

California Regional Water Quality Control Board

San Francisco Bay Region

February 11, 2009, 9:00 A.M.

Elihu M. Harris Building

First Floor Auditorium

1515 Clay Street

Oakland, CA 94612

**ITEM 6. Planning - Evaluation of Water Quality Control  
Conditions for the San Francisco Bay Region - Proposed  
Revisions to the Clean Water Act Section 303(d) List of  
Impaired Waters. Hearing to Consider Recommendations for  
Proposed Revisions.**



**ORIGINAL**

1   **ITEM 6. Planning - Evaluation of Water Quality Control**  
2   **Conditions for the San Francisco Bay Region - Proposed**  
3   **Revisions to the Clean Water Act Section 303(d) List of**  
4   **Impaired Waters. Hearing to Consider Recommendations for**  
5   **Proposed Revisions.**

6           Chair Muller - Moving to Item 6, Planning.

7           Mr. Wolfe - Item 6 is our second hearing to  
8   consider recommendations for revisions and update to the  
9   Section 303(d) List of Impaired Waters in the Region. I  
10   will note that we had our testimony hearing last month, so  
11   the goal of this meeting is to discuss with you the Response  
12   to Comments, and have you consider a resolution that would  
13   direct me to transmit our recommendations for revisions to  
14   that list to the State Board. With that, I would like  
15   Richard Looker to make the staff presentation.

16           Mr. Looker - It looks like the projector went on  
17   furlough for a little bit, as well, so it is just warming  
18   up.

19           Chair Muller - It almost looks as bad as those  
20   cyclamens in the lobby out there. They are looking pretty  
21   shabby, too.

22           Mr. Wolfe - Yeah. Well, I think it is part of the  
23   budget plan to cut lighting 10 percent.

24           Mr. Looker - Okay, good morning, Board. My name  
25   is Richard Looker and I am from the Planning and TMDL

1 Division. I am back again this month to talk about our  
2 proposed recommendations for changes to the Impaired Waters  
3 List, also known as the 303(d) List. So last month, we  
4 introduced our listing recommendations and gave the public  
5 an opportunity to share their views directly with you. This  
6 month, we are back to ask for your approval of our listing  
7 recommendation, so we can transmit them to the State Board.  
8 So in today's presentation, I am just briefly going to go  
9 through the specific listing recommendations, talk about a  
10 couple of minor revisions that we made, and also discuss our  
11 responses to some of the key comments that we saw in the  
12 comment letters.

13 So just to review where we are in the overall  
14 chronology of the listing process, this process started more  
15 than two years ago, in December of 2006, where we put out a  
16 solicitation to the public and other agencies that had data  
17 that they wanted us to consider for the listing process. We  
18 closed that solicitation period in the end of February 2007.  
19 We got 16 submittals of data. And so then we spent some  
20 time reviewing these data and doing our evaluation of water  
21 quality, and the results of this water quality evaluation,  
22 along with our proposed listing recommendations, were  
23 packaged into a Draft Report that we made available to the  
24 public in October of last year. And then that opened the  
25 comment period. We received 26 comment letters. And

1 that period ended December of 2008. Last month, we had the  
2 testimony hearing, and we have been working on staff  
3 responses to all of the comments that we got in the letters,  
4 as well as the issues that were raised at last month's  
5 testimony hearing. So we prepared those. They are in your  
6 packet, and we made a couple of revisions that I will tell  
7 you about. And today we are seeking your approval of the  
8 list. And then State Board has a separate process, and that  
9 will begin later this year, after all of the regions have  
10 done the same thing that we have been doing.

11           Okay, so just to review what the specific listing  
12 recommendations are, I am going to break it up into two  
13 parts, the trash listings and the non-trash. We have 26  
14 listings for trash, 24 creeks spread pretty widely around  
15 the region, and two Bay shoreline areas. And I mentioned  
16 earlier, we made three revisions to our listing  
17 recommendations; one of them involved trash, and we had  
18 incorrectly identified one of the impaired creeks as Alameda  
19 Creek, it is actually a little section that kind of branches  
20 off Alameda Creek, as it goes into the Bay, and it is  
21 formally known as Old Alameda Creek, so we made this change.  
22 And that was it for trash. So I just kind of indicated that  
23 in the star up there.

24           We have 14 non-trash listings and we had two  
25 revisions to this section of the list. One of them, we

1 are deciding not to list San Leandro Creek for Chromium VI.  
2 What we are going to do instead is collect additional data  
3 through SWAMP, to try to find out more about what is going  
4 on there. There may be a local source of this pollutant  
5 that we can follow-up on.

6           The second change, if you can see under Kirker  
7 Creek, we are listing, in addition to Pyrethroids, we are  
8 listing for water toxicity. So after making those two  
9 revisions, the 14 non-trash listings -- I will just quickly  
10 read them into the record: for Suisun Creek, dissolved  
11 oxygen and temperature; for Mt. Diablo Creek, water  
12 toxicity; the Kirker Creek has the water toxicity and  
13 Pyrethroids listing; Codornices for temperature; Arroyo Las  
14 Positas, eutrophication; Arroyo Mocho for temperature;  
15 Almaden Lake and Reservoir for Mercury; Stevens Creek for  
16 temperature; Permanente Creek for Selenium and water  
17 toxicity; and San Mateo Creek for sediment toxicity.

18           So by now you have had a chance to read the staff  
19 responses to all the comments that we got in the comment  
20 letters and the issues that we encountered at the testimony  
21 hearing. And last month, we went through a lot of the  
22 common themes that we saw in the comment letters, but we  
23 really did not give a staff perspective or response. So we  
24 do want to take a bit of time today to offer some staff  
25 response to some of the key themes that we saw in the

1 comment. These are not the formal full-blown response,  
2 which you have in the response document, but basically a  
3 summary of those. So the key themes that we saw, that we  
4 want to speak to today, are the spatial representation, of  
5 especially the trash data -- all of these are essentially  
6 about trash; the need for a trash sampling plan; comments on  
7 the photographic evidence for trash; comments on the  
8 scientific integrity of the trash assessment method; and  
9 also this comment that, since trash control measures are  
10 underway, there is no need to list some water bodies for  
11 trash.

12           On the spatial representation issue, we talked a  
13 lot about this last meeting, so in a nutshell, many  
14 commenters felt strongly that they disagreed with our  
15 decision to list an entire creek, based on data from a few  
16 locations mainly in the lower portion of a watershed. They  
17 felt, instead, that we should restrict the listings to just  
18 those discrete sections of the creek, or water body, where  
19 we actually had data because, by listing the whole creek,  
20 they felt it sent the erroneous message that the whole creek  
21 was similarly impaired by trash, and that this was an  
22 exaggeration.

