

September 13, 2002

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Re: Environmental Caucus Comments on "Draft Concepts for Developing a Policy for Listing and Delisting on California's 303(d) List" (July 11, 2002)

Dear Mr. Wilson:

On behalf of the Environmental Caucus of the AB 982 Public Advisory Group ("Environmental Caucus"), I am pleased to submit these comments on the State Water Resources Control Board's (SWRCB) "Draft Concepts for Developing a Policy for Listing and Delisting on California's 303(d) List" (Draft Policy). Our primary positions with respect to the development of a Draft Policy are as follows:

- **Scope:** The purpose of the Policy is not to interpret numeric standards, but rather to review data to assess compliance with standards. Accordingly, the Policy should not incorporate guidance on beneficial use de-designation or water quality standards revision.
- **Data:** All readily available data should be considered. QA/QC guidance should be reasonable and consider the amount and type of data that can be provided given available and prospective budgets.
- **Assessing Compliance with Water Quality Standards:** In evaluating whether a water segment meets water quality standards, the state should consider a variety of factors; one strategy (such as use of the binomial model) should not stand alone or trump other factors or strategies. Moreover, we believe the Policy should be specifically based on the premise that it should be easier to list and harder to delist, and accordingly there should be separate criteria for each process.
- **Contents of 303(d) List:** All water bodies that do not meet water quality standards must be on the list, and they cannot be removed until it has been shown that the water body has met standards over a minimum period. The Policy should be applied to new listings only. It should not be applied against current listings before moving forward; current listings will be evaluated as they come up in priority order. We do not support the use of a "Monitoring Priority List" or a "Probable Clean Waters List."
- **Public Access to Process:** Transparency and consistency in decision-making is essential, as is a reasonable level of public review and opportunity for comment. Public consensus with respect to listings is not required.

We provide further detail on these positions and raise additional issues in the text below. We will be providing additional technical comments on the Draft Policy, and will provide more comprehensive comments on the draft final Policy when it is made available for public review.

I. SCOPE

Both pages 2 and 18¹ of the Draft Policy provide options to “interpret numeric water quality standards.” The purpose of the Draft Policy is not to interpret numeric standards; rather, its purpose is to review data to assess compliance with standards. We agree with the statements on page 2 that the Policy should not be used to revise water quality objectives or beneficial uses. Accordingly, we are opposed to Alternative No. 2 on page 2, which would incorporate beneficial use designation/de-designation and water quality standards revision into the listing policy guidance. Beneficial use designation and water quality standards revision are explicitly dealt with in other parts of the Clean Water Act, and therefore should be addressed outside this Draft Policy.

II. DATA

As required in the regulations implementing Section 303(d) of the Clean Water Act, we believe that all readily available data should be used (see page 5 of Draft Policy). 40 CFR Sec. 130.7(b)(5). In accordance with this position, we have several specific comments on certain pages of the Draft Policy:

- p. 8 – Solicitation of Data. The last sentence of this section is confusing; it seems to state that the Regional Boards should not consider data unless it is delivered to them (such as through Discharge Monitoring Reports). We believe the Boards must actively seek out data as well (*e.g.*, data from USGS, drinking water monitoring, SWAMP, and other databases) in accordance with the “all readily available data” regulation.
- p. 11 – Documentation. Since we support transparency of the listing process (see further comments below), we support approaches to documentation that fully memorialize Regional and State Board evaluation methodologies. In addition, because SB 72 (Kuehl) is supposed to standardize statewide the reporting format for stormwater monitoring information, we encourage the State Board to leverage SB 72 efforts. Finally, any documentation approach must be comprehensive enough to accommodate all types of data; we do not support an approach that would have the indirect effect of excluding or making it difficult to submit a particular type of available data.
- p. 16 – Listing/Delisting Factors. We do not support Alternative 3, and we are opposed to the statement that “In all cases, data and information that is collected during a known spill or [permit violation] shall not be used in the assessment of standards and beneficial use attainment.” Blanket exclusions such as this are contrary to the “all readily available

¹ Page 26 also appears to address this issue; the topic of assessing compliance with water quality standards should be combined into a single section to avoid confusion.

data” policy called for by federal law. Likewise, we are opposed to Alternative 2, as it is illegal and promotes de-facto de-designation. As we have previously stated, neither designation/de-designation of beneficial uses, nor standards development or revision, should not be within the scope of a listing policy.

