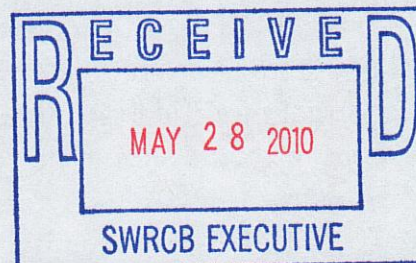




Redwood Chapter P.O. Box 466 Santa Rosa, CA 95402 Ph 544-7651

28 May 2010

State Water Resources Control Board
1001 I Street
Sacramento, CA 95814



Subject: Comment Letter-2010 Integrated Report/Section 303(d) List

Members of the Board:

We welcome this opportunity to comment on the draft 303d list, particularly in light of our participation in current litigation against the State Water Board involving these same issues. We do not see that suit as adversarial in nature as we are simply seeking compliance with the law. We hope that this communication provides a better understanding and allows us to find a common position on the issues that divide us.

The primary function of the draft 303(d) document is to list impaired watersheds, to set priorities, and to establish dates for the completion of implementation plans. The subject draft fails to do this. Instead it conceals an enormous backlog of long delayed obligations for which the State Board and North Coast Regional Board are responsible. The boards have failed to develop the necessary resources or will to address the problem. In the past, the 303d list has met the requirements of the Clean Water Act and the state's Porter Cologne Act by listing watersheds that are impaired for beneficial use, by establishing priority ranking and most importantly, by establishing a timely schedule for the completion of implementation plans. The subject 303(d) list now being considered fails to meet these simple objectives, has been transformed into an unwieldy document that fails to make any clear commitment as to when each impaired watershed will have an approved action plan in place.

RECOMMENDED CHANGES

We believe the format of 303(d) list should be revised with separate paginated sections for each region. We believe that it should be separated from the 305(b) listing as it has been in the past making easy public access to the 303d list of each individual region. The regional list should be available to the public on the regional website as it has been in the past. Format modifications that prevent comparison to earlier 303(d) commitments should be corrected.

The Clean Water Act 303(d)(1)(a) requires priority ranking and should be restored;

The state shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

Section 13242 of the Porter-Cologne Act requires the state adopt a time schedule for completion for every listed TMDL:

***The program of implementation for achieving water quality objectives, shall include but not be limited to:
(b) A time schedule for completion.***

In the past this basic information has been provided to the public showing the state's commitment for the preparation of timely action plans. The 1998 303d list¹ shows the priority and the estimated time for completion. We are not asking for a change in policy, but a return to compliance with the existing policy. This is not a clerical issue we are raising. The format changes go to the heart of the problem with the 303(d) list, concealing the real magnitude of the states obligation to restore the impaired watersheds.

ATTWATER OPINION

In 1999 the Santa Anna Regional Board asked William Attwater, Chief Counsel of the State Water Resources Control Board, his opinion² on the required timing for the state adopting implementation plans for TMDLs.

¹ www.waterboards.ca.gov/water_issues/programs/tmdl/records/past_reports/1998_303.pdf

² www.swrcb.ca.gov/water_issues/tmdl/docs/iwguide_apxb.pdf

This was Chief Counsel Attwater's response:

Under state law, the Regional Board must adopt an implementation plan for the TMDL. The plan should be adopted concurrently with the other TMDL components, if practicable, or within a short time frame thereafter.

And,

In response to the rising tide of litigation, EPA launched several initiatives. EPA issued TMDL guidance in 1997 establishing two significant policies. The first set a deadline for completion of all TMDLs of from 8 to 13 years. The second directed that the states prepare implementation plans for TMDLs addressing waters impaired solely or primarily by nonpoint sources. The plans should include "reasonable assurances" that the TMDL's nonpoint source load allocations would be achieved.

And,

A time schedule for implementing a TMDL has to be part of an implementation program under state law. In general, state law would require that a TMDL include an implementation program. A TMDL would not be effective, and could not be implemented, until an implementation program was adopted.

Our position is the same Chief Justice Attwater. He sets out policy that has been followed by earlier boards. But since the year 2000, as the 303(d) lists have grown in size, they have become more and more obscure as to the obligations of the state board to address the implementation plans.

THE NAVARRO RIVER

The Navarro River, located in the wine country of Mendocino County best illustrates the failure of the 303d list to comply with the Attwater opinion.