23           So in response, we really need to clarify that, by  
24 listing the entire creek, we are not implying that the  
25 entire creek, you know, every inch of it, is equally

1 impaired by trash. You know, there are probably sections of  
2 the creek that are fine. But there is a strong likelihood  
3 that the problems exist on more than the locations that were  
4 surveyed by the field teams, or that were depicted in  
5 photos. Trash is transported downstream, and so the  
6 presence of trash at one location is a pretty strong  
7 implication that there are trash impacts upstream. And  
8 beyond that, we just do not think it makes sense to restrict  
9 the listings to just those sections where we have data.  
10 There is really no reason why the listings cannot be refined  
11 in the future, but we do not have the data to make that  
12 refinement now, and we are very open to the idea of doing  
13 this in the future, but it just does not make sense to  
14 refine the listings to where we have data now. And so this  
15 is the most straightforward decision and we can work out the  
16 exact locations where the problems exist as we get data  
17 moving forward.

18 Another comment was that, since our trash data did  
19 not come with a sampling plan that described how the  
20 sampling sites were chosen, we should not rely on trash  
21 data. The Listing Policy provides a lot of guidance for the  
22 Water Boards to help us identify high quality data, so that  
23 the listings can be based on high quality, or reliable data.  
24 And in the Listing Policy, it does mention a sampling plan,  
25 it is a good idea, it does help you determine when data

1 are good, but it is not a requirement of the Listing Policy.  
2 And we need to point out that the basis of all of the trash  
3 data that we relied on for the trash listings really goes  
4 back to the SWAMP Rapid Trash Assessment. And this trash  
5 assessment method is supported by a lot of documentation.  
6 There is a detailed method description packaged in the  
7 report; that report also has numerous case studies to show  
8 what the method can do and how it can be used. There is an  
9 appendix of this report that has the results of testing and  
10 validation that was done, where they sent out multiple teams  
11 to compare the scores that they got. And there was a peer  
12 review of this method, as well. So based upon this  
13 documentation of kind of the foundation of how we assess  
14 trash data, staff can determine that the trash data are high  
15 quality and we do not need a sampling plan for the trash to  
16 tell us that we can rely on these data.

17           The next issue I want to talk about is  
18 photographic evidence for trash. Many commenters argued  
19 that we should not rely on the photos as the sole  
20 justification for listing because, they quote a section of  
21 the listing policy that says that, "since this information  
22 is only descriptive, estimated, or projected, the listing  
23 policy says that this kind of information should only be  
24 used as an ancillary line of evidence, and not the sole  
25 justification for listing." But in response, we need to



1 emphasize again as we did last month, that the approach we  
2 took went well beyond a mere "descriptive, estimated, or  
3 modeled, or projected assessment." We did not just look at  
4 the photos and jump to a conclusion based upon our first  
5 impression of the photos. Instead, we systematically  
6 inspected every photo and we applied the trash assessment  
7 methodology where we could, given appropriate quantity and  
8 quality of the photographic evidence. And this is the key;  
9 it is this rigor of the assessment approach that turned the  
10 photos from just something descriptive into quantifiable  
11 data that can serve as a legitimate basis for listing.

12 We also received many comments questioning the  
13 scientific integrity of the trash method. The specific  
14 concerns had to do with statistical representativeness of  
15 the data, subjectivity of the method, lack of peer review,  
16 and also there was a question about whether trash above the  
17 high water line should be counted in the assessments. So in  
18 response, although the trash assessments, as we readily  
19 admit, were not conducted sort of randomly throughout the  
20 watershed. The conditions that they reveal really are a  
21 true reflection of what is going on out there and that trash  
22 problems are persistent, and fairly widespread around the  
23 Bay Area. And the SWAMP trash assessment method was  
24 evaluated for objectivity and sensitivity, and found to be  
25 sufficiently sensitive and objective to be useful in

1 evaluating ambient conditions. And the consistency of the  
2 assessment scores from the different teams that were  
3 involved in the evaluation exercise means that the method is  
4 not highly subjective, and so it merits the confidence that  
5 the Regional Board staff have in the methodology. And the  
6 methodology was also subjected to peer review, and the peer  
7 reviewers did not have any concerns about the scientific  
8 integrity of the method. So neither do we.

9           So regarding trash above the high water line, we  
10 think it is entirely appropriate to count this trash in the  
11 assessments because of its relevance, both to recreational  
12 beneficial uses, because humans who are recreating are  
13 certainly going to notice this trash above the high water  
14 lines, so it impairs that use, and as well as its impact on  
15 the wildlife beneficial use. Wildlife are not somehow  
16 shielded from this trash above the high water line, and  
17 further, this trash can be transported either by wind or  
18 runoff into the channel and subsequently transported  
19 downstream. So it is part of the problem this trash above  
20 the high water line, and it should be counted in the  
21 assessments.

22           Finally, many commenters noted that there are  
23 already actions underway that have either remedied the trash  
24 problems that we saw in the data or the photos, or that they  
25 would soon be -- the problems would soon be remedied. So

1 they argue that there is no need to list because the data  
2 that we have used for our assessment are already out of date  
3 and the condition would soon be solved. So in response, the  
4 task of the list preparation was to look at readily  
5 available data and make a listing call based upon whether  
6 water quality standards were being met or not. And there is  
7 really no way to know if this reviewed available data is out  
8 of date, even if that were the case. There is a difficulty  
9 that we have to, as we said last month, we have to cut off  
10 the data consideration period at some point, or else we just  
11 never are able to look at a body of data and make an  
12 assessment. So it is possible that some of these problems  
13 have been solved, but we cannot accept the data after this  
14 solicitation period. But we do this every two years, and so  
15 there will be an opportunity for the next listing round.  
16 And because of this, we cannot speculate concerning how  
17 water quality conditions may change in the future due to the  
18 implementation of control measures. And we cannot defer the  
19 evaluation of water bodies pending the outcome of  
20 implementation measures. We have to take a look at what we  
21 have now and make the call.

22           One interesting thing we saw in the comments  
23 regarding control measures was that many commenters said  
24 that the trash problem was being solved by regular creek  
25 clean-ups which removed so many pounds or tons of trash

1 on a regular basis, say it is monthly. We really want to  
2 note that such clean-ups, while a good thing, and they raise  
3 awareness, and they are a laudable stopgap measure, are  
4 probably not sustainable long-term solutions for trash. If  
5 a creek is requiring ongoing maintenance like this, that  
6 means that there are sources of trash that are continuing to  
7 enter the channel. And instead of being evidence that the  
8 problem is solved, that is evidence of ongoing impairment.  
9 If you are just going in once a month and cleaning it up,  
10 that means that there is probably impairment going on in  
11 between those clean-up periods. As I said, though, it  
12 really is possible that some measures have been taken to  
13 deal with these problems, and it is possible that some of  
14 these problems have been solved. And we look forward to  
15 reviewing evidence of the changed conditions during the next  
16 listing round.