In addition, while we agree in concept that the discovery of clearly faulty data should be a trigger for a review of a listed segment, we would like to see an affirmative statement that delisting water segments that are based upon “faulty data” or “limitations related to the analytical methods that would lead to improper conclusions” cannot take place *unless affirmative information is proffered* to show that the water segment is not, in fact, impaired. The definitions of “faulty data” and “limitations related to the analytical methods” in the Draft Policy are loose. Outdated guidelines, for example, could conceivably fall under such a definition. As some members of the PAG Environmental Caucus have stated in their comments previously, such guidelines, while not current, may still indicate a problem. Before delisting, the Regional or State Board should show that despite such “faulty data” or “limitations,” the water body is in fact not impaired.

- p. 19 – Data Quality. We support Alternative 5, under which QA/QC is only a consideration, and does not preclude readily available data from being considered. Since data are collected from many sources, the weight given to data in a listing decision can be based in part on an assessment of the quality assurance methods for the data and the degree of adherence to the quality assurance procedures.² Data supported by a Quality Assurance Plan (QAPP) pursuant to the requirements of 40 CFR 31.45 should be deemed acceptable for use in developing the 303(d) list.
- p. 21 – Age of Data. Again, we believe that all available data should be used, particularly given the low levels of funding for SWAMP and other monitoring programs. The age of data employed in a listing decision can be taken into consideration when making quality assurance assessments regarding the weight given the data.
- p. 22 – Water Body Specific Information. The term “actual data” should be defined, and should include photographs.
- pp. 23 *et seq.* – Temporal and Spatial Representation and “Minimum Number of Samples.” These requirements should all be feasible; *i.e.*, cognizant of monitoring budgets. Infeasible requirements will guarantee that impaired waters will go unlisted. Along these lines, we reiterate our opposition to recent SWAMP budget cuts, as we articulated in the July PAG meeting. If the state will not commit to funding for even the

² If the Policy is to include a list of monitoring groups and efforts, as the Draft Policy does, then it should also include, among others: NOAA, California Department of Fish and Game (for fish habitat surveys), California State Mussel Watch Program, California State Toxic Substances Monitoring Program, U.C. Davis Granite Canyon Toxicity Testing Laboratory, the California Aquatic Bioassessment Laboratory, the Sierra Nevada Aquatic Research Laboratory, the Monterey Bay Aquarium Research Institute, and the Central Coast Long Term Environmental Assessment Program.

most basic level of monitoring, it cannot place unreachable restrictions on what data can be used.

- p. 23 – Temporal Representation. Regional Boards should establish temporal representation requirements on a case by case basis. Moreover, the suggested policy language is not appropriate because it presumes the existence of monitoring resources that do not currently exist and have never existed. While general guidance regarding desired temporal representation can be developed, it must consider available and projected monitoring resources, or impaired waters will go unlisted.
- p. 24 – Spatial Representation. Regional Boards should establish spatial representation requirements on a case by case basis. The other language on page 24 should be eliminated, since it sanctions a “one size fits all” approach to monitoring.
- p. 25 – Minimum Number of Samples. General guidance on minimum number of samples could be established as an aid to the Regional Boards, who should then establish on a case by case basis, considering sampling resources and other factors, the number of samples used to assess standards attainment. An unfunded mandate for high sample counts will not protect water quality.

II. ASSESSING COMPLIANCE WITH WATER QUALITY STANDARDS

With respect to assessment of compliance with water quality standards, the Draft Policy does not specifically differentiate between criteria for listing and criteria for de-listing. As we have stated repeatedly, we believe it should be easier to list and harder to delist. Consequently, we believe there should be separate criteria for each assessment process, clearly laid out.

We also believe that a single strategy is not possible or reasonable. For example, the use of a single strategy approach for both dioxin and nitrate would not make sense. Required sample counts, percentage exceedances, and confidence limits are different for different substances, and need to be determined based on best professional judgment at the Regional Board level.

So, we would at a minimum be opposed to Alternatives 3, 5, 6, 7, 8 and 9 on page 9 as too narrow for listing to ensure listing of impaired waters with an adequate margin of safety. We also believe all of the data need to be considered as a whole, and so are opposed to the use of the binomial model alone, rather than as one factor in an overall assessment. The reasons for our concerns with use of the binomial model alone were discussed at the July 2002 PAG meeting, and include the following:

- aquatic life could be dead by the time you get enough exceedances to meet the threshold;
- bioassessments in particular can indicate impairment with fewer samples than proposed under the model;
- standards often don't permit the number of exceedances you would need to meet the model's parameters;

- the binomial model doesn't consider the magnitude of exceedances or exceedance trends, both of which can be very important;
- set exceedance percentages and listing/delisting confidence level percentages may not work for different parameters (causing more complexity than anticipated); and
- the method may be illegal (EPA is being sued over the Florida rule) because all reasonably available data must be used, and the binomial model alone ignores other data.

