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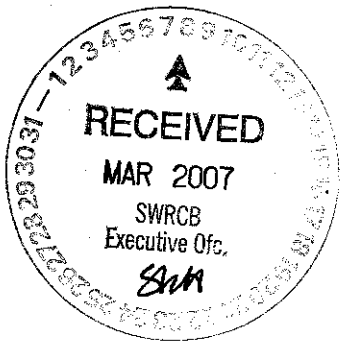

Chair Doduc and Board Members
State Water Resources Control Board
Executive Office
1001 I Street, 24th Floor
Sacramento, CA 95814

Re: Comments on the Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List ("Listing Policy")

Dear Chair Doduc and Board Members:

Heal the Bay hereby submits the following comments regarding the State Water Resources Control Board's ("State Board's" or "Board's") Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List ("Listing Policy"). We appreciate your consideration of these comments.

I. INTRODUCTION

Overall, we support the State Board's efforts in developing a more standardized and uniform approach for listing impaired waters in the State of California under CWA section 303(d). However, this approach must be fully consistent with the CWA and provide full protection of beneficial uses. In this regard, we have several technical and legal concerns with the State Board staff's interpretation and application of the State Board's Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List ("Listing Policy" or "Policy") in developing the 2006 List of Impaired Waterbodies ("303(d) List" of "List"). These include numerous inconsistencies in the application of the Listing Policy, the failure to evaluate all readily available data and information, the improper reevaluation of prior listings for which TMDLs have already been adopted, an extremely narrow construction and use of the situation specific weight-of-the-evidence factors for listing and de-listing, and inadequate consideration of narrative standards. All of these concerns arise from an improper use or interpretation of the Listing Policy. As this was the State's first attempt at using and interpreting the new Listing Policy, these overall concerns can and should be resolved by the Board before the 2008 List is developed.

II. GENERAL APPLICATION OF LISTING POLICY

A. Retroactive Application of the Listing Policy Is Inappropriate and Improper

The State Board should not apply the Listing Policy retroactively to reevaluate listings made prior to the adoption of the Policy, except in very limited circumstances. In its

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review for the 2006 List, however, State Board staff applied the Listing Policy retroactively in a much more wholesale manner using the new Listing Policy factors. Staff's approach fails to recognize the substantial deference that must be given to prior administrative decisions and ignores the limited circumstances set forth in the Listing Policy for re-evaluating previous listings for de-listing.

1. Failure to Give Substantial Deference to Prior Administrative Decisions.

First of all, staff's summary review of prior administrative decision-making contravenes well-established legal principles, which require substantial deference and a presumption of correctness in reviewing previous agency decisions. *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 820-21 (agency decisions are presumed to be correct); *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 739 (same); *see also Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 568 (holding that agency's interpretation of the Clean Water Act is due substantial deference.). Staff failed to adhere to the legal presumption of correctness by ignoring the required standard of substantial deference and the corresponding high burden of evidence in evaluating the majority of the 2006 de-listings.

Staff de-listed waterbodies if there were no approved guidelines under the new Listing Policy to evaluate the original data set, the original data was lost or anecdotal, or if the original data set did not meet all of the requirements of Sections 4.1 to 4.10 of the new Listing Policy. Again, the State Board must make a substantial showing in order to overcome the presumption of correctness that applies to the original regional board decision. Notably, staff made certain express assumptions to avoid this recognized burden altogether. *See* Draft Revisions, Vol. I., Staff Report (hereinafter "Staff Report") at 11-12. This is a clear violation of the law. The State Board is required to provide substantial evidence in all cases to overturn prior agency decisions. Moreover, in most cases, the regional boards had sufficient evidence to place these water bodies on the 303(d) List when the original administrative decision was made. The regional boards are much more knowledgeable about their local waterbodies and local conditions than the State Board is or can be, particularly in the 2006 process where State Board staff was tasked with reviewing a huge amount of information for the entire state. Thus, it is not appropriate, or legal, for the State Board to propose to overturn these prior administrative decisions without providing substantial evidence to show that the earlier decision was not correct. This is a high burden, and in most cases, the State Board did not meet in its decisions to de-list waterbody pollutant combinations in the 2006 List.

Notably, during the process of adopting the Listing Policy, the State Board itself recognized this presumption of correctness and the regional boards' expertise in making prior listing decisions. Indeed, in adopting the Policy, the Board voiced its intent that *an affirmative showing of current attainment is required* before waters may be de-listed. SWRCB Hearing Transcript, Sept. 30, 2004. Specifically, Board Member Sutley clarified that it is not enough to simply state that the listing was made by mistake – the boards must affirmatively demonstrate a lack of **current** impairment. *Id*. ("If it's on the list…then you have to have some information that says that they [fish] are not dying now and that the waterbody is not currently impaired…."); *see also* discussion *infra* at section

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II.B. Again, this directive was not followed by staff in the 2006 List revisions.