17           Okay, so now we are at that time where we request  
18 that you adopt the tentative resolution which approves our  
19 proposed 26 trash and 14 non-trash listings, as well as the  
20 delisting of Nickel for some Bay segments, a revision of the  
21 list for the Castro Cove sediment hot spot that is being  
22 addressed by actions other than the TMDL, and also some  
23 minor revisions to the list to reflect U.S. EPA approved  
24 TMDLs for a number of our listings. And, of course, we are

1 always happy to answer questions that you might have. Thank  
2 you.

3 Chair Muller - Very good. We do have some cards,  
4 so would you like to hear, our questions first? Go ahead,  
5 Board member.

6 Mr. McGrath - I have just one question for the  
7 staff. I think there is a typo in one of the responses.  
8 This is on page 27 -- wait, I have got the wrong note -- I  
9 think there is a place where they left out the word "non" on  
10 impaired -- I found it, it is on page 9 where it talks about  
11 "data collected by SWAMP indicate that aquatic life in  
12 Arroyo Los Positas is impacted. The measurement of very few  
13 pollution tolerant organisms..." Don't you mean non-  
14 pollution?

15 Mr. Moore - I had the same comment, Board member  
16 McGrath.

17 Mr. Wolfe - And this is in the --

18 Chair Muller - You think these guys do not read  
19 their packets!

20 Mr. Wolfe - In the third paragraph.

21 Mr. McGrath - In the third paragraph, right. I  
22 think the reference here, to make logical sense to me, would  
23 be non-tolerant or intolerant; in other words, that the  
24 attacks are a demonstration of pollution. I think that is  
25 very important to have corrected in the record.

1 Mr. Wolfe - We can do that, yeah. I agree.

2 Mr. McGrath - But your intent was to have it  
3 "intolerant?" I am seeing nods.

4 Dr. Mumley - Yes, that is right.

5 Mr. McGrath - Okay.

6 Mr. Moore - And I confirm that, as a person with  
7 bio-assessment experience, that is the right terminology.  
8 And the EPT tax are intolerant of pollution.

9 Chair Muller - Everyone in agreement? Thank you  
10 for that information. Any other comments for the staff? We  
11 do have a number of cards, and if more individuals would  
12 like to submit cards, now is the time, please. If not, we  
13 will go ahead and we will start with our public comments  
14 again here, and the first one will be -- I believe it is  
15 Lesley Estes, please, Storm Water Manager, City of Oakland.

16 Ms. Estes - Good morning. I am Lesley Estes. I  
17 am Storm Water Manager for the City of Oakland. Two creeks  
18 in Oakland are proposed to be listed for trash, those are  
19 Damon Slough and Sausal Creek. I am not here to discuss  
20 Damon Slough, Damon Slough is a mess, we know it has a  
21 problem, and I am very anxious to leverage this listing in  
22 trying to get internal and external resources to address  
23 Damon Slough, and I also really understand and relate to  
24 what Mr. Singh was saying earlier about highway trash. That  
25 is just one of the many components that is contributing

1 to Damon Slough and we want to address it very badly. And  
2 we have had some success. We were on some of the first  
3 listings with Lake Merritt and we definitely put our heart  
4 and soul into addressing it, and we have made some  
5 improvements and plan to keep making improvements. But I  
6 want to talk about Sausal Creek and wanted to talk about a  
7 potential outcome of this listing for Sausal Creek, so just  
8 bear with me for a moment. I need to talk a little bit  
9 about the chronology, and then I can tell you what is the  
10 potential outcome and risks to Sausal Creek from this  
11 listing. The listing itself is based on visits to three  
12 locations in Sausal Creek back in 2004 and 2005. Two of  
13 those sites were found to have [quote unquote] "remarkably  
14 low levels of trash, especially in an urban setting." The  
15 last location was an illegal dumping hotspot and was full of  
16 trash. Staff noted specifically at that site that they felt  
17 that there was illegal dumping and that they actually  
18 witnessed nearby residents dumping into the creek. Then  
19 staff went on to say that this location should be subject to  
20 a focused and education enforcement effort. Coincidentally,  
21 unbeknownst to us, the City did not know that these  
22 assessments were taking place, but we launched our own  
23 enforcement campaign on this site. We actually did quite a  
24 bit of enforcing and the site has been clean ever since.  
25 Now, I understand from what Richard Looker is saying, you

1 cannot really take that into account, but we also did  
2 present photos showing that the entire creek is clean  
3 recently and, again, that data, because it is post the  
4 deadline two years ago is not submissible. But in response  
5 to the City's comments regarding sort of these issues, the  
6 Water Board, then, has a new justification for the listing  
7 and they state that, this time, they strongly suggest that  
8 the other areas are impacted as a result of the past data.  
9 I think they also go on to say that we should collect more  
10 data and petition for delisting in the next cycle, which we  
11 certainly will do. But the timing of this is really  
12 crucial. Here is the key issue for Sausal Creek. This  
13 listing may have a negative impact or jeopardize our current  
14 efforts to restore trout habitat in Sausal Creek. The City,  
15 along with the community, has invested hundreds of thousands  
16 of dollars, and tens of thousands of hours, in creek  
17 restoration specifically for trout restoration. We are  
18 lucky because Sausal Creek is a gem; it is a pretty clean  
19 creek, and it also has and sustains trout. We want to  
20 expand that trout habitat. We are currently completing a  
21 design for a new \$3 million project to remove culverts and  
22 barriers to trout so we can greatly expand that trout  
23 habitat. We have already successfully raised \$1.8 million  
24 towards this project, but we will be seeking the remaining  
25 funds from grant agencies in the next year or two, right



1 when this listing will take place. Every grant agency will  
2 ask us to disclose any listings for impaired water bodies.  
3 We will have to disclose this listing, despite the fact  
4 that, really, the creek does not have a lot of trash and the  
5 data does not show that it has a lot of trash. But this  
6 listing will give those agencies the impression that trout  
7 habitat is not appropriate for Sausal Creek. Our  
8 competitiveness for those fundings to complete this project  
9 may be jeopardized by this listing. The funding is  
10 available now. We do not know if it is going to be  
11 available years from now and we cannot wait to apply. In  
12 summary, we have a listing based on one illegal dumping  
13 hotspot from 2004-2005. That spot has been clean for years.  
14 We have a city and a community investing funds and time  
15 towards trout restoration habitat. The current project is  
16 ready for getting more funding, but it may be deemed less  
17 competitive as a result of this listing. This is a chance  
18 we really want to take. It has been made clear to me that  
19 this list is a done deal and that your role is to adopt it  
20 as is, today. Maybe there is an opportunity to amend the  
21 list now; maybe staff now understanding what the  
22 consequences could be to Sausal Creek won't oppose taking  
23 Sausal Creek off the list. I am begging, please consider  
24 this request. The opportunity for Sausal is now and it

1 would be a shame to put that trout habitat at risk. Thank  
2 you.

