



February 28, 2020

Via Electronic Mail to: commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Subject: Comments - Proposed Revised ELAP Regulations

Dear Ms. Townsend:

The Southern California Alliance of Publicly Owned Treatment Works (SCAP) appreciates the opportunity to comment on the California Environmental Laboratory Accreditation Program's (ELAP) Changes to Proposed Regulations for Accreditation of Environmental Laboratories.

SCAP represents over 80 public water/wastewater agencies in southern California. SCAP members provide essential water supply and wastewater treatment for approximately 20 million people in Los Angeles, Orange, San Diego, Santa Barbara, Riverside, San Bernardino and Ventura counties. SCAP's wastewater members provide environmentally sound, cost-effective management of more than two billion gallons of wastewater each day and, in the process of protecting public health and the environment, convert wastewater into resources for beneficial uses such as recycled water and renewable energy.

On behalf of SCAP's laboratory community, I write to provide comment upon the updated draft of regulations released on February 12, 2020. SCAP represents numerous agencies with on-site laboratories that support treatment plant operations and compliance with NPDES and WDR permit reporting requirements. These labs run the gamut from full service to smaller one or two-person operations. Those entities without on-site laboratories (and smaller labs) must use commercial lab services to meet regulatory requirements, and therefore virtually all of SCAP water/wastewater agency members will be impacted by the development of new ELAP regulations and laboratory standards.

SCAP's primary and overriding concern, still, is that adoption of the proposed regulations released earlier this month using only the 2016 TNI Standard without significant modification would have a devastating impact on smaller labs, with dire consequences for local public agencies and the viability of some water quality monitoring activities at water and wastewater



facilities. This concern has been shared across the water and wastewater sector over the last five years, including by AWWA CA-NV, ACWA, CMUA, BACWA, CASA, CVCWA and CWEA. These concerns can be reviewed in the letters from 2015 on pages 9, 12, 19, 26, and 30 available on line at:
<ftp://ftp.sccwrp.org/pub/download/DOCUMENTS/ELAP/Background/YearOneFollowUp/PublicCommentsReceived.pdf>.

There are many other letters from cities and special districts explaining the same concerns with a TNI only accreditation system. The adoption of the full TNI standard is going to cause smaller on-site wastewater labs to shut down, which the ISOR acknowledges, because at a minimum, the proposed regulations released this month require staff increases that smaller water and wastewater agencies can ill afford. This results from compliance with requirements that notably and undisputedly have no meaningful impact on the quality of the data coming out of these labs.

This is not only a technical issue, but lab closures create, a very serious water quality concern for the state when considering the lengths of time that transpire during off-site tests and the risks posed in the interim by unknown water quality. Small municipal labs avoid uncertainty by providing water quality in real-time.

With the February changes, SCAP and others are concerned with the removal of all references to Fields of Testing in the regulations, as Field of Testing are identified in the legislative Environmental Laboratory Accreditation Act (Health & Safety Code § 100870(d)), while Field of Accreditation is not, and this omission is further compounded by Fields of Testing being the term used in the TNI standard that the proposed regulations incorporate by reference, specifically in TNI Volume 1 Module 1 Section 3, to which TNI accredited proficiency test providers must conform.

In conflict with the legislative Environmental Laboratory Accreditation Act (ELAA), the proposed changes make suspension, revocation, denial, and citation optional and discretionary, even though the ELAA requires it in some instances via “shall” (Health & Safety Code § 100850(b)). Beyond the various technical changes to the proposed regulations are the sum of its parts, which also are in conflict with the legislative ELAA. These proposed regulations scheduled for adoption on March 17, 2020 result in ELAP “off-loading the bulk of its laboratory review process while retaining the licensure decision... due to ELAP’s lack of trained staff, standards of practice, management system, and technically qualified leadership,” as the CEO of the American Council of Independent Laboratories (ACIL) characterized the impact of the proposal in 2015. In our estimation, such a decision to transfer the crux of ELAP’s operations to commercial, private, third-party assessors is beyond the legislative authorization in the ELAA, and in the 5 years since program staff have pursued this course, the necessary training and staff ACIL identified being needed could have been delivered. Instead, ELAP’s laboratory assessment backlog has grown over 900% in the last 3 years, while fees have dramatically



increased from a \$1,003 base fee to \$2,268. This weakens management confidences when considering ELAP received a \$1,500,000 loan from the State Revolving Fund for assistance.

Further proposed ELAP Regulations conflicts with ELAA, and the most troubling for SCAP, is the lack of a dual accreditation system. Unless the legislature updates the ELAA to limit the State Water Board to accrediting only through TNI, established judicial precedent imputes legislative intent for the State Water Board, as the regulatory implementing agency of the ELAA, to promulgate regulations that allow California labs to pursue either state accreditation or TNI accreditation.

The California Department of Public Health since 1994 has accredited environmental labs under both TNI and state accreditation (California Code of Regulations, Title 22). In 2014, the State Water Board assumed the Division of Drinking Water and too the role of providing laboratory accreditation through both the state system, in Title 22, and TNI. To quantify this dual-track enterprise in the present, the State Water Board accredits 675 labs in California, while TNI accredits somewhere between 23 (according to ELAP's ISOR) and 35 (according to TNI's website). This "dual-track" accreditation has been in effect and is consistent with the Environmental Laboratory Accreditation Act (Health & Safety Code § 100829(a)). Accordingly, the state must continue a "dual-track" accreditation system.