2. The Listing Policy Allows Reevaluation of Prior Listings Only In Specified Situations.

The 2006 listing and de-listing decisions went well beyond the letter and intent of the Listing Policy. As discussed, staff improperly engaged in a wholesale reconsideration of previous listings. This directly contravenes the letter and spirit of the State Board's own Listing Policy. The Listing Policy is very clear on the issue of removing previously listed waters from the 303(d) List. Specifically, section 4 of the Listing Policy sets forth only three situations under which a listing may be reevaluated. Listing Policy at 11. The first is if the listing was based on faulty data, such as typographical errors, improper QA/QC or limitations in the analytical methods that would lead to improper conclusions as to the status of the waterbody, and the listing would not have occurred absent this data. *Id*. The second is if a water quality standard or objective has been revised. *Id*. The third situation is if any interested party requests a reevaluation of a particular listing. *Id*. The factors in 4.1 to 4.11 are to be used in such a reevaluation, but only if it is raised under one of these three specified circumstances. *Id*. By listing these specific situations, the Listing Policy prohibits any broader reconsideration of previous listings.

As stated above, the Listing Policy went through an intensive stakeholder and public process before it was finalized. As a result, a great deal of debate was involved in drafting each of its various provisions. Given this level of debate and participation, to read more into any provision than is expressly stated is a clear violation of the well-known canon of construction *expressio unius est exclusio alterius*—the expression of one thing ordinarily implies the exclusion of other things. *See In re J.W.* (2002) 29 Cal.4th 200, 209. Here, the specific situations were delineated in order to prevent a haphazard reevaluation of prior listings with all of the attendant problems that have now in fact resulted from the application of the wholesale approach. In an analogous situation, this maxim is applied where specific exemptions are set forth in a statute. In that situation, the canon forestalls a court from implying additional exemptions. *See Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230. That same maxim would apply similarly here – it forestalls the State Board from implying an authorization for a broader re-evaluation of prior listings based on its own initiative. The only time that a re-evaluation should be conducted is on a case by case basis pursuant to the three specific situations expressly set forth in the much discussed and debated Listing Policy. In the situation with the 2006 List, where the State Board is conducting this reevaluation *on its own initiative*, only the first situation applies (faulty data), as the Board did not make any listing/de-listing decisions due to revision of a water quality standard.

3. The De-Listing Approach Used in the 2006 List Is Not Adequately Protective of Water Quality.

From an overall policy perspective, the retroactive de-listing approach, in addition to being contrary to law, is not adequately protective of water quality for all of the same reasons set forth above. In addition, de-listing based on applying the new Policy retroactively provides a perverse incentive to **avoid** monitoring or collecting

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further data on currently listed segments where there is limited numerical data. California must provide incentives for additional monitoring, not dissuade it, if we are to fully characterize the condition of our waterways.

B. A Precautionary Approach Should Be Followed.

As an overarching premise, the Section 303(d) listing process should err on the side of protecting water quality and beneficial uses. The Precautionary Principle was endorsed at the United Nations Conference on Environment and Development in 1992 as an appropriate guideline in environmental decision-making.[1] This Principle encourages environmental managers to err on the side of caution, in order to ensure that neither human nor environmental health is compromised. *Id*. In implementing this approach, uncertainty should not be a valid rationale for inaction. *Id*.

In the 303(d) Program, the implications of a false negative (failing to list an impaired waterbody) are much worse than a false positive (listing a non-impaired waterbody), as the latter can be corrected early on in the TMDL development process, as indeed it has in many of the TMDLs completed to date. In contrast, a failure to list an impaired waterbody has potential impacts on human health and aquatic life. Where uncertainty exists, decisions should be made in favor of protecting water quality, as well as human health and the environment. Indeed, federal regulations and the Listing Policy itself favor listing of threatened waterbodies (those for which water quality is declining and for which water quality standards may not be maintained). 40 C.F.R. § 130.2(j); Listing Policy at Sections 3.10 and 4.10. This is necessary to account for the anti-degradation component of water quality standards. *Id*.

The State Board recognized the precautionary principle in adopting the Listing Policy in 2004. Significantly, the State Board intended that, as a rule, a strong evidentiary showing is required to remove waterbody/pollutant combinations from the 303(d) List. Again, this intent was also made clear during the final hearing adopting the Listing Policy where the Board voiced its intent that an affirmative showing of attainment is required before waters may be de-listed. SWRCB Hearing Transcript, Sept. 30, 2004. Specifically, Board Member Sutley suggested that it is not enough to simply state that the listing was made by mistake – the boards must affirmatively demonstrate a lack of **current** impairment. *Id*. Ms. Sutley further stated that she was "Okay with not adding [additional] language [to the Listing Policy] as long as we're all in agreement and that's the direction of the regional boards that you have to look at the current conditions as well [before de-listing]." *Id*.[2]

Yet, while staff appears to acknowledge this high burden in its 2006 List Staff Report and in its Response to Comments on the Listing Policy,[3] it fails to apply it either in letter or in spirit

[1] United Nations, Rio Declaration on Environment and Development, June 14, 1992, 31 ILM 874.
[2] At that point the Board discussed the fact, and staff agreed, that the situation-specific weight of the evidence factor must be considered in all listing and de-listing decisions, and the Board added new language to Sections 3.11 and 4.11 that says "providing any data or information including current conditions supporting the decision." *Id*.
[3] The State Board stated: "Using the balanced error approach, the delisting requirements are not more

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throughout the 2006 revisions. Staff Report at 12; State Water Resources Control Board, *Functional Equivalent Document: Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List* (2004) (hereinafter "FED") at B-158. To the contrary, the staff applied a very lax standard, *i.e*. that a waterbody is clean until proven dirty, to de-listing decisions (as well as listing decisions) in the 2006 List. No evidence that a waterbody is currently in attainment is provided to back up the majority of the de-listings decisions. The necessary burden is to demonstrate that the water quality standard is being met, not that there is insufficient information to show it is not being met.