3 Chair Muller - Thank you for all the good work you  
4 are doing. Staff, would you mind responding to those  
5 accusations here -- comments.

6 Dr. Mumley - This is Tom Mumley, Assistant  
7 Executive Officer. We very much appreciate what Oakland is  
8 doing and what Lesley is saying, but I think we have to  
9 still be cautious here about how much we open this door  
10 because the issue that the listing may constrain funding is  
11 unfortunately just a speculation, and where it is made, and  
12 I am not familiar with any such constraint. Now, that may  
13 be because I am ignorant of the specific situation, I do not  
14 want to overstate my assertion that it is speculative,  
15 because I think Lesley knows her stuff and she is making a  
16 sincere plea. The other part is we also have an issue about  
17 consistency and consideration of data, and the possibility  
18 of considering new evidence beyond the established  
19 assessment period. So I would advise you that we want to  
20 proceed with caution if we crack that door. And the bottom  
21 line still gets down to, do we have sufficient quantitative  
22 evidence to say that our initial assessment of impairment is  
23 no longer sustained. And that is really the question that  
24 we have to ask ourselves. And actually I will refer to  
25 staff. Richard, do you have something more specific to

1 state relative to the additional evidence, other than our  
2 general response regarding new evidence being outside the  
3 assessment period, and the ability to consider that evidence  
4 in the future listing cycle? We are sympathetic, but our  
5 concern about making an exception --

6           Mr. Looker - There were several commenters who  
7 made similar claims that a problem had been solved, that  
8 they submitted photographic evidence of surveys from maybe a  
9 couple of locations, maybe for one or a couple of dates,  
10 sometimes just one date. And so the argument would be made,  
11 "Look, the problem is solved." But there are a couple of  
12 problems, one, the deadline for the data solicitation that  
13 we mentioned, and also sort of putting this new information  
14 into the context of how we would evaluate the other data,  
15 like does it cover a sufficient time period, you know, is it  
16 during the storm season where you would see trash  
17 mobilization? So it is tough to put this into context.  
18 And we certainly understand the frustration that, in many  
19 cases, the data are a few years old and they may not reflect  
20 current conditions. But we are somewhat constrained by the  
21 sort of business rules that we have taken to evaluate data.

22           Dr. Mumley - May I suggest a possible compromise,  
23 maybe, is to take into consideration that your action today  
24 is not the end of the decision making process; this Board's  
25 recommendations go to the State Board, they compile the

1 statewide list, and then ultimately take action once they  
2 have compiled all that list. That, as Richard pointed out,  
3 will take several months. So if indeed there is -- so this  
4 listing does not exist until it is actually approved by EPA  
5 subsequent to the State Board submitting their approved list  
6 to EPA. And EPA ultimately makes the final decision. So  
7 that is quite a ways down the road. Unfortunately, these  
8 processes take time. So if in that interim this issue  
9 surfaces, well, one, the listing does not exist, so if there  
10 are funding opportunities within the next year, these creeks  
11 are not listed officially within that time frame.  
12 Otherwise, if there is an issue that rises during this  
13 period, I would commit and we would go out of our way to do  
14 whatever we could to assist Oakland to respond to any  
15 concerns raised by other funding entities about this listing  
16 issue.

17 Chair Muller - Board member Eliahu?

18 Mr. Eliahu - Yeah. Is it really one time dumping  
19 in that creek?

20 Ms. Estes - Our understanding from all of our own  
21 enforcement efforts is that it was not one-time dumping, it  
22 was one location that was subject to a lot of illegal  
23 dumping, both from the nearby property owners, so what we  
24 did was enforcement with the nearby property owners, plus we

1 installed some physical barriers to prevent illegal dumping  
2 in the future.

3 Chair Muller - My quick comment would be that we  
4 as government agencies, we have got to be really careful we  
5 do not hurt people that are doing a good job, too. You  
6 know, I mean, let's be very sensitive to that because you  
7 have individuals out there working really hard to do the  
8 right thing, and then we step up and kind of slow down their  
9 good work they are doing. So let's be careful. That would  
10 be my quick comment. Board member?

11 Mr. Moore - How about Board member McGrath?

12 Mr. McGrath - Well, I would like to drill down a  
13 little bit deeper. I agree with the comment that we do not  
14 want to in any way impair efforts to restore the creek, and  
15 as somebody who worked in Oakland, I have got the Friends of  
16 Sausal Creek Newsletter for years, so I know that there is a  
17 pretty deep effort here. The testimony, as I recall from  
18 Ms. Estes, was that there were only three data points, two  
19 of them were clear, and the other physical location was just  
20 one problem of persistent dumping. I would like the staff's  
21 reaction to that. Walk us through the evidence. There were  
22 three sites on Sausal Creek that were looked at, two were --  
23 I mean, this is what the essence of the testimony -- I mean,  
24 a hearing has got to be about facts, so two were okay and  
25 one was not, and is closely correlated with this illegal

1 dumping. What is your reaction to that particular  
2 assertion?

3 Mr. Looker - That is true. There was one site,  
4 but it had this persistent problem, so it was not just on  
5 one date as Ms. Estes indicated, it was -- I do not, by  
6 looking at our evidence, cannot make inferences --

7 Mr. McGrath - As to the source.

8 Mr. Looker - -- as to the source. Board member  
9 Moore may be able to because I think he actually might have  
10 been involved in the assessments, but by looking at the  
11 data, I cannot tell the source; I just know that it was a  
12 persistent problem at this location.

