compare concentrations found in an effluent or in ambient waters with a chemical concentration-based water quality criterion, the claim made in the quoted statement is not necessarily true. In fact, rarely is the exceedance of numeric criteria a reliable basis for assessing the impacts of constituents on human health or the environment. While it may be more precise, it can be highly inaccurate. This is one of the areas that needs to be corrected by the US EPA where biological effects-based approaches are used, rather than chemical-based approaches for regulating such impacts as aquatic life toxicity for potentially toxic constituents.

Response to: CTR-061-005a

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria with regard to WQBELs and storm water discharges, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTR-096-001a

Comment Author: City of Modesto

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-03 Applicability of Criteria

References:

Attachments? N

CROSS REFERENCES C-17

Comment: Thank you for the opportunity to comment on the proposed California Toxics Rule. The City's comments are related to five main concepts:

1. The numerical standards are ambiguous or incomplete to address the variety of operating conditions under which discharges to waters of the United State occur.

Specifically, the City submits the following comments:

A. California's receiving waters have a very wide diversity of hydraulic and environmental conditions. The numerical standards do not take into account the wide range of rainfall patterns, storm durations, irrigation flows and power generation flows that are the current aquatic habitat. California's rivers are highly regulated, highly managed. The proposed regulations neither address this variety, nor provide a means by which numerical standards can be readily developed to address such variety.

B. The California Toxic Rule presents new water quality standards for the State of California. This rule

presents water quality standards for all water bodies within the state. Water quality standards as presented in this rule would apply to all environmental conditions (dry and wet weather). During wet weather, conditions in the receiving streams can be extremely variable due to the quality and quantity of stormwater. Treatment plants generally have hydraulic capacity to process twice the average dry weather flow received. Water quality standards were developed based on dry weather conditions. Therefore, numerical water quality standards should not need to be achieved during storm events. If water quality standards need to be achieved during storm conditions, it is suggested that new standards be developed to account for the changes in environmental conditions.

Response to: CTR-096-001a

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria with regard to WQBELs and storm water discharges, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTRE-002-004

Comment Author: G. Fred Lee & Associates

Document Type: Academia

State of Origin: CA

Represented Org:

Document Date: 09/18/97

Subject Matter Code: I-03 Applicability of Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: As you may or should know, the urban stormwater dischargers are not claiming that there are no water quality problems associated with their discharges. It appears that there may be real water quality problems in urban stormwater discharges due to chemicals, such as the organophosphate pesticides principally known at this time, diazinon and chlorpyrifos, which the US EPA either, in the case of chlorpyrifos for which there is a water quality criterion, has failed to implement a criterion or, for diazinon, has yet failed to develop a criterion. I understand that finally after years of delay where it has been well known by the US EPA that diazinon was causing widespread aquatic life toxicity, the Agency is now beginning again to formulate a water quality criterion for this chemical.

Even with the development of these criteria, however, it does not mean that they would be enforced. The chlorpyrifos situation is a prime example of where there is well-known aquatic life toxicity in many communities' stormwater runoff, yet the Agency, including US EPA Region 9, has failed to admit publicly that there is a problem, much less act to control the problem. A situation could readily develop where stormwater dischargers are required under CTR to spend massive amounts of public funds building "50 Oakland Coliseums" just to store stormwater runoff in Alameda County from a storm magnitude that occurs more frequently than once in three years because of administrative exceedances of several CTR-regulated heavy metals in the stormwater runoff which have been repeatedly found to be in non-toxic, non-available forms, including the dissolved forms. yet could have the treated stormwater discharge to San Francisco Bay be highly toxic due to unregulated or inadequately regulated

organophosphate pesticides. This is an artifact of the inappropriate approaches used by the Agency of focusing on chemicals, rather than chemical impacts, i.e. potential toxicants rather than toxicity.

Response to: CTRE-002-004

The scope of today's rule is to establish numeric criteria to bring California into compliance with CWA Section 303(c)(2)(B): Section 303(c)(2)(B) requires adoption of numeric criteria for priority toxic pollutants contained in CWA Section 307(a) for which EPA has issued Section 304(a) criteria guidance if those pollutants could reasonably be expected to interfere with the designated uses of state waters. The promulgation, implementation, and control of pollutants that are not identified as priority toxic pollutants (i.e. those pollutants that are not contained in CWA Section 307(a)) are outside of the scope of today's rule. Diazinon and chloropyrifos, the pollutants referenced by the commenter, are not contained toxic pollutants under CWA Section 307(a) and are thus outside of the scope of this rulemaking.