For example, without any new evidence demonstrating attainment, the State de-listed several waterbodies for pollutants or conditions that are not quantifiable or do not have numeric evaluation guidelines, or where original listings were based upon guidelines that are not approved under the new Listing Policy. Similarly, staff de-listed segments for which there is some uncertainty regarding the original listing or the original data has been lost. This is inappropriate and improper. The Regional Board exercised its Best Professional Judgment in listing these segments originally. Notably, the use of BPJ is permitted under Sections 3.11 and 4.11 of the Listing Policy. There must be some affirmative proof that the waterbody is not impaired before de-listing on any of these bases.

Further, although there are no numeric standards or guidelines for some pollutants, narrative standards still apply. The State's Porter-Cologne Water Quality Control Act (Porter-Cologne") acknowledges both narrative and numeric water quality objectives. 40 C.F.R. § 131.3(b). Yet, in the majority of cases, staff failed to present any data or information in the 2006 List staff reports to demonstrate that narrative standards are met in these water segments. The onus is on the State Board to demonstrate that these water segments are no longer impaired before removing them from the 303(d) List. Only where the State has affirmative and demonstrable knowledge that water quality standards are being attained and maintained should they remove a water segment from the list. The State Board must make this clear in reviewing the Listing Policy.

C. <u>Failures in Public Process.</u>

After more than two years of stakeholder negotiation, the Listing Policy calibrated a relationship between the State Board and regional boards designed to enable these agencies collectively to manage the workload involved in preparing the Section 303(d) list for a state as large as California. Just as important, the Listing Policy took into account the need to provide adequate public participation opportunities.

The Policy resolved these issues by providing for the regional boards to play a central role in the Section 303(d) process by (1) preparing the lists in the first instance, including

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rigorous by design so the burden of proof is equivalent." FED at B-158. **The State Board did provide a higher burden for de-listing toxic pollutants** however: "The Policy has been modified to *require for toxicants that there be more certainty* when delisting because of the concerns about the expected impacts of these chemicals. The policy requires more data to remove a water body or pollutant from the list." *Id*. (emphasis added).

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the implementation of the Situation-Specific Weight of Evidence Listing Factor (Listing Policy at § 3.11); (2) holding public hearings; and (3) submitting proposed regional lists to the State Board for final review and approval. FED at B-167. One of the chief functions of the regional boards is to allow for detailed factual review of local water quality conditions; by contrast, the State Board role is as a final "check" on the entire process as well as to consider matters of statewide interest or significance. *Id.* ("the SWRCB approval process is the last stage of review.") This central role of the regional boards is conveyed not only by these provisions but also by the more than one hundred references to the regional boards in the FED and in the Listing Policy itself.

Nevertheless, in its first implementation of the Listing Policy, the State Board has turned these procedures on their head by eliminating regional board formulation and public consideration of lists, as well as the other basic structural steps carefully set forth in the Listing Policy. It is not difficult to connect this failure to follow the Listing Policy to the State Board's related failure to consider all readily available information, given the scope of this task in a state as large as California. Moreover, the related failure to implement a weight of the evidence analysis, as required under Section 4.11 of the Listing Policy, whenever evidence suggests non-attainment of standards, appears connected to the attenuated role played by the regional boards in making listing decisions in the first instance.

D. Failure to Consider All Readily Available Information.

1. General Legal Principles.

The body of regulations and guidance that bear on 303(d) listing are unambiguous about the information that should be considered in making listing decisions: all of it. TMDL regulations state clearly that "[e]ach State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the [303(d)] list."[4] The regulations go on to mandate that local, state and federal agencies, members of the public, and academic institutions "should be actively solicited for research they may be conducting or reporting."[5] Furthermore, EPA's 2004 Integrated Guidance similarly states that "[a]ll existing and readily available data and information must be considered during the assessment process."

The regulations and guidance are even more explicit about not excluding data on the basis of age and sample size. The Integrated Guidance states clearly that "[d]ata should not be excluded from consideration solely on the basis of age,"[6] and "does not recommend the use of rigid, across the board, minimum sample size requirements in the assessment process."[7] EPA adds that "the methodology should provide decision rules for concluding non-attainment even in cases where target data quantity expectations are not met, but the available data and information indicate a reasonable likelihood of WQC

[4] 40 C.F.R.§ 130.7(b)(5).
[5] 40 C.F.R.§ 130.7(b)(5)(iii).
[6] 2004 Integrated Guidance at 23-24.
[7] *Id*. at 25.