13 Chair Muller - Board member Moore.

14 Mr. Moore - Yeah. You know, one thing I want to  
15 make clear about all this is I was the author, or lead  
16 author, of this trash assessment report, but this assessment  
17 process has been conducted entirely independently of my work  
18 because I just documented facts of what we had, and then I  
19 had no involvement whatsoever in this independent assessment  
20 of that information. In honesty, you know, in doing my own  
21 analysis of this information, the report holds up the Sausal  
22 Creek site as some of the more positive sites in the whole  
23 study and the region, which covered over 100 individual  
24 study events, and 26 water bodies -- or 26 sites. And so,  
25 you know, in my comments last month I said, if I recall

1 correctly, that I was a little uneasy about singling out  
2 specific drainages and this relates to comments received by  
3 the City of Oakland, Alameda County, on Sausal Creek. I  
4 will be honest. And I am also, like Board member McGrath,  
5 aware of the Friends of Sausal Creek's effort, so I did not  
6 want that to color the judgment too much on this. But in  
7 this case, my gut, then, when I first saw the comments and  
8 the decision, and it still is my gut feeling, that a  
9 decision could be made here in Sausal Creek, which was a  
10 longitudinal study, as we described in the report, where we  
11 looked at a water body going upstream, and looking at  
12 branches in some cases, or just going up; I think a decision  
13 could be rendered that the lower Sausal Creek has an issue,  
14 but you would have to draw the line somewhere and then that  
15 -- I respect Dr. Mumley's point that, you know, how far do  
16 we want to go into micromanaging these listings. But the  
17 fact is that two out of three sites in this study had  
18 favorable scores that would not indicate a persistent  
19 problem.

20 Chair Muller - Okay. Thank you.

21 Dr. Singh - I would like to make some comments.

22 Chair Muller - Dr. Singh.

23 Dr. Singh - I think what we are trying to do is to  
24 clean up these creeks and all the water bodies in the city  
25 and county. And we have to work with these environmental

1 groups and the cities and counties and various agencies. If  
2 they sincerely are engaged in cleaning up, and they have  
3 done a fantastic job, and our data is about more than two  
4 years old, representing some new actions they have taken, I  
5 think we have to be reasonable. We have to be really -- for  
6 one side, which she is saying over here, representing the  
7 City of Oakland, there was a problem and she is admitting  
8 that, and then they have taken -- they have put some  
9 physical barriers, some fences, and they have started  
10 cleaning up, they are making a very sincere effort to stop  
11 that problem site also from being polluted. I think just to  
12 list it because we have certain old data and not considering  
13 all these officials and all these government agencies'  
14 requests, I think it is overreaching, in my opinion, our  
15 powers. And ultimately we have to go through them and I  
16 will at least -- there is a list over here that we do not  
17 have sufficient data on these creeks, and they have not been  
18 listed over here in 303(d). Maybe if there is a doubt here,  
19 we should take this creek and put it on that list, and maybe  
20 do some further investigation. We are not going to list --  
21 you can always add it to the 303(d) list, just like Mr.  
22 Mumley said over here, that we can remove it later, there is  
23 a long process. Similarly, we can add it later. I really  
24 believe that a good effort being made to clean up the site,  
25 we should encourage them, we should help them, rather



1 than try to discourage them or make them unhappy. So I will  
2 be in favor of taking that creek out at this time. Thank  
3 you.

4 Chair Muller - Vice Chair?

5 Vice Chair Young - I am very uncomfortable with  
6 sitting here in the middle of a meeting and throwing our  
7 whole methodology out the window. And for only one site and  
8 not for others. I have not -- as Mr. McGrath said, hearings  
9 are about facts, testimony is about facts. We have an  
10 assertion that a particular site has been cleaned up. We do  
11 not have any evidence of that in front of us right now. So  
12 I would not be in favor of removing Sausal Creek from the  
13 list, although what I know of the creek, the sections I know  
14 of the creek, are relatively clean. And like other Board  
15 members, I have been following the efforts of Friends of  
16 Sausal Creek for many years. I do not want this listing to  
17 get in the way of the continued restoration. I think there  
18 are ways that we can deal with that. My recommendation, or  
19 my thinking at the moment, is that I think it would be  
20 inappropriate for us to, without any facts in front of us,  
21 change our methodology and change our decision on Sausal  
22 Creek. On the other hand, it is unfortunate that sometimes  
23 we get caught in a situation where we know we have not been  
24 able to put new data on record for a couple of years, and  
25 things may have happened in Sausal Creek and in other

1 areas. So in the interim period between the time that we  
2 adopt whatever we adopt today, and in goes to the State  
3 Board, if there is an opportunity to, across the board,  
4 institute new -- an allowance for new evidence that we feel  
5 is temporally representative, then I think that is a  
6 decision the State Board can make, to accept that evidence.  
7 When I say "temporally representative," what I am thinking  
8 of is that it is not good enough to go out in one dry year  
9 to a bunch of sites and say, "Oh, well, it is clean now. I  
10 guess it is always going to be clean." That is not evidence  
11 to me, that is not appropriate scientific methodology. So I  
12 would see that as one work-around that we could suggest. A  
13 second work-around is that, if we do end up listing Sausal  
14 Creek, if the State Board does end up adopting that listing,  
15 there are things that we can do following the adoption to  
16 help Friends of Sausal Creek to get money to do restoration.  
17 We can write a letter saying that we think, based on more  
18 recent evidence than we were allowed to consider in the  
19 record, that they are doing a good job, etc., that we can  
20 help our friends out without completely throwing overboard  
21 the procedures by which we have tried to put together the  
22 303(d) list.

23 Chair Muller - Well said. We have more cards, so  
24 I will move forward. I believe it is Jill Yung, please, to  
25 come forward. And the last card will be David Lewis.

1 Ms. Yung - Good morning, Chair Muller and members  
2 of the Board. My name is Jill Yung. My business address is  
3 55 Second Street in San Francisco. And I am here today on  
4 behalf of my firm, Paul, Hastings, Janofsky & Walker, and  
5 also the Citizens for East Shore Parks. And our main topic  
6 of concern is the status of Stege Marsh in the 303(d)  
7 listing scheme. In this 2008 303(d) listing process,  
8 Citizens for East Shore Parks has commented both in writing  
9 and at the Board's last meeting that Stege Marsh belongs not  
10 on the state's list for waters being addressed just by other  
11 programs, but rather on California's 303(d) list for  
12 segments deserving TMDLs. In prior listings, it has been  
13 established that the marsh is impaired for seven different  
14 pollutants, yet TMDLs will not be developed for the marsh  
15 because of the misconception that another regulatory program  
16 will address water quality issues. And to sum up this  
17 matter, in 2006, the State Water Resources Control Board  
18 identified the Consolidated Toxic Hotspots Clean-up Plan as  
19 the other program that would address water quality issues in  
20 the Marsh; however, Clean-up and Abatement Orders pursuant  
21 to that program were never issued. The staff has now  
22 recommended leaving the Marsh on the Being Addressed list,  
23 but merely substituting the hotspots plan with the DTSC's  
24 Clean-up and Abatement Orders applicable to contamination  
25 caused by activities on two separate upland parcels. The