However, EPA notes that the CWA and Water Quality Standards Regulation requires all states, including California, to adopt water quality standards (which includes water quality criteria) sufficient to protect the designated uses of their waters. This requirement necessitates State adoption of criteria that are not included in the CWA Section 307(a) list. In addition, states may also use their narrative criteria to prevent toxic effects caused by pollutants that are not identified as priority toxic pollutants, such as those pollutants mentioned by the commenter, in instances where a state does not have numeric criteria in place or to supplement the numeric criteria

For a discussion of the scientific validity of CTR criteria, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004. See also response to CTR-001-003.

Comment ID: CTRH-001-007
Comment Author: Doug Harrison
Document Type: Public Hearing
State of Origin: CA
Represented Org: Fresno Met. Flood Control
Document Date: 09/17/97
Subject Matter Code: I-03 Applicability of Criteria
References:
Attachments? N
CROSS REFERENCES

Comment: Even if it could be successfully argued that the CTR as drafted is applicable to the stormwater dischargers, we believe that the criteria is flawed. During one recent meeting of the Water Quality Standards Work Group of FACA, EPA headquarters staff made a presentation that reminded us of the language of the Act, which seems to establish a test of attainability -- a reality test, if you will -- that the objectives must be attainable.

We also have extensive data from the NURP program and the NPDES permits that suggest that through monitoring it was demonstrated that the criteria are not attainable, the concerns that you heard from the

two previous speakers. It is documented that episodic stormwater flows vary greatly the ability to handle -- in things like recovery times and so forth.

And I would also note a 1992 memo that was produced by Tudor Davis of the Office of Science and Technology, reporting on the CSO Wet Weather Panel that focused on some of these, and the fact that while they concluded it was not necessarily appropriate to produce a separate set of criteria just for wet weather conditions, that what the criteria did have to do is to be applied to both duration and the frequency and magnitude -- frequency and magnitude.

The EPA began this work shortly thereafter and brought to the Urban Wet Weather FACA the individual who is doing this work of application to the aquatic life criteria of these variables. The criteria analysis was to have been completed by September/October of this year.

We have to conclude that if the criteria as proposed in the current CTR proposal is in fact to be interpreted to include stormwater, that there are these inconsistencies that need to be addressed.

Certainly there's awareness at EPA of the limitations of BMP programs regarding attainment of CWA objectives and criteria.

The Phase II draft rule that is now before OMB for review provides for a complete comprehensive stormwater program evaluation in 13 years from the date of the adoption of that final rule, which is scheduled for March of '99. And that program definition included Phase I to Phase II programs, and goes on to state that there should be no additional BMPs required until that evaluation is completed.

It appears to limit flexibility -- would tend to limit state flexibility. We have concern about that, and also that it appears to limit the compliance schedule to 5 years. EPA has already cited the need to go to a 10-year evaluation after two permit terms for the entire stormwater program.

We have run models in our community FMFCD stormwater system. We capture 90 percent of all runoff in the community and keep it. It never gets to the waters of the U.S. The remaining 10 percent, we treat 90 percent of it through extensive detention.

Response to: CTRH-001-007

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTRH-001-061
Comment Author: Fred Lee
Document Type: Public Hearing
State of Origin: CA
Represented Org:
Document Date: 09/17/97
Subject Matter Code: I-03 Applicability of Criteria
References:

Attachments? N
CROSS REFERENCES

Comment: MR. LEE: My name is Fred Lee, L-E-E.

I want to focus on one aspect of the discussions today, and that is the urban stormwater and highway stormwater runoff issues. These are of concern to me. I'm particularly concerned about this issue in applying these criteria to regulating stormwater runoff and the ultimate goal mandated by the Clean Water Act.

I have been involved in criteria and standards development since the 60s, I helped EPA develop its current approach as a peer reviewer for agencies for the so-called gold book criteria, which is still basically the approach being used today to promulgate these criteria.

There is no question, if you understand how the current criteria were developed, that they tend to significantly over regulate urban stormwater runoff. This will result in massive expenditures as we approach the goal of achieving water quality standards in stormwaters.

This is a well-known problem. Everyone knows this is a problem, but everybody says, "Well, apply BMPs for a while." And that's no man's land. what's that really mean and what's MEP mean and so forth?