- In 1995 the Navarro River was first 303(d) listed as impaired for sediment with a priority rating of High and with a completion date set for the implementation plan in 2000 that allowed five years for the work.
- In 2000 the EPA, in response to the failure of the regional board to act, adopted a technical TMDL in compliance with the 1997 consent decree with the environmental plaintiffs.

- By 2002 the implementation plan had not been started, and a new completion date was set on the 303(d) list for 2004. This added four more years to the project, notwithstanding EPA policy prohibiting the resetting of completion dates referenced in the Attwater opinion above.
- In 2006 we were advised that “*due to staff reductions*” the Regional Board would not be completing the implementation plans for the Navarro River, now listed for high water temperature as well as sediment.
- The 2006 303(d) listing revised the completion date again to 2019, *twenty-four years following its first listing as a high priority Coho watershed*. The High priority rating has been removed from the listing.
- The proposed 303d list now under consideration no longer lists any completion date or priority for the Navarro, only the “USEPA TMDL APPROVAL DATE” of 2000.

This action re-defined what “completion” means on the 303d list. It appears that the state would like to give the impression that it has no responsibility for the actual completion of the implementation plans. This of course is not the case.

STAFFING REDUCTIONS

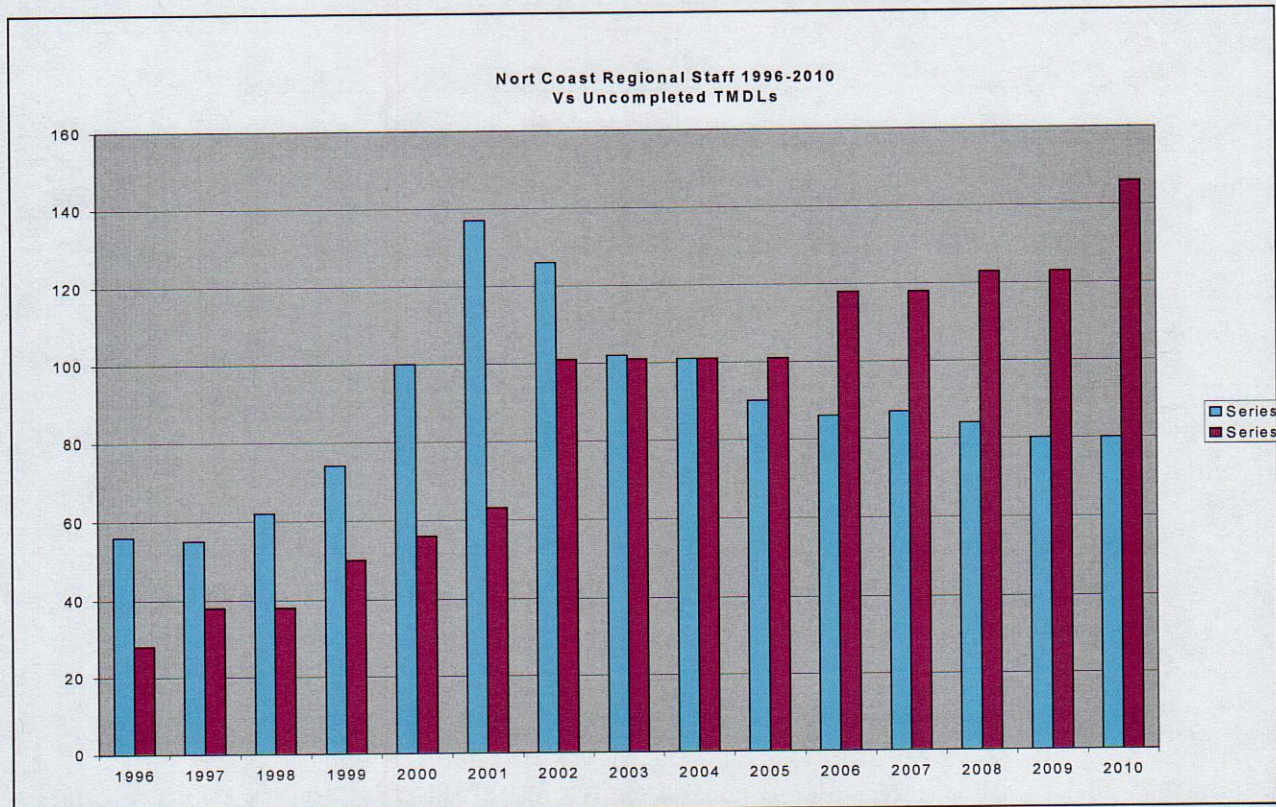
Following the notification that the Navarro River implementation was to be stopped due to staff reductions, we raised the issue of inadequate staffing with the Regional Board in our letter of 24 July 2007 bringing attention to the low rate of progress on addressing implementation plans. At the board hearing we pointed out that, at the then current rate of progress, it would take 164 years to address the backlog of listed TMDLs. The regional board’s only response was “We have budget problems.”