1 staff has not yet prepared a new Fact Sheet memorializing  
2 this change, but in response to Citizens for East Shore  
3 Parks comments, the staff tells us that the inboard and  
4 outboard areas of the Marsh, meaning the areas north and  
5 south of the Regional Bay Trail, are all under the  
6 jurisdiction of DTSC and that, based on conversations with  
7 DTSC, the staff is informed that DTSC intends to address all  
8 contamination at the site to a level that protects human  
9 health and the environment. And from this, I think we are  
10 to presume that that will also address the water quality  
11 issues and standards, as well. And with all due respect to  
12 the staff's analysis, we do not believe that this account is  
13 entirely accurate or sufficient to justify relying on  
14 another program in this case. First of all, the Remediation  
15 Orders do not apply to the outbound areas of the Marsh,  
16 specifically, Section 2.2 of the Orders for both properties  
17 state that the southern border of the site being addressed  
18 by DTSC is the Bay Trail. So the Marsh areas below the Bay  
19 Trail, or south of the Bay Trail are not going to be  
20 addressed by the Orders. Second, we do not believe that  
21 DTSC's existing regulatory program aims to address water  
22 quality issues in a timely manner, as the state Listing  
23 Policy requires. Regarding the East Stege Marsh property  
24 that is subject to one of the Orders, further activity under  
25 DTSC's program is not planned, with the exception of

1 five-year water quality sampling. Originally, DTSC's  
2 Remediation Order required annual surface water sampling, in  
3 addition to the five-year monitoring. But after just two  
4 years of sampling, which did find evidence of continuing  
5 contamination in previously excavated and backfilled areas,  
6 DTSC concluded that the results did not definitively provide  
7 evidence of recontamination, attributed the pollution to the  
8 use of contaminated backfill material, and discontinued the  
9 annual sampling requirement. Of course, these results do  
10 not show us, or disprove our recontamination theories, or  
11 demonstrate that the Marsh sediments were and are now clean.  
12 Regarding the Western Stege Marsh, the remediation work as  
13 ordered by DTSC includes water quality considerations, but  
14 whether we can reasonably expect this work to occur within a  
15 reasonable specified timeframe, again, as required by the  
16 Policy, is questionable. The current Conditions Report,  
17 which was due on January 13, 2007, under the terms of the  
18 Remediation Order, it was not submitted until November 21,  
19 2008. If this initial report was almost two years late, one  
20 must wonder when remediation work will finally address water  
21 quality issues in Western Stege Marsh. Finally, whether  
22 DTSC program can, just standing alone, substitute for TMDLs  
23 is somewhat questionable. DTSC must protect human health in  
24 the environment, but it can accomplish these goals through  
25 institutional and land use controls, rather than

1 requiring comprehensive remediation. The water quality  
2 objectives that the Water Boards must enforce are not quite  
3 so flexible. In fact, of the handful of waters in  
4 California being addressed by other actions list, Stege  
5 Marsh stands alone as the only one for which the existing  
6 regulatory program alternative is not a program with direct  
7 State or Regional Board involvement. With one exception,  
8 the other regulatory programs are either Water Board issued  
9 clean-up orders, or NPDES permits. While DTSC's clean-up  
10 requirements will likely improve conditions in the Marsh,  
11 the Marsh's overall water quality is not DTSC's main  
12 concern. This portion of the project needs the Water  
13 Board's expertise and input and we believe the most  
14 unobtrusive way for the Board to provide that input is to  
15 place the Marsh on the State's 303(d) list and create TMDL's  
16 that can guide DTSC's clean-up process. Thank you.

17 Chair Muller - Thank you. Yes, Board member.

18 Mr. McGrath - Ms. Yung, I would like to ask you a  
19 couple questions. Although I have ridden the Bay Trail in  
20 this area quite a few times, I am not sure I know exactly  
21 the area you are worried about, or the mechanism, but let me  
22 just walk through a couple questions. The Stege Marsh  
23 outboard of the Bay Trail is a natural marsh, is it not? Or  
24 is it something that had been created by runoff of sediments  
25 in the recent period of time?

1           Ms. Yung - The Marsh has probably been expanded by  
2 the sediments because -- the Bay Trail is actually a former  
3 railroad tie -- and when the tie was built, the Marsh grew  
4 both inside of that boundary and outside of that boundary.

5           Mr. McGrath - And that could be from upland  
6 sediments or Bay sediments?

7           Ms. Yung - Right.

8           Mr. McGrath - And what I am probing at is the  
9 mechanism of your concern and why you are seeking this  
10 regulatory tool. Is your concern that the Marsh is  
11 contaminated and might need to be remediated? Or is your  
12 concern that contamination continues to come from either  
13 improperly remediated contaminants on the upland site, or a  
14 combination of that and contaminated backfill that affects  
15 the Marsh?

16           Ms. Yung - Right. The contamination that is in  
17 the Marsh is most likely largely due to the contamination  
18 from the former Zeneca Chemical site and then the  
19 predecessors to that company. And in addition to that,  
20 though, there are theories that have not been really  
21 scientifically flushed out that other contamination has  
22 flowed in from Baxter Creek, as well. And another concern -  
23 - but I guess, if we really had to boil it down to the big  
24 concern, is that the site is not being remediated to the  
25 point to stop contamination from flowing into the Marsh

1 because we have a lot of buried sites of contamination,  
2 sites that are continuing to leech contamination, that are  
3 dug out to an extent and then left alone, and we have to  
4 wait for it to re-contaminate things or actually take place.

5 Mr. McGrath - So your primary concern is whatever  
6 activity is incomplete on the Zeneca site might re-  
7 contaminate or continue to contaminate.