When I looked at that rule, I said we really missed the boat by not discussing what it's going to cost to apply these criteria to urban stormwater as an ultimate goal where you have no measure for exceedence for five years. That's Clean Water Act requirements.

We've got to get these figures on the table and we've got to start to understand where we're heading for as a goal with respect to applying these criteria as ultimate goals for urban stormwater.

It's -- there may be situations it's 1 to 2 dollars per person per day in the regulated communities. That's the kind of cost we're talking about for achieving Clean Water Act requirements, with no more than one exceedence for constituents, as we've heard, such as copper and lead, zinc, et cetera -- 1 to 2 dollars per person.

We don't have lands to store this water in order to provide treatment, so it's -- to me, it's a matter for EPA as part of this rule to do a proper economic analysis of what it's going to cost the public actually to process ever-increasing BMPs until we get to the goal.

It's a serious mistake. We're talking about a massive bill for this country. And what are we going to get? We'll get a lot of over regulation because criteria are not applicable to this kind of situation.

We need different kind of criteria, and this has been well discussed; we understand that needs to be done obviously.

Response to: CTRH-001-061

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality

criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Comment ID: CTRH-002-024

Comment Author: Gary Hildebrand

Document Type: Public Hearing

State of Origin: CA

Represented Org: L.A. Dept of Public Works

Document Date: 09/19/97

Subject Matter Code: I-03 Applicability of Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: My name is Gary Hildebrand. I'm with the Los Angeles County Department of Public Works, and I'm the stormwater permit program manager for Los Angeles County. I'm here representing the principal permittee for the L.A. County Municipal Stormwater Permit Program which is the largest municipal stormwater permit program in the nation. We have over 86 permittee cities in our program. We cover over a 3,000-square-mile watershed which contains like 9 million people. We also have a 3,000-mile-plus urban storm drain network that permittees must maintain.

First, I'd like to express our support and agreement with the comments expressed at the public hearing yesterday in San Francisco by Mr. Bob Hale, the chairman of the California Stormwater Quality Task Force, and also the other municipal stormwater program representatives, both there and at the hearing today.

Then I would like to provide some additional comments that are concerned to our municipal stormwater program. First off, compliance with the proposed criteria for stormwater discharges may be impractical. The proposed criteria was established for typical steady flow point source discharges and are not applicable to the wet weather flows. Quantity of stormwater discharges, slow conditions and receding waters, the numerous discharge points and the variability in discharge quality, there is no published scientific approach to determine the compliance with water quality criteria for stormwater runoff from a municipal storm drain system. Until such an approach is accepted and published by a regulatory agency, it should not be applicable to municipal stormwater discharges.

Response to: CTRH-002-024

EPA disagrees with the comments. See response to CTR-001-003. For a discussion of the scientific validity of CTR criteria, see response to CTR-031-004c. For a discussion of the relationship between criteria, standards, effluent limitations and implementation costs, see response to CTRH-002-006a. For a discussion of EPA's evaluation of studies concerning costs associated with achieving water quality criteria for storm water discharges, see responses to CTR-013-003 and CTR-040-004.

Subject Matter Code: I-04 Site-Specific Criteria

Comment ID: CTR-013-006a
Comment Author: County of Los Angeles
Document Type: Storm Water Auth.
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: I-04 Site-Specific Criteria
References: Letter CTR-013 incorporates by reference letter CTR-027

Attachments? N

CROSS REFERENCES C-24e

Comment: In addition, we would like to emphasize the following concerns which greatly impact the Los Angeles County Stormwater Program:

6. The proposed criteria will apply to all inland surface waters and enclosed bays and estuaries, regardless of the designated or attainable uses for a water body. This is of particular concern for waters that only have flows during wet weather events or that are point source effluent dominated water bodies. Blanket application of water quality criteria to all waters without designated uses is inconsistent with Federal and State water quality laws. Water quality standards are made up of two components--designated uses and the appropriate criterion to ensure the designated use can be achieved. Assigning criteria to a water body without first considering the designated uses is inappropriate and could result in over restrictive, unnecessary permit limits potentially resulting in significant compliance costs to a discharger.

It is common in California for urban stormwater runoff discharges to be the primary or only source of waters to urban creeks and waterways, that is, there would be little or no flow during most of the year were it not for urban stormwater or other point source discharges. Given the potential compliance problems for stormwater discharges for certain constituents (even after a fully implemented BMP program), a municipality could be forced to remove stormwater discharges from the creek. The costs would be significant and the benefit little, if any. In fact, the removal of these discharges would be environmentally damaging to aquatic life and wildlife that were supported by the effluent/runoff dependent waters.