"Because the Legislature is presumed to be aware of a long-standing administrative practice, the failure to substantially modify a statutory scheme is a strong indication that administrative practice is consistent with the Legislature's intent." (*Sheet Metal Workers Int'l Association v. Duncan* (2014), *Yamaha Corp. of America v. State Board of Equalization*(1998), *Rizzo v. Board of Trustees* (1994), *DeYoung v. City of San Diego* (1983), *Horn v. Swoap* (1974), *El Dorado Oil v. McColgan* (1950))

In 2017, the legislature enacted AB 1438, which amended the Environmental Accreditation Act, including the specific provision that allows the Board to provide accreditation through the state or through TNI. These amendments were not substantial, nor did they modify the statutory scheme. Rather, it updated "NELAP" in the prior version by replacing it with TNI, to reflect the organization's name change, as shown in the 2/17/17 draft of the bill. (Attached)

Now, § 100829(a) reads, "The State Water Resources Control Board may do all of the following related to accrediting environmental laboratories in the state: (a) Offer both state accreditation and TNI accreditation, which shall be considered equivalent for regulatory activities covered by this article."

Notably, there were no updates to the provision providing for accreditation by the state, which judicial precedent characterizes as a strong indication that the longstanding practice of dual track accreditation fulfills the legislature's intent for accreditation. Yet if this contention is disputed or reasonable minds disagree over it, then certainly that "strong indication" to impute



legislative intent is solidified by the fact that legislature also did not modify the clause toward the end of § 100829(a) that equivocates state accreditation and TNI accreditation. Leaving the two types of accreditations' equivalency unmodified indicates the Legislature did not want a single-track, nor that the notion of the equivalency of the state system to TNI was of concern, given "... the failure to substantially modify a statutory scheme is a strong indication that administrative practice is consistent with the Legislature's intent." *Id.*

This draft of regulations thus are partial and incomplete since it is not a dual-track system, and too then, it would follow the rulemaking package's economic analysis is partial and incomplete since it only provides economic analysis for accreditation through TNI, in spite of ELAP's statutorily authorized Environmental Laboratory Technical Advisory Committee (ELTAC) voting for the CA QMS to be in the regulations as the state accreditation system.

SCAP agrees with others that ELAP's newest draft of regulations need major improvement, and we support revising ELAP's laboratory accreditation standards. We regret the seeming rejection of the alternative "California QMS" system after the January 17, 2020 meeting State Water Board staff held with the authors and proponents of the California QMS, the adoption of the currently proposed regulations is by no means the only option available to ELAP. Rejection of the California QMS should not be equivocated to sanction for the new draft, as there are numerous other alternatives still available, including municipal exemptions which perhaps could be based on fields of testing (or fields of accreditation if that distinguished term is retained.) Or, like with advanced treated wastewater certification and education performed by CWEA for the State Water Board, such a model of training and continuing education for an updated state accreditation system for municipal water/wastewater laboratories is far preferable than the costs associated to the proposed regulations.

With regards to cost associated with the current proposed ELAP regulations, ELAP's ISOR for these proceedings is estimated at \$21 million annually for an approximate 355 new lab employees. As SCAP and others have previously expressed these figures are severely underestimated. The actual costs will certainly exceed \$50 million annually, which then requires additional SRIA analysis, for which neither the FSOR nor subsequent major regulatory status analysis have been performed. These activities must be performed before adoption.

Additionally, the California QMS was only provided to show what a TNI-modified system would look like in order to eliminate the necessity of public agencies having to hire more personnel to perform the requirements of the full TNI system in order to retain accreditation from the State, since ELAP is a fee based program. In the light of the currently proposed changes released on February 12, 2020, we still have significant concern with the annual costs of the proposed requirements to public labs, and assert the latent consequence of lab closures as antithetical to the very purpose and benefit of ELAP providing licenses to operational small labs in remote places around the state who perform critically necessary environmental tests, to say nothing about the societal costs of ultimately expending rate and taxpayers contributions for

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administrative recording keeping, which the APA specifically identifies as requiring particular justification. California's historical environmental small-lab network is at serious risk, as are increased costs in utility bills and commercial lab services. While the lab community is amenable to the ISOR's approximate \$15 million over three years for us to retain consultants to upgrade and contemporize our respective quality management systems, we and the public who we serve would much prefer that the personnel who the State also would be insisting upon labs hiring actually perform sampling and testing and environmental lab duties, and not the full-time administrative, recording keeping, activities to ensure compliance with the TNI system, which was pronounced at the December 18, 2019 public hearing by Bruce Godfrey, a TNI proponent, to only be necessary for interstate commerce, which public labs are not engaged.

If there is any room for a coalition of representatives from the water/wastewater sector to meet and discuss other alternatives to these regulations before the adoption hearing, please reach out and contact me.

SCAP would like to thank you for the opportunity to comment on the Proposed Revised ELAP Regulations and we wish to emphasize the following requests:

- Follow ELTAC's recommendations to include the CA QMS in the draft regulations.
- Revise the ISOR to include a side by side comparison of 2016 TNI and the August version of the CA QMS with an accurate economic analysis that includes a cost/benefit analysis with stakeholder input allowing the SWRCB to make an informed decision for California citizens.

SCAP is always interested in opportunities for further discussion or clarification. If there is any room for a coalition of representatives from the water/wastewater sector to meet and discuss other alternatives to these regulations before the adoption hearing, please reach out and contact me at 760.479.4112 or sjepson@scap1.org.

Sincerely,

Steve Jepsen

Executive Director, SCAP