8 Ms. Yung - Right.

9 Mr. McGrath - Thank you.

10 Chair Muller - Okay. We could respond after David  
11 Lewis' comments?

12 Mr. Wolfe - Sure. And that is the last card I  
13 have. Coming up is David.

14 Mr. Lewis - Good morning, Board members. I am  
15 David Lewis, the Executive Director at Save the Bay, and I  
16 am pleased this morning to support the staff recommendation  
17 and encourage your approval. These proposed additional  
18 listings are justified by the evidence. The Response to  
19 Comments is clear and supportable, and I think Richard  
20 Looker made an excellent summary presentation this morning  
21 of those responses. In particular, on the trash listings,  
22 the Board members have been expressing your concerns about  
23 trash loud and clear, and some of you for years. And as you  
24 have repeatedly underscored in the absence of mandated  
25 limits and required reductions and enforceable penalties



1 for violations, the trash pollution continues to interfere  
2 with beneficial uses. Actually, this recommendation that is  
3 before you is a conservative recommendation. And the staff  
4 has acknowledged that the trash problem is almost certainly  
5 larger than the listings provided here, and that this  
6 listing on its own will not remediate the trash problem; it  
7 is the beginning of a long process. But the hands-off, more  
8 vague, and voluntary approach of not having these listings  
9 in place and of the now seven-year-old Municipal Regional  
10 Permit for Storm Water clearly does not work. The old Watch  
11 List has seen enough watching and it is time for action. So  
12 today you can take the first step to change that basic  
13 underlying situation; by adopting these additions to the  
14 303(d) List, you declare that the trashing of these parts of  
15 San Francisco Bay is a violation of the Clean Water Act. It  
16 constitutes impairment. The trash is illegal and it  
17 requires clear action by responsible parties, that means the  
18 municipalities, it means the people who live in them, it  
19 means the businesses that operate in them, it means us as  
20 consumers and producers, all of those. In fact, as Lesley  
21 Estes mentioned, this initial declaration will help mobilize  
22 resources and focus resources on the areas that do need to  
23 be cleaned up, including dollars. And, in addition, on  
24 point with some of the comments from Board members this  
25 morning, taking this step actually does raise the profile

1 of this issue and does help educate the public about  
2 pollution and pollution prevention. So I think that it is  
3 clear the hearing record and Response to Comments is  
4 through; you have a strong justification. This approach is  
5 comprehensive and conservative. And I guess I would just  
6 make one more comment. In my frank observation in re-  
7 reading the actual comments and Responses to Comments this  
8 morning, I am sure I take them all at face value and they  
9 are well meaning, but many of the comments on the Draft  
10 Order, I think, objectively constitute a denial of the  
11 problem. They are literally incredible. Of course, they  
12 are officially challenging methodology, or suggesting that  
13 there is a change in time for when evidence was submitted,  
14 but overall many of those do not propose an alternative  
15 approach or suggest something instead of this 303(d) listing  
16 that is going to address the problem. And in that sense,  
17 they constitute a denial of the problem, and they are  
18 literally incredible. So in sum, I urge your adoption and I  
19 want to thank the staff for a very thorough job this time.  
20 I think, in fact, this 303(d) listing process has elicited  
21 more public participation from municipalities and from  
22 citizens and citizen groups than any prior. Thanks.

23 Chair Muller - Thank you, David. Staff?

24 Mr. Wolfe - Unless there are Board questions.

1           Mr. McGrath - I would like a specific response on  
2 the Zeneca site as to whether or not there are sufficient  
3 tools in considering it as a point source, rather than a  
4 TMDL to be able to deal with these issues.

5           Mr. Moore - And a comment on our involvement. I  
6 mean, DTSC is the lead agency, but could you comment on how  
7 we are involved?

8           Mr. Wolfe - Sure.

9           Chair Muller - We have kind of lived that site for  
10 a few years.

11           Mr. Wolfe - Well, yes. We have extensive history  
12 on that and it is interesting to hear comments saying that  
13 we should have oversight rather than DTSC when those same  
14 arguments were a few years ago being said that DTSC should  
15 have oversight rather than us. Nonetheless, I think it  
16 comes down to how we can ensure that Stege Marsh is being  
17 cleaned up and can meet water quality objectives. At this  
18 point, there are clean-up orders, or orders from DTSC on  
19 both the Zeneca site and the Richmond Field Station. DTSC  
20 also has orders on a number of sites within the area there,  
21 Baxter Creek area. We also, of course, have a storm water  
22 program that oversees the Richmond area. So there are a  
23 number of regulatory actions already in play that address  
24 the sediments in Stege Marsh. Based on the comments, there  
25 has been a benefit of these comments being raised

1 because, since then, we have had ongoing discussions with  
2 DTSC about their approach towards addressing the sediment  
3 hot spots out there, and we have even very recently had  
4 ongoing discussions about how they will ensure using their  
5 regulatory approach, that they address areas even outside of  
6 the outlet from Baxter Creek and going under the Bay Trail  
7 there. So we feel confident that our interests can be  
8 implemented through the existing order. But I guess the  
9 flip side is, is there any benefit out of listing this and  
10 implying a TMDL would be done when our approach towards  
11 cleaning this up would be regulatory orders that are already  
12 in place. And in my mind, there is no benefit of changing  
13 the fact that, right now, it is listed as impaired, and we  
14 are saying that the response to that impairment has used  
15 existing regulatory mechanisms to address that impairment.  
16 And I think that is the same approach we would be following,  
17 no matter if we list it as scheduled for a TMDL because we  
18 would want to ensure that our regulatory orders were  
19 functioning properly before we consider the need for a TMDL,  
20 and we think we can continue to respond to the actions DTSC  
21 has taken without the need to go back and revisit many years  
22 of history and peel away at that and consider whether it is  
23 appropriate for us to do a clean-up abatement order out  
24 there, which again would be a regulatory action rather than  
25 a TMDL action. So, in my mind, the comments definitely

1 have had the benefit of making sure that we are coordinating  
2 with DTSC and keeping that dialogue moving because, frankly,  
3 we had been basically saying, "Yeah, it is DTSC's game, we  
4 will let it go there." So we have had that dialogue since  
5 these comments and will continue to have that dialogue. But  
6 I would say that there is no benefit in ensuring that Stege  
7 Marsh is cleaned up and becoming supporting of the water  
8 quality objectives by changing the listing status at this  
9 point.

10 Chair Muller - I will also add that we have been  
11 taken to the wood shed a number of times over that  
12 particular site. I know the Executive Officer and myself  
13 have been to Sacramento a couple of times. It was with the  
14 leaders up there, not happy, and then happy, and so we are  
15 well aware of it for the commenter.

16 Mr. McGrath - I would like in one of your  
17 subsequent Executive Director's reports a comment about  
18 whether or not water sampling needs to be done because of  
19 the comment that was made that water sampling has been  
20 discontinued. Of course, we have the authority to direct  
21 water sampling be done if we deem it necessary. So that  
22 one, I do not want to deal with today. Down the road, I  
23 would just like you to report in an Executive Director's  
24 Report what your current assessment is of whether or not

1 further monitoring is necessary in order to provide us with  
2 the tools.

3 Mr. Wolfe - The point is taken. And I think it  
4 appropriate also to note that there are a number of the  
5 [quote unquote] "toxic hotspots" that are in the 303(d) list  
6 already and there is that ongoing challenge of how do we  
7 appropriately identify a responsible party versus watershed  
8 contributions versus re-suspension of sediment in the Bay.  
9 And a lot of these contributions are hard to fully  
10 understand and we just need to continue to work at it.