Therefore, the proposed rule should be revised to avoid blanket application of the proposed criteria to all surface waters and to require appropriate beneficial and attainable uses of all waters be determined prior to imposing water quality criteria in the water body. The rule should also be revised to implement separate and distinct water quality criteria for water bodies that are primarily effluent or runoff-dependent.

Response to: CTR-013-006a

See response to CTR-040-004.

Comment ID: CTR-027-007a
Comment Author: California SWQTF

Document Type: Storm Water Auth.

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-04 Site-Specific Criteria

References: Letter CTR-027 incorporates by reference letters CTR-001, CTR-036 and CTR-040

Attachments? N

CROSS REFERENCES C-24e

Comment: 7. The proposed criteria will apply to all inland surface waters and enclosed bays and estuaries regardless of the designated or attainable uses for a water body. This is of particular concern for waters that only have flows during wet weather events, or that are point source effluent dominated water bodies. Blanket application of water quality criteria to all waters without designated uses is inconsistent with federal and state water quality laws. Water quality standards are made up of two components - designated uses and the appropriate criteria to ensure the designated use can be achieved. Assigning criteria to a water body without first considering the designated uses is inappropriate and could result in overly restrictive, or unnecessary permit limits, potentially resulting in significant compliance costs to a discharger.

It is common in California for urban stormwater runoff discharges to be the primary or only source of waters to urban creeks and waterways; that is, there would be little or no flow during most of the year were it not for man's activities. Given the potential compliance problems for stormwater discharges for certain constituents (even after a fully implemented BMP program) a municipality could be forced to remove stormwater discharges from the receiving water. The costs would be significant and the benefit little, if any. In fact, the removal of these discharges would be environmentally damaging to aquatic life and wildlife that were supported by the effluent/runoff dependent waters.

Recommendation: The proposed rule should be revised to avoid blanket application of the proposed criteria to all surface waters, and to require appropriate beneficial and attainable uses of all waters be determined prior to imposing water quality criteria in the water body. The rule should also be revised to implement separate and distinct water quality criteria for water bodies that are primarily effluent or runoff dependent waters. An example of such flexibility is the use of a less stringent cancer risk factor such as 10E-4 or 10E-5 for the human health criteria for effluent dominated streams.

Response to: CTR-027-007a

See response to CTR-040-004.

Comment ID: CTRH-002-025

Comment Author: Gary Hildebrand

Document Type: Public Hearing

State of Origin: CA

Represented Org: L.A. Dept of Public Works

Document Date: 09/19/97

Subject Matter Code: I-04 Site-Specific Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: The next and the proposed criteria will apply to Inland Surface Waters, Enclosed Bays, and Estuaries regardless of the designatable or attainable uses for water -- this is a particular concern that only flows during wet weather events or that are dominated water bodies.

There are many situations in our area where early stormwater runoff discharges to local creeks and waterways are the primary or only source of waters. There would be flow under most of the year were it not for discharges. Given the stormwater discharges and compliance problems with certain decisions, this would be even after a fully implementing BMP program. The municipality could be forced to remove the discharge from the creek constantly without benefit. In fact, removal of these discharges could be environmentally unsound given the wildlife that are supported by the effluent and/or runoff-dependent waters.

Response to: CTRH-002-025

The commenter feels that in situations where a municipality is unable to achieve compliance with CTR in an intermittent stream, they will be forced to continuously remove the discharge from the stream. EPA does not mandate removal of runoff as part of a storm water management plan, rather the upgrading / addition of BMPs to lower pollutant loadings. Commenter is right in that wildlife may be dependent on the intermittent flows which are totally of storm water origin. But it must be noted that the flora and fauna may also be similarly imperiled by toxics contained in the storm water effluent.

Subject Matter Code: I-05 Compliance Schedules

Comment ID: CTR-013-007a
Comment Author: County of Los Angeles
Document Type: Storm Water Auth.
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: I-05 Compliance Schedules
References: Letter CTR-013 incorporates by reference letter CTR-027

Attachments? N

CROSS REFERENCES G-02

Comment: In addition, we would like to emphasize the following concerns for which greatly impact the Los Angeles County Stormwater Program:

7. The proposed rule provides only a five-year compliance schedule to achieve compliance with the proposed water quality criteria. Again, setting aside the issue of whether water quality standards actually apply to municipal stormwater discharges, municipal stormwater programs are long-term, BMP-based programs. Because of this, it will take many years for a municipality to realize any water quality benefits in the receiving waters. The preamble to the proposed rule addresses all wet weather discharges together in one discussion. Municipal stormwater programs should be discussed and treated separately from all other wet weather and point source discharges. These are unique programs and cannot be placed in a "one-size fits all" regulatory program. The proposed rule needs to account for the nature of stormwater discharges by allowing more time for the MS4 long-term, BMP, source control program approach to take place for controlling pollutants in stormwater discharges.

