



December 22, 2014

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: Comment on Proposed Amendments to Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (Listing Policy)

Dear State Water Resources Control Board:

Please accept these comments requesting the State Water Resources Control Board (SWRCB) to 1) modify the first proposed amendment to the Listing Policy in order to encompass the evaluation of all existing and relevant water quality data, and 2) amend the listing policy to explicitly require that the Regional and State Water Resources Control Boards evaluate ocean acidification as part of their biennial assessment.

On November 19, 2014, the SWRCB released proposed amendments to the Water Quality Control Policy for Developing the Clean Water Act Section 303(d) List (Listing Policy). We submit these comments to the SWRCB on behalf of the Center for Biological Diversity (the Center). The Center is a nonprofit environmental organization dedicated to the protection of imperiled species and their habitats through science, education, policy, and environmental law. The Center's Oceans Program aims to protect marine life and ocean ecosystems in United States and international waters. The Center has over 800,000 members and online activists throughout the United States and submits these comments on its own behalf and on behalf of its members and staff with an interest in protecting the ocean environment.

1. Modify Listing Policy to Comply with the Clean Water Act, 33 U.S.C. § 1313(d)

The proposed amendments to the Listing Policy includes four significant process changes. Our comments concern the first proposed change – the modification of “readily available information” to mean all information submitted to the California Environmental Data Exchange Network (CEDEN), a website location for sharing and collecting information about the State's waterbodies. In limiting “readily available data and information” solely to data submitted to the CEDEN, this amendment improperly limits the directive of the Clean Water Act and implementing regulations, 33 U.S.C. § 1313(d)(1)(c), and 40 C.F.R. § 130.7(b)(5), which

require states to consider “all existing and readily available water quality-related data and information.” (Emphasis added).

The Clean Water Act is the nation’s strongest law protecting water quality. Congress enacted the Clean Water Act, 33 U.S.C. §§ 1251 et seq., with the express purpose of “restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation’s waters” and promptly eliminating water pollution. *Id.* § 1251(a). Section 303(d) requires each state to establish water quality standards. *Id.* § 1313(a)-(d); 40 C.F.R. § 130.3. Water quality standards set goals for enhancing water quality and must “provide water quality for the protection and propagation of fish, shellfish and wildlife and for recreation.” 40 C.F.R. § 130.3.

Every two years, states must identify impaired water bodies for which existing pollution controls “are not stringent enough” to ensure “any water quality standard applicable” will be met. 33 U.S.C. § 1313(d). The Section 303(d) list must include all water bodies that fail to meet “any water quality standard,” including numeric criteria, narrative criteria, water body uses, and antidegradation requirements. *Id.* § 130.7(b)(1)(iii) & (b)(3).

In creating the 303(d) list, states “shall assemble and evaluate all existing and readily available water quality-related data and information.” 40 C.F.R. § 130.7(b)(5). The regulations further specify that “all existing and readily available water quality-related data and information” includes at a minimum, but is not limited to, all existing and readily available data and information about “[w]aters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data.” *Id.* § 130.7(b)(5)(iii).

The first proposed amendment to the Listing Policy specifies that “‘readily available data and information’ is information that can be submitted to the CEDEN.” (Draft Amendment to Listing Policy 6.1.1). This supersedes the previous iteration of the policy, which stated that “at a minimum, readily available data and information includes paper and electronic copies of” various water quality sources, including fish and shellfish advisories, reports of fish kills, water quality data from EPA’s STORET database, and other data and information reporting by local, state and federal agencies, citizen monitoring groups, academic institutions, and the public. In addition, the previous definition required the Regional Water Boards and the State Water Board to actively solicit data and information from federal agencies, such as the National Oceanic and Atmospheric Administration and the U.S. Geological Survey. (See Listing Policy 6.1.1).

This proposed amendment limits the data which will be assessed as part of the biennial 303(d) listing process; instead of “at a minimum,” looking at relevant databases with applicable information, the only information considered will be that which is contained in the CEDEN

database. This violates the strictures of the Clean Water Act regulation requiring “all existing and readily available information and data” to be examined in the 303(d) biennial review. 40 C.F.R. § 130.7. Courts have emphasized that states must take seriously the requirement to examine all existing and readily available information data in the 303(d) listing process. *See, e.g., Sierra Club v. Hankinson*, 939 F. Supp. 865, 870 (N.D. Ga. 1996) (“The Court is further concerned about Georgia’s apparent failure to use ‘all existing readily available water quality-related data and information’ . . . such as . . . available EPA databases.”). Likewise, in other contexts, courts have struck down an agency determination when that agency failed to use data that was required by statute and regulation. *See, e.g., Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1124 (9th Cir. 2012) (holding that the BLM failed to look at data relevant to a finding of jeopardy under the Endangered Species Act); *Sierra Club v. EPA*, 671 F.3d 955, 968 (9th Cir. 2012) (finding that EPA’s approval of a State Implementation Plan under the Clean Air Act was arbitrary and capricious for failing to use the most recent available data); *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46 (1983) (finding the highway safety agency acted in an arbitrary and capricious manner when it “apparently gave no consideration” to requiring airbags when modifying a passive restraint standard).