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exceedance."[8] As an illustration, EPA explains that "[w]hen considering small numbers of samples, it is important to consider not only the absolute number of samples, but also the percentage of total samples, with concentrations higher than those specific in the relevant WQC."[9] EPA applied these rules in its review of California's 2002 303(d) list, finding that "it is inconsistent with federal listing requirements for the State to dismiss a water from further consideration in the Section 303(d) listing process simply because a minimum sample size threshold was not met for a particular water body. This is particularly true . . . where the impairments are caused by toxic pollutants."[10]

2. Listing Policy Requirements

Recognizing these principles, the Listing Policy clearly states that "all readily available data and information shall be evaluated." Listing Policy at § 6. It further states that the "RWQCBs and SWRCB shall actively solicit, assemble, and consider all readily available data and information." *Id.* at § 6.1 (emphasis original); *see also* FED at B-142 ("If data and information is available, it is required that it be assessed.)"

Nevertheless, a review of the 2006 List shows that the SWRCB failed to implement these bedrock requirements. Board staff has admitted that perhaps as little as 25% of available data was, in fact, been reviewed for the 2006 Listing process. Moreover, in many instances staff circumscribed the set of data used to formulate the list by restricting it to a public solicitation that ended in June of 2004, eighteen months ago. *See* Staff Report at 4. The result of both of these actions is that the List may, or may not, actually set forth the full extent of impaired waters. Moreover, in many instances staff de-listed well-studied waters notwithstanding the availability of high quality data that contradicts staff's conclusions. An example of this is State Board's inaction on listing statewide beaches for bacteria impairments. Both of these results are at odds with applicable regulations, guidance, the Listing Policy—and the basic "safety net" policy rationale for Section 303(d).[11]

E. The Listing Policy Is Not Being Applied as Intended.

The State Board issued the Listing Policy in 2004 after a long public process. During the public process, almost every issue in the Listing Policy was subject to comment and debate by agencies, environmental groups and dischargers. Thus, the intent of the final Listing Policy was clear to all parties. Unfortunately, staff has not interpreted or applied certain aspects of the Listing Policy consistent with that intent.

1. An Existing TMDL is Not A Valid Justification to De-list.

Staff has used Section 2.2 of the Listing Policy improperly to de-list water quality

[8] *Id.* at 26.
[9] *Id.* at 27. EPA refers the reader to Section D.6, page 47 last paragraph through page 50 of CALM for further discussion of this point.
[10] Letter from Alexis Strauss, U.S. EPA Region IX to Celeste Cantu, SWRCB (July 25, 2003).

[11] 12 Houck, Oliver A., *The Clean Water Act TMDL Program* 49 (Envtl. Law Inst. 1999).

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segments where a TMDL has been adopted but compliance with water quality standards has not yet been established. Not only is this inconsistent with the CWA, which requires listing of all segments where water quality standards are not attained and does not contemplate de-listing waters at the time of TMDLs adoption, it was not the intent of Section 2.2. 33 U.S.C. § 1313(d); Listing Policy at § 2.2. Delisting must only occur when TMDL requirements are met and beneficial uses are attained.

Section 2.2 defines when a water quality segment should be moved from the Water Quality Limited Segments category to the Water Quality Limited Segments Being Addressed ("WQLSBA") category of the 303(d) List. Listing Policy at 3; FED at B-73 – B-74 . Nothing more. It was developed as an alternative to proposals either to de-list segments with a TMDL in place or to leave those segments on the main list until water quality standards are attained. As the CWA does not authorize the State to remove waters from the 303(d) List until water quality standards are attained,[12] the State chose to create a separate category on the list for these segments to distinguish them from segments still needing a TMDL. Listing Policy at 3. This is the sole purpose of Section 2.2, as confirmed by its placement in Section 2: *Structure of the CWA Section 303(d) List*. *Id*.

Staff, however, has taken Section 2.2 out of context and applied it in a way that essentially denigrates the entire purpose of that section. Basically, staff cites Section 2.2 to justify de-listing segments for which a TMDL has been adopted and approved by EPA but compliance with standards not yet attained, whenever a reevaluation of the data used for the original listing was insufficient to meet the new guidelines in the Listing Policy. This is wrong on many levels.

First of all, as discussed above, staff should not be reevaluating listing decisions for segments for which TMDLs have been adopted. Rather, for segments already listed, staff should focus solely on whether a TMDL has been approved by EPA for that segment. If so, the Listing Policy provides that it should be moved to the WQLSBA category. During the development of the Listing Policy, neither the State Board nor the public was contemplating using section 2.2 as a justification for de-listing segments for which a TMDL had been approved. Second, from a practical standpoint, it makes no sense to reanalyze the original information and decide that no listing, and thus no TMDL is required, when the State and EPA have obviously very recently re-analyzed all the information during the rigorous TMDL development process, and made a decision to develop and adopt a TMDL based on the fact that water quality standards were not being met.[13] The entire scenario belies logic.