We recommend that the rule be revised to provide a longer compliance schedule and to provide more flexible regulatory relief for MS4 dischargers who have fully complied with the MEP discharge standards but cannot achieve compliance within the established compliance schedule. At a minimum, the CTR should follow the recommendation of the State Task Force on the Inland Surface Water Plan to provide a 15-year compliance schedule.

Response to: CTR-013-007a

See response to CTR-030-004c.

Comment ID: CTR-027-008a
Comment Author: California SWQTF
Document Type: Storm Water Auth.
State of Origin: CA
Represented Org:
Document Date: 09/25/97
Subject Matter Code: I-05 Compliance Schedules
References: Letter CTR-027 incorporates by reference letters CTR-001, CTR-036 and CTR-040
Attachments? N
CROSS REFERENCES G-02

Comment: 8. The proposed rule provides only a five-year compliance schedule to achieve compliance with the proposed water quality criteria. Again setting aside the issue of whether water quality standards actually apply to municipal stormwater discharges, municipal stormwater programs are long term BMP based programs. The proposed rule fails to recognize this, addressing all wet weather discharges together in one discussion. Municipal stormwater programs should be discussed and treated separately from all other wet weather and point source discharges. These are unique programs and cannot be placed in a "one-size fits all" regulatory program. The proposed rule needs to account for the nature of stormwater discharges by allowing more time for the MS4 long-term, BMP, source control program approach to take place for controlling pollutants in stormwater discharges.

The compliance schedule in the proposed rule discourages a watershed approach to improving water quality. The development and implementation of a watershed plan requires many years and many stakeholder involvements. However, the short compliance schedule in the CTR would actually encourage the discharger to forgo the watershed approach and address its toxicity issues separately and more expeditiously.

Recommendation: The rule should allow the State to establish compliance schedules. Short of this flexibility, the rule should be revised to provide a longer compliance schedule and to provide more flexible regulatory relief for MS4 dischargers who have fully complied with the MEP discharge standards but cannot achieve WQBELs compliance within the established compliance schedule. At a minimum, the CTR should follow the recommendation of the State Task Force on the Inland Surface Water Plan to provide a 15-year compliance schedule. Also provisions should be made for a longer compliance schedule when dischargers use a watershed approach to control toxic pollutants.

Response to: CTR-027-008a

See response to CTR-030-004c.

Comment ID: CTRH-001-034b
Comment Author: Dave Brent
Document Type: Public Hearing
State of Origin: CA
Represented Org: CA Water Qual. Task Force
Document Date: 09/17/97
Subject Matter Code: I-05 Compliance Schedules
References:
Attachments? N
CROSS REFERENCES I-08
G-03

Comment: Thirdly, I'd like to touch upon implementation of the rule. My understanding is that the state's Inland Surface Waters and Enclosed Bays and Estuaries Plan will address implementation of the CTR. With this in mind, the CTR should serve as an enabling rule and allow the state and the dischargers flexibility in the implementation of objectives contained in the rule.

As I touched upon earlier in my opening remarks, EPA has included some enabling provisions in this rule that we support, such as use and determination of mixing zones and water effects ratios. From the

stormwater perspective, we believe other important enabling provisions must be included to allow for regional flexibility in the implementation of our stormwater programs.

For example, enabling provisions should be included to allow flexibility in establishing compliance schedules for stormwater discharges and should allow flexibility for site-specific establishment of low-flow conditions and wet weather standards, and ranges of human health criteria depending on the use of individual receiving waters.

Response to: CTRH-001-034b

With respect to compliance schedules see response to CTR-030-004c.

The final CTR also provides flexibility for site-specific flow conditions. EPA notes that the State of California may develop alternative design flows for its waters provided that those alternative flows are scientifically defensible and protective of the designated uses of State waters. Such alternative flows will be subject to EPA review and approval. However where the State has not adopted low flow provisions, the design flows specified in today's rule shall be implemented to ensure that the criteria will be implemented appropriately to provide environmental and human health protection.