Following our filing the current suit against the state last year, the Director of the North Coast Regional Board acknowledged their understaffed conditions:

“‘The bottom line is we're doing the best we can with what we've got Kuhlman said’. Kuhlman also said her current staff of about 78 is nearly half the size it was in 2000”³.

³ http://www.times-standard.com/localnews/ci_11633576

The Director's assessment on staff reduction and the data below comparing staff levels against pending implementations plans, show the 303(d) remediation work slowed to a crawl, while the backlog of listed impaired rivers was steadily increasing.



The Work Plan for the Control of Excess Sediment also paints an accurate picture of the understaffed condition of the North Coast Region. This Work Plan, supported by the Sierra Club, was approved by the regional board in 2004. Designed to address sediment TMDLs on a regional basis, it sets out clear and specific objectives that could lead to recovery of all sediment listed TMDLs. The plan has the unique feature of putting a price tag on the work. This honest statement of the staffing needs warrants consideration as a policy for all TMDLs and their implementation plans. The funding section on page 239 of the final 2008 document shows the number of personnel required in each of the ten years following adoption and indicates 46 full time positions in this fiscal year. The problem is that the 46 full time required personnel do not exist. They have never existed. Like the term 'paper water', these are 46 *paper employees*.

Table 53
Funding Summary by Fiscal Year

	07/08	08/09	09/10	10/11	11/12	12/13	13/14	14/15	15/16	16/17
Pys Regional Tasks	16.4	16.3	31.4	32.0	31.4	30.7	30.5	30.0	29.8	29.8
Pys watershed Tasks	8.6	8.7	14.4	13.8	14.4	15.0	14.9	15.0	14.3	13.8
Pys Total Tasks	25.0	25.0	45.8	45.8	45.8	45.7	45.4	45.0	44.0	43.6
Pys Now Funded	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0	25.0
Additional Pys	0.0	0.0	20.8	20.8	20.8	20.7	20.4	20.0	19.0	18.6

The current organization chart shows only seven staff members available to work on all TMDLs, essentially all seven working on the Klamath Basin, yet the subject 303(d) lists convey the impression that this plan is functioning and that every thing is fine!

LITIGATION

The Sierra Club with other environmental groups, brought suit against the EPA on this issue that resulted in the 1997 Consent Decree in which the state participated, agreeing to establish implementation plans by fixed dates for many of the listed watersheds in the North Coast Region. As the state failed to meet these responsibilities, members of the plaintiff group filed a suit in 2009 asking that the state “develop a program of implementation for TMDLs” and “establish a priority ranking and a time schedule for completing such actions.” Our suit is not complex or over reaching, we are asking only for the states conformance to the law. The draft 303(d) does not meet that standard.

Should the 303d list be approved as now proposed we will advocate for the EPA to reject it for the reasons we have set out above. We would also suggest EPA develop better protocols to enforce prioritization to the process, to prevent this obfuscation of the 303(d) requirement we see in this document, and to find much greater financial support to the state to address this very large environmental need.

We do not demean the work that is being performed by the Director and the limited staff of the North Coast Region now working on the TMDL program. We would agree with the Directors comment that they are doing the best they can with what they've got. We see their candid request for manpower in the Workplan for Excess Sediment as an unanswered cry for help to which the state board should listen. Instead of burying the problems imbedded in this draft 303(d) list, we would ask the State Water Resources Control Board bring light to the problems so that state, the EPA and the public can work together to restore water quality.

Very truly yours,

Daniel Myers
Water Committee Chair, for
Redwood Chapter of the Sierra Club

CC: Alexis Strauss EPA
North Coast Regional Water Quality Control Board
Catherine Kuhlman NCRWQCB