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[12] Section 303(d) of the CWA does not contemplate de-listing waters at the time that TMDLs are established. 33 U.S.C. §1313(d). Rather, Section 303(d) focuses solely on requiring TMDLs to result in the attainment and maintenance of beneficial uses. *Id.*

[13] It has been the state's practice to effectively de-list a pollutant by not establishing a TMDL if it discovers during the TMDL development process that the waterbody is no longer impaired for that pollutant. This certainly implies that the State believed that the waterbodies were impaired for those pollutants for which a TMDL was established during this process.

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Adding insult to injury, staff has based several of these erroneous de-listing decisions on the fact that there is *uncertainty* with regard to the original listing. *See e.g.*, Draft Revisions, Vol. II, Los Angeles Region 4 (hereinafter "Draft Rev. Reg. 4") at 206, 299. Obviously, the TMDLs that were developed by the Regional Boards and approved by the State and EPA have already addressed any uncertainty in reevaluating the data and including appropriate provisions in the TMDL to address any uncertainty.[14] Again, the State Board should clearly state that if a TMDL has been adopted, but not yet fully implemented for a waterbody/pollutant, the original listing should not be reevaluated for de-listing during the 303(d) list update process. Instead, those segments should be moved to the WQLSBA category as directed by the Listing Policy.

2. Situation-Specific Weight of Evidence Listing/De-listing Factors Must Be Considered.

The Situation-Specific Weight-of-the-Evidence Approach set forth in Sections 3.11 and 4.11 of the Listing Policy was included to cure well-understood legal and technical inadequacies in a the SWRCB's draft binomial-only listing policy. *See* Environmental Caucus of the AB 982 Public Advisory Group Comments on SWRCB, "Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List" (2/18/04). Board Members required that a weight of evidence approach complement the specified listing and delisting factors, acting as a "safety net" to ensure that all impaired waterbodies are included on the 303(d) List. Both of these sections require an evaluation of all available evidence under the situation-specific weight of the evidence process whenever there is any information that indicates non-attainment of standards. Together, these sections provide flexibility to allow the State to use its best professional judgment in listing and de-listing decisions so that it can meet Section 303(d) standards and submit impaired waters lists that EPA can approve. For instance, Section 3.11 states

> When all other Listing Factors do not result in the listing of a water segment but information indicates non-attainment of standards, a water segment shall be evaluated to determine whether the weight of evidence demonstrates that a water quality standard is not attained. If the weight of evidence indicates non-attainment, the water segment shall be placed on the section 303(d) List.

Section 4.11 is, and was intended, to be a direct counterpart to Section 3.11. Thus, the Board inserted the exact same language in section 4.11 by simply substituting the terms de-listing and attainment for the terms listing and non-attainment.

> When all other Delisting Factors do not result in the delisting of a water segment but information indicates attainment of standards, a water segment shall be evaluated to determine whether the weight of evidence

[14] In addition, basing a de-listing on a re-evaluation of the original data where a TMDL already exists for that segment will potentially weaken existing TMDLs by opening them up for argument that they should be reopened because the State has determined the segment is no longer impaired under the new Listing Policy.

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> demonstrates that a water quality standard is attained. If the weight of evidence indicates attainment, the water segment shall be removed from the section 303(d) List. If warranted, a listing may be maintained if the weight of evidence indicates a water quality standard is not attained.

Listing Policy at 8. Unfortunately, State Board staff apparently misinterpreted this language when it appears in Section 4 of the Policy to mean that the weight of evidence approach does not have to be employed as a "check" when delisting appears appropriate under the specified delisting factors but would not be appropriate when all evidence is considered.

Staff's interpretation is flawed. First, if the Listing Policy is faithfully implemented, staff's interpretation amounts to a distinction without a difference. Proceeding in a step-wise fashion through the biannual Section 303(d) process requires consideration of all readily available information as a fundament of the process. Even if staff believe (erroneously, as discussed immediately below) that delisting is appropriate without employing a weight of the evidence analysis under Section 4, the evidence available must in any case be considered under Section 3—it cannot be ignored without violating basic Section 303(d) principles. So, whether Staff employs the weight of the evidence approach under Section 4, or under Section 3, this analysis must be undertaken before a Section 303(d) list of impaired waters can be completed.[15]

Second, staff's interpretation of Section 4 is wrong, in any case. This interpretation would set a far less stringent standard for del-listing than to list waterbodies. This plainly was not the intent of the Board nor is it the standard set forth in the Listing Policy. *See e.g.*, Hearing Transcript, Sept. 30, 2004; FED at B-158 – B-159 (responding to the comment that "the burden of proof [for listing and delisting] is equivalent" by noting "this is true.") Second, if staff believes the language chosen in Section 4 of the Listing Policy fails to clearly reflect the underlying principle of the Listing Policy, staff need only read Section 4 along with Section 3 and in light of the well-documented intent of the State Water Board in approving the Listing Policy. *See e.g., Food and Drug Admin. v. Brown and Williamson Tobacco Co*. (2000) 529 U.S. 120, 133 ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") Notably, the SWRCB relies on the fact that the Policy employs adequate measures to assure that impaired waters are identified and placed on the Section 303(d) list in the first instance—and not improperly removed thereafter—as a basis of its approval and its related certification that "this policy will not have a significant adverse impact on the environment." Were staff to persist in contending that delisting is proper when evidence indicates impairment but specified listing factors are not triggered, these critical findings would have no

[15] It would be far simpler for Staff to employ the weight of evidence approach before delisting under Section 4, but they could reach a provisional decision to delist under Section 4 and then analyze the same waterbody and the same information under Section 3 before completing the process. This would appear to be less efficient.