As noted in the preamble of today's rule, EPA's Technical Support Document for Water Quality-based Toxics Control (the TSD) also recommends the use of dynamic models to perform wasteload allocations. EPA is clarifying that today's rule provides the State of California with the flexibility to utilize dynamic models in establishing low flow designs. The dynamic modeling techniques, as outlined in the TSD, will enable the determination of wasteload allocations that will meet the criteria in today's rule without using a single, worst-case concentration based on a critical condition.

EPA disagrees that it must or should establish ranges of criteria depending on the use of individual receiving waters. In establishing water quality criteria for California, EPA is implementing section 303(c)(2)(B) of the CWA which requires adoption of criteria for all priority toxic pollutants for which EPA has issued criteria guidance and for which the discharge of such pollutants could reasonably be expected to interfere with the designated uses adopted by the state. EPA based the criteria contained in the CTR on its recent national criteria guidance, which are designed to protect aquatic life and human health. As long as a waterbody currently has a designated use for the protection of aquatic life and/or human health, application of the section 304(a) criteria is appropriate for fulfilling section 303(c)(2)(B). As a policy matter, EPA believes that the CTR, a massive undertaking in and of itself, is an essential first step toward reinstating a strong water quality program in California. Under the CWA, EPA has no obligation to develop such site-specific criteria or the data upon which such site-specific criteria would be based. If, however, the State wishes to develop site-specific criteria or to change the uses of the waterbody, pursuant to the regulations at 40 CFR Part 131, EPA would consider and possibly approve such a site specific criterion.

Comment ID: CTRH-002-026

Comment Author: Gary Hildebrand

Document Type: Public Hearing

State of Origin: CA

Represented Org: L.A. Dept of Public Works

Document Date: 09/19/97

Subject Matter Code: I-05 Compliance Schedules

References:

Attachments? N

CROSS REFERENCES

Comment: The last thing, the proposed rule provides only a five-year compliance schedule for a discharger to achieve the proposed criteria. Municipal stormwater programs are long-term programs that could take many years to fully implement and to realize any water quality benefits. Limiting municipal stormwater discharges to a five-year compliance schedule is inappropriate and impracticable.

The preamble to the proposed rule addresses all wet weather discharges. This should be discussed and treated separately from all other weather and point sources charges. These are unique programs and cannot be placed in a one size-fits-all category. The proposed rule needs to account for the nature of stormwater discharges but needs to allow a longer compliance schedule to account for the long-term BMP source control program approach. The proposed rule and corresponding compliance schedule discourages a watershed approach to improving water quality. The development and implementation of a watershed plan requires many years and various involvement. However, the CTR with a short compliance schedule would actually encourage the watershed approach and address toxicity issues separately and a little more expeditiously. The CTR should follow the recommendations of the State Task Force on the Inland Surface Water Plan than propose a 15-year schedule for full compliance.

Again, we'll be following up with written comments covering our oral testimony today. Thank you.

Response to: CTRH-002-026

See response to CTR-030-004c.

Subject Matter Code: I-07 Attainability of Criteria

Comment ID: CTR-040-005

Comment Author: County of Sacramento Water Div

Document Type: Storm Water Auth.

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-07 Attainability of Criteria

References: Letter CTR-040 incorporates by reference letter CTR-027

Attachments? Y

CROSS REFERENCES

Comment: MAJOR CONCERNS

We do, however, have fundamental concerns with the Rule as it is presently proposed and its supporting economic analysis. We believe the Rule can be modified in a manner that will be responsive to our concerns while at the same time being consistent with applicable Federal law and regulations. Our major concerns are presented here and are followed by our recommended modifications.

1. Concern: The Rule, as presently proposed, appears to require discharges from municipal stormwater programs to meet water quality based effluent limits (WQBELs).

* Attaining sufficient pollutant reduction through source control and other reasonable measures can be infeasible because many sources of pollutants are extremely difficult or impossible to control. This situation is illustrated by the Sacramento Stormwater Management Program's recent experience in evaluating sources of lead in Sacramento County. This past year the Sacramento Stormwater Program conducted an intense effort to evaluate lead, an identified high priority stormwater constituent of concern for the Program. A major part of the effort was to identify all potential sources of lead to stormwater. Approximately 50 individual sources of lead were identified. The next step was to determine which of these sources could be controlled considering the nature of the sources, practicality of controlling the sources, legal jurisdiction of the permittees, etc. Only a portion of the sources identified could be addressed through source control and BMPs. Some examples of sources that are difficult or impossible to control are: naturally occurring lead in soil, aircraft fuel (which does not come in unleaded form), automobile emissions (which still contain some lead), abrasion of road striping paint, and abrasion of tires.