With respect to de-listing, the Draft Policy currently does not provide for the "margin of safety" called for in the Clean Water Act. For instance, a fixed time period will not be sufficient for many circumstances. As an example, if a harbor is listed for synthetic chemicals that adhere to fine sediment particles, it will need to be monitored for a sufficient period of time to include rainy seasons that drive the fate and transport of the substances. A Policy that had an appropriate delisting margin of safety would include guidance establishing a minimum (rather than fixed) sampling time period, as well as a minimum sample count.

Finally, with respect to the tissue discussion on page 34, many PAG members submitted Section 303(d) list comments to the State Board stating that we do not believe it is proper to delist water segments that were originally listed based on elevated data levels (EDLs), or outdated NAS guidelines, *unless affirmative information is proffered* to show that the water segment is not, in fact, impaired. For example, some Environmental Caucus members have stated that although the EDL is not a standard and is not directly related to a beneficial use, the fact that tissue levels in a given water body exceed levels in 85 or 95 percent of other water bodies may indicate a problem. The question is: do those elevated tissue levels have human health impacts? And do they impact the aquatic life that are accumulating these problems? Since the data are available, they should be compared to known standards where possible, and delisting should only occur if levels are below those known to affect human health or aquatic life.

III. CONTENTS OF 303(d) LIST

With respect to the contents of the list, we strongly support Alternative #1 on page 16; that is, the water body should be on the list if any type of standard is not met. This is the only option that complies with the requirements in Clean Water Act Section 303(d). We also support the listing of waters that are expected to exceed standards during the listing cycle (*see* page 44).

As discussed at the July 2002 PAG meeting, we also strongly support the proposal on page 45 that the state reject past and current reliance on an "Enforceable Programs List," a "Pollution List," and a "TMDL Completed List" as lists separate from the Section 303(d) list. Members of the Environmental Caucus have submitted extensive comments on this topic (*see, e.g.,* Heal the Bay comments dated June 12, 2002; NRDC comments dated May 15, 2002, and NRDC Supplemental comments dated June 12, 2002). Water bodies that do not meet standards must be included on the 303(d) list, and TMDLs are required where the application of existing requirements has not resulted in water quality standard attainment. Given that the Clean Water Act requirements are twenty-five or more years old, and fifteen years old in the case of Section 402(p) (stormwater), it is abundantly clear that existing requirements have failed to attain standards for the pollutants on the list and associated waters.

Moreover, listed waters must stay on the list until they meet standards. This is the position approved by the vast majority of the members of the AB 982 Public Advisory Group (PAG) at our meeting on February 15, 2002. There is no basis in the Clean Water Act for delisting a water body simply because a TMDL has been written. Section 303 of the Act mandates that impaired waters be listed; it does not grant EPA authority to allow states to remove waters from the list while the impairment is continuing.

We do not support the use of a "Monitoring Priority List" or a "Probable Clean Waters List" (as described on page 45). As we stated at the July 2002 PAG meeting, we believe that these lists are at best duplicative of, and at worst counterproductive to, Regional Board efforts to set monitoring priorities under SWAMP. If the State Water Board wishes to assess the relative health of the state's waters, it should not do so selectively through the 303(d) listing process, but rather as a comprehensive and planned assessment of all of the state's waters.

IV. PUBLIC ACCESS TO PROCESS

We agree with the implication on the top of page 11 that the listing decision should be "transparent" to the public. We believe that this means that not only must the reasons for list deletions and rejections must be transparent, but also that all data (not just that "solicited," as Draft Policy states at the bottom of the page) should be considered in developing "fact sheets" for each water body/pollutant-pollution combination. Transparency is essential for the process to be successful. However, this does not mean that there must be public consensus for listings.

Finally, we strongly disagree with the suggestion on page 2 that the whole list should be reviewed against the final Policy after it is complete. The Policy should only be applied to new potential listings. Currently-listed waters will be "reviewed" as they come up in the normal process; when a problem statement is drafted for the water body, inaccurate listings will become evident. The program is far enough behind as it is without spending another year just reviewing the list.

* * *

Thank you for the opportunity to provide these comments. Please do not hesitate to call if you have any questions. We look forward to providing additional technical comments soon, as well as when the draft final Policy is made available for public review.

Sincerely,

Linda Sheehan
Co-Chair, AB 982 Public Advisory Group

cc: Arthur G. Baggett, Jr., Chair, SWRCB

Celeste Cantu, Executive Director

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