We support a policy change that encourages data to be submitted to CEDEN and evaluated by Regional and State Water Boards, but this amendment should not eliminate the requirement to examine other sources of existing and relevant information. We encourage the SWRCB to amend the policy to reinstate the previous definition of “readily available data and information,” and include within that definition the proposed amended definition:

All data submitted the CEDEN, which can be accessed at www.ceden.org. If CEDEN is unable to accept a particular subset of data and information, the State Water Board or the Regional Water Board may accept that data and information if it meets the formatting and quality assurance requirements detailed in section 6.1.4 of the Policy and the notice of solicitation for the current Listing Cycle.

(Draft Amendment to Listing Policy 6.1.1).

In order to properly identify waters failing to meet applicable water quality standards, allowing the state to implement total maximum daily loads of pollutants that are causing the impairment, State and Regional Water Boards must thoroughly asses existing data during the 303(d) biennial assessment. This is only achieved via a careful examination of various databases which contain relevant information. *See* 40 C.F.R. § 130.7. It is laudable for the SWRCB to encourage centralization of data collection for easy and simplicity of conducting the 303(d) assessment, but not at the risk of missing valuable information which will inform accurate assessment of impaired waters.

2. Amend Listing Policy to Evaluate Ocean Acidification

We request that the SWRCB amend the listing policy to explicitly require that the Regional and State Water Resources Control Boards evaluate ocean acidification as part of the biennial assessment. California has a duty to evaluate ocean acidification during its water quality assessment (Environmental Protection Agency, 2010). Specifically, EPA directed states to evaluate ocean acidification data:

“EPA has concluded that States should list waters not meeting water quality standards, including marine pH [water quality criteria], on their 2012 303(d) lists, and should also solicit existing and readily available information on OA using the current 303(d) listing program framework.”

(Environmental Protection Agency, 2010).

Accordingly, California must evaluate pH, biological information, and other monitoring data that is available to it and seek out ocean acidification data from state, federal, and academic research institutions. EPA recommended that states solicit baseline data and ocean acidification data-- such as DIC, pCO₂, TA, pH--including modeling and non-site-specific data. EPA also advised states to evaluate biological information related to resources that are vulnerable to OA, such as coral reefs, marine fisheries, or shellfish resources.

EPA’s 2010 memo and Integrated Report Guidance discussed several sources:

- State coastal monitoring
- NOAA-National Estuarine Research Reserve System
- NOAA National Data Buoy Center

There are several additional sources for high resolution ocean acidification data. California must obtain and evaluate data from research institutions, including but not limited to:

- PMEL NOAA <http://www.pmel.noaa.gov/>
- National Ocean Data Center <http://www.nodc.noaa.gov/>
- Integrated Ocean Observing System <http://www.ioos.noaa.gov/>
- Central & Northern California Ocean Observing System <http://www.cencoos.org/>
- Monterey Bay Aquarium Research Institute
- Scripps Institution of Oceanography
- West Coast Ocean Acidification and Hypoxia Science Panel <http://westcoastoah.org>
- California Current Acidification Network <http://c-can.msi.ucsb.edu/>

The Regional and State Water Resources Control Boards must include ocean acidification in its integrated reports and “start developing assessment methods for evaluating marine waters based on [ocean acidification] impacts using their existing marine pH and biological (narrative and numeric) [water quality criteria]” (Environmental Protection Agency, 2010: 7). “Guide to best practices for ocean CO₂ measurements” contains the most up-to-date information available on the chemistry of CO₂ in seawater and the methodology of determining

carbon system parameters (Dickson, Sabine, & Christian, 2007). Methods are also described by the Ocean Carbon and Biogeochemistry comments to EPA and in the “Guide to best practices for ocean acidification research and data reporting” (Ocean Carbon and Biogeochemistry Program, 2009, 2010; Riebesell, Fabry, Hansson, & Gattuso, 2010). The latter also describes the best practices for researching and reporting biological responses to ocean acidification (Riebesell et al. 2010). For example, the study describes five methods that are in wide use for the study of calcification of benthic organisms, including buoyant weight of the organism, skeletal density banding, direct measurement of shell or skeleton weight, change in total alkalinity of the incubation water, and measurements of radioisotopes (Id.). California can draw from this guide for its own listing policy.

The listing policy should ensure that waters are assessed with respect to ocean acidification not only with regard to numeric criteria, but also narrative criteria and antidegradation standards.

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Thank you for affording the Center the opportunity to comment on the Proposed Amendments to the Listing Policy. Should you have any questions please do not hesitate to contact us.

Sincerely,



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Sources Cited:

Dickson, A., Sabine, C., & Christian, J. (2007). Guide to best practices for ocean CO₂ measurements. *PICES Special Publication*.

Environmental Protection Agency. (2010). Memo: Integrated reporting and listing decisions related to ocean acidification.

Ocean Carbon and Biogeochemistry Program. (2009). Responses to EPA Notice of Data Availability From Ocean Carbon and Biogeochemistry Program. *North*.

Ocean Carbon and Biogeochemistry Program. (2010). Response to EPA Notice of Call for Public Comment on 303 (d) Program and Ocean Acidification from the Ocean Carbon and Biogeochemistry (OCB) Program.

Riebesell, U., Fabry, V., Hansson, L., & Gattuso, J. (2010). *Guide to best practices for ocean acidification research and data reporting*.