Response to: CTR-040-005

See response to CTR-040-004.

Comment ID: CTR-096-002

Comment Author: City of Modesto

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-07 Attainability of Criteria

References:

Attachments? N

CROSS REFERENCES

Comment: Thank you for the opportunity to comment on the proposed California Toxics Rule. The City's comments are related to five main concepts:

2. Scientific data is lacking to show that impairments to waters of the United States are occurring during storm events.

Response to: CTR-096-002

Every two years, the California State Water Resources Control Board (SWRCB) submits a report on the State's water quality to the U.S. EPA pursuant to Section 305(b) of the Federal Clean Water Act. These reports present water quality assessment information compiled by California's nine Regional Water Quality Control Boards. SWRCB (1996) indicates that urban runoff and storm sewers are major and moderate sources of impairment of beneficial uses in estuaries, lakes and reservoirs, rivers and streams, and wetlands. The extent of this impairment is shown in the table below.

Sizes of Waters Impaired by Urban Runoff and Storm Sewers by Contribution to Impairment

Waterbody Type (Units)	Major ¹	Moderate and Minor ²
Estuaries(Acres)	899	52,552
Lakes and Reservoirs (Acres)	120,320	7,985
Rivers and Streams (Miles)	92	1,620
Wetlands, Freshwater (Acres)	1	58,316
Wetlands, Tidal (Acres)	0	184

Source: SWRCB (1996).

1. A major contributor is a source that is either the only one responsible for nonsupport of any designated use or it predominates over other sources.

2. A moderate contributor is a source that is the only one responsible for partial support of any use, predominates over other sources of partial support, or is one of multiple sources of nonsupport that have a significant impact on designated use attainment. A minor contributor is a source that is one of multiple sources responsible for nonsupport or partial support and is judged to contribute relatively little to this nonattainment.

State Water Resources Control Board (SWRCB). 1996. California 305(b) Report on Water Quality. Prepared as Required in Clean Water Act Section 305(b). August.

Subject Matter Code: I-08 SWRCB Flexibility&Authority

Comment ID: CTR-001-010
Comment Author: Law Offices of Alan C. Waltner
Document Type: Storm Water Auth.
State of Origin: CA
Represented Org: Alameda Cnty Clean Wtr Pgm
Document Date: 09/22/97
Subject Matter Code: I-08 SWRCB Flexibility&Authority
References:
Attachments? N

CROSS REFERENCES

Comment: EPA SHOULD ADDRESS ALL OF THE FACTORS THAT THE STATE WOULD ADDRESS UNDER THE PORTER COLOGNE ACT IN ESTABLISHING AN IMPLEMENTATION POLICY FOR MS4S

In promulgating water quality standards, EPA "is subject to the same policies, procedures, analyses, and public participation requirements established for States . . ." 40 C.F.R. Section 131.22(c). If EPA is to stand in the shoes of the State Board in this activity, it needs to address the fundamental statutory criteria for basin plan amendments, which limits the Regional Board to adopting only those objectives that "will ensure the reasonable protection of beneficial uses and the prevention of nuisance . . . [taking into account] . . . economic considerations . . . [and] the need for developing housing within the region." Water Code Section 13241.

Under state law, the definition of water quality objectives incorporates this requirement of reasonableness, by defining objectives to mean "the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." Water Code Section 13050(h).

All basin plans must implement the basic policies of Water Code Section 13000, which states that "activities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible."

At the permitting stage, water code Section 13263(a) provides for the case-by-case consideration of site specific beneficial uses and objectives in every instance: "(discharge requirements) shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose . . . and the provisions of Section 13241."

Even if EPA considers itself exempt from the application of these provisions of the Porter Cologne Act when it adopts water quality standards for California, by including inflexible standards that do not allow for the future consideration of costs as required by Section 13241, EPA is putting the Regional and State Boards on a collision course with these requirements when future Basin Plan and permitting decisions are made. Adequate flexibility must be included in the regulation, at minimum by preserving existing basin plan and State Board implementation policies, so that these state law requirements can be satisfied when basin planning and permitting decisions are made in the future.