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basis and would be subject to challenge.

The need for this flexibility and judgment is highlighted by the fact that some well-known and obviously polluted waterbodies may not meet the specific requirements of the Listing Policy's other de-listing or listing factors. Similarly, the binomial table approach doesn't work in the absence of any quantitative data, yet there may be other information indicating impairment. Instead of acknowledging this flexibility, staff improperly took a very narrow and conservative interpretation of these sections to avoid utilizing them, even in situations where it is clearly warranted. De-listings made in this manner would be clearly arbitrary and capricious in view of the totality of the information. State and regional board staff thus need clear direction from the State Board that they are **required** to apply Sections 3.11 and 4.11 whenever there is any information indicating impairment regardless of the other factors, consistent with both the language of the Listing Policy and the intent of the State Board in including these sections.

The State Board therefore should direct its staff and the regional boards on the appropriate application of section 4.11 of the Listing Policy to situations where any evidence exists to support retaining a listing even if the precise requirements of Sections 4.1 to 4.10 are not met or all of the required data sets do not exist. This is the only interpretation consistent with the Listing Policy as a whole and the recognized equal burden of proof applicable to both listing and de-listing decisions.

3. Sediment Chemistry Data Should be Evaluated under Situation-Specific Weight of Evidence

Staff did not list numerous water segment- pollutant combinations despite the fact that a "sufficient number of samples exceeded the sediment quality guidelines." For instance, although six of twenty-four sediment samples in Los Angeles Harbor – Cabrillo Marina exceed the copper sediment quality guideline ("SQG"), which satisfies the required frequency for listing under the binomial distribution table, staff asserts that no listing should occur because there was no observed toxicity. Draft Rev. Reg. 4 at 371. Section 3.6 of the Listing Policy is cited as the basis for this decision. This line of reasoning is inappropriate.

Section 3.6 of the Listing Policy provides listing factors for water and sediment toxicity, but **not** for pollutants in sediment. In fact, there are no specific listing factors provided in Section 3 of the Listing Policy for pollutants in sediment. Listing Policy at 5-6. An exceedance of a SQG, in and of itself, is an indicator that water quality standards are not being attained. For example, ERMs are set at a chemical concentration above which adverse biological effects are frequently observed. Long, E.R., MacDonald, D.D., Smith, S.L., and F.D. Calder, Incidence of Adverse Biological Effects Within Ranges of Chemical Concentrations in Marine and Estuarine Sediments, *Environmental Management* at 19(1): 81-97 (1995). Thus, it is unfounded to require sediment *and* observed toxicity data before listing is considered.

Sediment quality data are sufficient for listing decisions on their own merit. As there is no specific section addressing this, pollutants in sediment must be evaluated using a

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situation-specific weight of evidence under Section 3.11 of the Listing Policy. The magnitude of the SQG exceedance may also be considered in conducting this situation-specific weight of evidence analysis. The State Board therefore should require its staff and the regional boards to evaluate available sediment quality data using the Section 3.11 situation-specific weight of evidence approach, regardless of the availability of overall sediment toxicity data.

4. Lost or Anecdotal Data

Staff also made express unilateral assumptions that go beyond the Listing Policy in creating the 2006 List. For instance, on pages 11-12 of the Staff Report, staff provided a list of assumptions, *in addition* to those contained in the Listing Policy, which it used to evaluate potential delistings for the 2006 List. Staff Report at 11-12. These additional assumptions include de-listing previously listed segments if "data or information justifying the original listing was anecdotal" or "data or information to support the original listing simply does not exist." Staff's support for this is the following: "This approach was used to *avoid requiring a large burden of proof to delist* a water body pollutant combination if the original listing was found to be baseless in terms of Listing Policy procedures." *Id*. (emphasis added). Significantly, this approach also illegally avoids the Listing Policy's requirement to show that the segment would not have been listed absent the faulty or non-existent original data. *See supra* section II.A.2.

The application of these additional assumptions is plainly in direct contradiction to the Listing Policy. These additional assumptions go well beyond the intent of the Listing Policy, which requires a high burden of proof for de-listing. As staff acknowledges, these factors in fact **negate** that required burden. Given that the regional boards must have had a justification for listing the majority of these waterbodies in the first place, substantial deference must be given to the original listing. A high degree of persuasion is necessary to overturn this presumption of correctness.

The State Board should direct staff and regional boards to not use these additional assumptions in developing future 303(d) lists, as they constitute revisions to the Listing Policy. The State Board also should clarify that in the absence of any new data showing attainment of water quality standards, listings should remain.

5. Narrative Standards Must Be Evaluated.

Staff is de-listed several nuisance conditions, including excess algal growth, odor, taste, and foam, which are all covered under various narrative standards in the Basin Plans,[16] on the basis that they are conditions, not pollutants. *See e.g.*, Draft Rev.

[16] The Los Angeles Basin Plan, like most Basin Plans, contains only narrative objectives for nuisances, including:
"Waters shall not contain biostimulatory substances in concentrations that promote aquatic growth to the extent that such growth causes nuisance or adversely affects beneficial uses."
"Waters shall not contain floating materials, including solids, liquids, foams, and scum, in concentrations that cause nuisance or adversely affect beneficial uses."
"Waters shall be free of coloration that causes nuisance or adversely affects

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Reg. 4 at 316. This is inconsistent with both the CWA and Porter-Cologne Act, as well as the express terms of the Listing Policy.

One of the main objectives of the CWA is to restore water quality so that all of the Nation's waterbodies are fishable and swimmable. 33 U.S.C. § 101(a). The narrative standards at issue are necessary to attain this important goal. Moreover, federal regulations explicitly state that narrative water quality standards should be assessed for the purpose of listing waters under Section 303(d). 40 CFR § 130.7(b)(3). The Porter-Cologne Act similarly acknowledges both narrative and numeric water quality objectives; the State and regional boards are charged with enforcing these objectives. Cal. Water Code § 13241. Accordingly, the FED sets forth guidelines for interpreting narrative water quality standards, and the Listing Policy provides for such listings in Section 3.7. FED at 75-78, B-120; Listing Policy at 6. Indeed, in response to a specific comment requesting that assessments based on narrative standards or other qualitative assessments be excluded from the Listing Policy, the State Board responded "Federal regulation requires that narrative water quality standards be evaluated and that waters be placed on the section 303(d) list if these waters exceed these narrative standards." FED at B-74. Plainly, nuisance conditions must be considered for listing on the 303(d) List.

Staff's rationale for not listing nuisances because they are conditions rather than pollutants is erroneous. Using staff's own terminology, the narrative water quality standards themselves describe a condition, not a pollutant. Presumably, these narrative standards exist because it is difficult to pinpoint one specific pollutant that causes these conditions under all circumstances. For instance, odor could be caused by algae or by petroleum or trash or a combination of factors including water temperature and flow. Regardless of the cause, it is a nuisance. Under staff's approach, however, a Segment is not listed even though specific narrative standards are not attained whenever a pollutant(s) causing the problem cannot be precisely identified during the listing process. This too is erroneous, as determining the source(s) of the non-attainment is generally done during the TMDL development process, which may include such factors as seasonality and a margin of safety.[17] From a more practical standpoint, if narrative listings cannot be made, there may be no incentive to address the problem and investigate the source. The logical and appropriate way to address this is to list waterbodies for the nuisance condition where a narrative nuisance standard is not being attained. This is exactly what Section 3.7 does. Section 3.7 contains no requirement to list for a specific pollutant instead of a nuisance condition. Nor can it under the CWA. To the contrary, the express terms of Section 3.7 allow a segment to be listed for several nuisance conditions, including excessive algae growth, odor, taste or foam. Listing Policy § 3.7; *see also* testimony of State Board Legal Counsel, SWRCB Hearing

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beneficial uses."
LA Basin Plan at 3-8 and 3-9.

[17] In addition, the majority if not all of the TMDLs passed to date in California also include some amount of study and pollutant/source characterization as part of their implementation, with reopeners provided in case new information comes to light.

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Transcript, Sept. 30, 2004 ("When you know the pollutant, list the pollutant, if you don't know it, it doesn't mean don't list it…In fact, EPA has consistently held that its own regs [sic] require listing for unknown toxicity, low dissolved oxygen and other conditions like nuisance conditions. So we have no choice but to list for those conditions."). Thus, staff's rationale that only pollutants may be listed must be rejected and relevant listings reassessed.

Staff also asserts that quantitative data is necessary for a nuisance listing. Again, this is erroneous. Translators for assessing narrative conditions are not limited to numeric objectives and guidelines. As acknowledged in Sections 3.7.1 and 3.7.2 of the Listing Policy, there are scientifically-accepted approaches to evaluating compliance with narrative objectives aside from comparison to numeric guidelines. These include biological assessment approaches and the widely used and accepted reference system-based approach. Listing Policy at 6 ("Waters may **also** be placed on the section 303(d) list when a significant nuisance condition exists as compared to reference conditions…." (emphasis added)); *see also* FED at B-27. Further, with regard to nutrient-related conditions, section 3.7.1 expressly allows listing for nuisance conditions if "nutrient concentrations cause or contribute to excessive algal growth." *Id*. ("Waters may **also** be placed on the section 303(d) list … when nutrient concentrations cause or contribute to excessive algal growth.") This is independent of any need to pinpoint whether the cause is nitrogen (N) or phosphorous (P) or some combination of the two, to list either N or P, or whether there are applicable numeric objectives for N or P. Therefore, consistent with the very language of the Policy, the State Board should clarify that Sections 3.7 and 4.7 should not be interpreted as narrowly as staff has done in the 2006 List.