Response to: CTR-001-010

EPA disagrees with this comment. EPA must adopt criteria in accordance with the requirements of the CWA. The quoted regulation means that EPA will follow the same policies, procedures, analyses, and public participation requirements as it requires for states under the CWA. The regulation does not mean that the CWA's provisions are negated by state law. As EPA explained in the CTR response to CTR-042-007a, while economic factors may be considered in designating uses, they may not be used to justify criteria that are not protective of those uses. As a Federal agency, EPA is not subject to the requirements of the Porter-Cologne Act.

The CTR does not interfere with the State's discretion to develop implementation policies including basin planning activities and permitting decisions. Federal law does allow the State to consider economics in decisions regarding changes in designated uses and variances.

Comment ID: CTRH-001-034a
Comment Author: Dave Brent
Document Type: Public Hearing
State of Origin: CA
Represented Org: CA Water Qual. Task Force
Document Date: 09/17/97
Subject Matter Code: I-08 SWRCB Flexibility&Authority
References:
Attachments? N
CROSS REFERENCES I-05; G-03

Comment: Thirdly, I'd like to touch upon implementation of the rule. My understanding is that the state's Inland Surface Waters and Enclosed Bays and Estuaries Plan will address implementation of the CTR. With this in mind, the CTR should serve as an enabling rule and allow the state and the dischargers flexibility in the implementation of objectives contained in the rule.

As I touched upon earlier in my opening remarks, EPA has included some enabling provisions in this rule that we support, such as use and determination of mixing zones and water effects ratios. From the stormwater perspective, we believe other important enabling provisions must be included to allow for regional flexibility in the implementation of our stormwater programs.

For example, enabling provisions should be included to allow flexibility in establishing compliance schedules for stormwater discharges and should allow flexibility for site-specific establishment of low-flow conditions and wet weather standards, and ranges of human health criteria depending on the use of individual receiving waters.

Response to: CTRH-001-034a

See response to CTRH-001-034b.

Subject Matter Code: I-09 Pesticides in Runoff

Comment ID: CTR-061-001

Comment Author: G. Fred Lee & Associates

Document Type: Academia

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-09 Pesticides in Runoff

References:

Attachments? Y

CROSS REFERENCES

Comment: Please find enclosed an original and two copies, and a computer disk, of my comments on the draft "US EPA 40 CFR Part 131 Water Quality Standards for the State of California" as proposed on Tuesday, August 5, 1997. As indicated, I find significant problems with the proposed approach set forth in the draft CTR for regulating some "toxics" in California waters. I also find problems with some of the criteria in that they do not represent the information on the constituents' potential impacts on the beneficial uses of waterbodies. If adopted as proposed, the CTR will lead to massive waste of public and private funds in the construction of unnecessary treatment works for domestic and industrial wastewaters and especially urban and highway stormwater runoff, in an effort to try to meet water quality standards based on the CTR proposed criteria in discharges and ambient waters without a significant improvement of real water quality/beneficial uses of waterbodies of concern to the public who must pay for the over-regulation. The proposed CTR fails to address the most important cause of real ambient-water toxicity in California, organophosphate pesticides in urban and agricultural stormwater runoff. The Agency needs to shift its toxics control program from control of chemical constituents that in some situations can be toxic, to the control of ambient water toxicity in ambient waters.

Response to: CTR-061-001

EPA disagrees. The CTR establishes the pollutant levels in ambient waters necessary to protect beneficial designated uses. Establishing numeric criteria for ambient water bodies does not limit the discretion of the permit writer to use appropriate and flexible tools such as mixing zones or translators for dissolved metals in establishing effluent limits. In addition, if a discharger believes the CTR criterion is inappropriately restrictive or overprotective of the designated use, the discharger can request the State and EPA to approve a site-specific criterion or to downgrade the designated use.

Subject Matter Code: I-10 CSO Policy

Comment ID: CTR-090-021

Comment Author: C&C of SF, Public Util. Commis.

Document Type: Local Government

State of Origin: CA

Represented Org:

Document Date: 09/25/97

Subject Matter Code: I-10 CSO Policy

References: Letter CTR-090 incorporates by reference letters CTR-035 and CTR-054

Attachments? Y

CROSS REFERENCES

Comment: Wet weather flows - p 42186 - This section needs to be rewritten to incorporate the policy for combined sewer systems as described in EPA's Combined Sewer Overflow Control Policy. The policy includes two specific approaches for assessing compliance with water quality standards and these are not addressed in this rule-making.

Response to: CTR-090-021

See response to CTR-040-004.