Further, where there is no quantitative data, the State and regional boards must evaluate the nuisance condition under Sections 3.11 and 4.11 based on all available information. The State Board acknowledged in its Responses to Comments on the Listing Policy that even if a nuisance does not meet the quantitative requirements for listing, the Policy "was amended to include a situation-specific weight of evidence listing or de-listing process by which Regional Boards can list or de-list any water body-pollutant combination even if it does not meet the listing requirements of the Policy as long as the decision can be reasonably inferred from the data and information." FED at B.27. This situation-specific weight of the evidence process is provided for in Sections 3.11 and 4.11 of the Listing Policy and, as discussed in Section II.E.2., *supra*, must be used when the other factors fail whenever there is *any* evidence of non-attainment.

6. Lack of Acceptable Evaluation Guidelines

Staff is made numerous de-listings in the 2006 List based on the assertion that there is no existing and/or acceptable evaluation guideline under the provisions of the new Listing Policy.[18] This is improper for two reasons. First, this rationale is not included in the list of three situations

[18] Evaluation guidelines do exist for several of the pollutants said to have no guideline. For example, currently there is a National Academy of Science ("NAS") guideline for aldrin and dieldrin, an OEHHA guideline for chlordane, and an ERM guideline for DDT. It is unclear if these guidelines were used to reevaluate the data.

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in which de-listing may be considered. Listing Policy at 11. Second, this line of reasoning is inappropriate in the absence of any evidence indicating that the segment is in attainment with water quality standards. Once the water is listed, the substantial deference standard applies and a high burden of proof is required for de-listing. The assertion of this line of reasoning by the State Board also ignores the regional boards' own best professional judgment and the precautionary principle.

The CWA and its implementing regulations cast a wide net to assure that water quality standards are met. This is apparent throughout Section 303(d) and its regulations, which require TMDLs to be established and also require a margin of safety where uncertainty is present. 33 U.S.C. §1313(d). Given all the above, the State Board should direct staff and regional boards to retain listings when these circumstances arise in the future, until such time as substantial information is gathered to indicate that water quality standards are being met.

7. <u>De-Listings Should Not Be Made Based on New Standards for Evaluation Guidelines</u>

Finally, staff made several de-listings in the 2006 List because the new Listing Policy did not recognize Maximum Tissue Residue Levels (MTRLs) and Elevated Data Levels (EDLs). This is another good example of how such staff's retroactive application of the Listing Policy fails. Once again, this is not one of the three express situations in which previous listings may be re-evaluated under Section 4 of the Listing Policy. Moreover, staff did not provide any affirmative evidence that the waterbodies de-listed in the 2006 revision are not currently impaired under the situation-specific weight of the evidence standard or otherwise. Finally, the approach taken again ignores the deference due to prior agency decisions.

Although MTRLs and EDLs are not permissible in data evaluations under Section 6.13 of the new Listing Policy, the Policy must be read as a whole. *See e.g., Food and Drug Admin. v. Brown and Williamson Tobacco Co*. (2000) 529 U.S. 120, 133 ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") It is another well-established canon of construction that courts must interpret a statute "'as a symmetrical and coherent regulatory scheme' [citation] and 'fit, if possible, all parts into an harmonious whole.'" *Id.* The same canon applies here, where the Listing Policy, a regulatory guidance document, is issued with an intent to provide regulatory guidance for consistent implementation of a section of the CWA. Following this principle in this case, it becomes clear that the regional boards are to consider the totality of the evidence using the situation-specific weight of the evidence factor in Section 4.11 before a waterbody may be de-listed for any reason. The State Board staff did not do this for these de-listings. Thus, de-listings on this basis are inappropriate and improper.

Finally, the Precautionary Principle should be heeded where the constituents of concern have no other established guidelines, as is the case here. While previous guidelines may have associated uncertainties, they do indicate **potential** impairments in these water segments. For instance, EDLs are indicative of biological stress and impairment at the very minimum. Similarly, the Los Angeles Regional Board recognizes that "MTRLs have value as alert levels indicating water bodies with potential human health concerns." Los Angeles Regional Water Quality Control Board and U.S. Environmental Protection

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Agency, *Total Maximum Daily Load for Toxic Pollutants in Marina del Rey Harbor* (2005) at 13.

In this vein, we also encourage the State Board to actively pursue efforts to develop new or revised guidelines. Once a new guideline is established, the water quality standard may be revised and the listing may be reevaluated properly. However, absent any new guideline or standard, and absent affirmative information to show that the water segment is not, in fact, impaired or threatened, it is inappropriate in the context of Section 303(d) to de-list previously listed segments.

If you have any questions or would like to discuss any of these comments, please feel free to contact us at (310) 451-1500. Thank you for your consideration of these comments.

Sincerely,

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