11 Chair Muller - Board member?

12 Mr. Peacock - This is a significant list that we  
13 are forwarding to the state. And comments have been made  
14 that it may, by listing certain creeks, cause hardships in  
15 the process of receiving a grant. It has also been made  
16 very clear that this is an effective way of creating public  
17 awareness. So I would like to request your statement as to  
18 where we stand on going to the public with this. We have  
19 the President of the United States running all over the  
20 country selling an Economic Stimulus Package; this is a  
21 fundamental piece of our business, what are we doing to make  
22 sure that the public is aware that this list is forwarded  
23 should we pass it?

24 Mr. Wolfe - Well, I think you hit on, in fact,  
25 that has been the tenor of the whole meeting, the need to

1 make sure we are doing appropriate outreach about this issue  
2 because status quo is obviously not working. And I think  
3 you raise a good point that we need to publicize this. We  
4 very well understand that, with the re-release of the  
5 Tentative Order for the municipal storm water permit, that  
6 the whole trash issue, again, is going to become very  
7 public, and we want to make it public. And as you note,  
8 that this is an opportunity. There are potential benefits  
9 of having a listing because that identifies an impairment,  
10 provides the opportunity to get funding. So I think we want  
11 to work with State Board because, essentially, it is not  
12 final until it is done through that process, but we want to  
13 look at how we can publicize this. We have already had the,  
14 I think, success in raising the bar at State Board to make  
15 sure that they recognize that, while the Los Angeles Region  
16 had taken measure for trash, that this is truly a statewide  
17 issue, and they have said, "Yes, we are going to come up  
18 with statewide policy on trash, but we want the regions to  
19 pursue their listings and not stop that process." So we are  
20 going to pursue, but I think we need to take it out of sort  
21 of the black box that at some point State Board will do a  
22 policy and back-up and say, "This is something that needs  
23 action now." The Ocean Protection Council, for instance,  
24 has called upon the Water Boards to address trash through  
25 its Storm Water Permits, and I think there are a number

1 of things coming together. We will continue to work on our  
2 own, but also with groups like Save the Bay to continue to  
3 raise the profile that this is an area, that if we cannot  
4 address the impacts from the trash, it is going to be  
5 difficult to address the impacts from other constituents.  
6 But I think, last month also, Steve Moore commented that he  
7 feels there is an opportunity here, especially with the  
8 Economic Stimulus, to connect the dots, that as I commented  
9 earlier, we have a tendency, especially through the State  
10 Revolving Fund, to say, "Okay, we will put new money into  
11 waste water treatment or really fix infrastructure," but  
12 this is an opportunity to consider new infrastructure that  
13 has multiple benefits, including collection of trash. So we  
14 want to push that, too, in the dialogue about getting  
15 funding from the State Revolving Fund, and push entities to  
16 look for those opportunities.

17 Chair Muller - Thank you. Board member McGrath?

18 Mr. McGrath - I am ready to move forward on this.  
19 I started out as a skeptic. Before I was appointed to the  
20 Board, I remember David Lewis talking about trash and I was  
21 kind of skeptical, but I windsurf almost daily in the Bay  
22 during summer and I have been riding my bicycle in this nice  
23 dry winter around, and I see both ends of the trash. I have  
24 gone across the Bay at 25-30 miles an hour and hit a buried  
25 plastic bag, and over the bars you go. And I have ridden



1 up in the watersheds in the last week and seen where the  
2 plastic bags come from. So there is no question that there  
3 is impairment. In addition to what the OPC has said about  
4 the oceans, we have got the evidence that I clarified today,  
5 that trashy streams have suboptimal biological value. So  
6 there is no question that there is impairment, there is  
7 substantial evidence to that effect. And people have said,  
8 "Well, gee, a bunch of awful things will ensue, and we need  
9 to comply with CEQA," well, not really, not at this stage.  
10 There are three big tools to deal with the problems of  
11 impairment. There are cultural changes, there is having  
12 economic consequences for those activities which result in  
13 trash, and there is funding for structural measures. Those  
14 three tools need to be applied to a specific physical,  
15 cultural, and political landscape. They are going to be  
16 different in every landscape in every particular city. It  
17 is inevitable that there will be some controls physically,  
18 but we can start with the hotspots. Local government is  
19 critical to this and it is not the time to do CEQA now, or  
20 even really awfulize about it. That is one of the comments  
21 that I wanted to respond to. It is not clear that this  
22 leads to any particular environmental action, any particular  
23 action automatically, that has significant impacts; rather,  
24 it leads to the consideration of what we are doing in  
25 different ways. Some of those projects inevitably will

1 have environmental impacts, but we are not mandating a  
2 sweep, we are looking for innovation by local governments to  
3 do those things. It can be integrated into dealing with sea  
4 level rise, it can be integrated into dealing with  
5 substandard flood control systems, it can be integrated, we  
6 believe, into dealing with enhancing streams, and I think we  
7 have pledged our staff effort to make sure that this  
8 impairment effort does not indicate that there is no  
9 habitat. I mean, what you said is there is trout habitat  
10 and thus it is an appropriate stream to work on enhancement.  
11 There are at least three pieces of legislation that would  
12 establish charges for plastic bags and water bottles, two of  
13 the most commonly littered. Each local government can  
14 decide what to do about those legislative efforts, what it  
15 does in its own constituency, with this particular sources  
16 of litter. So all we are doing is setting the stage to  
17 consider these tools. But, in my mind, the information on  
18 impairment is clear and overwhelming and we should adopt  
19 this.

20 Chair Muller - Any other comments?

21 Mr. Moore - I will be brief. I wanted to just  
22 thank staff for a really, I think, systematic concerted  
23 effort. The Responses to Comments, I thought, were concise  
24 and excellent. And I wanted to just try to clear up what we  
25 are doing today. We are answering the question based on

1 available information if water quality standards are being  
2 met. When you go through that process, the law does not  
3 compel the process of ascertaining the economic consequences  
4 of that. The economic consequences have been ascertained  
5 through the establishment of the Water Quality Standards.  
6 That is clear. And so there was such a jumble of comments  
7 that, as Mr. Lewis characterized some as "not credible," and  
8 it is true, there were a lot of not credible comments in the  
9 body of this agenda item because they distract from the  
10 purpose of this action. The purpose is to evaluate whether  
11 water quality standards are being met. In my opinion, a  
12 reasonable amount of time was given to the commenting  
13 agencies and parties to look at the methodology, and you  
14 know, there was actually a lot of positive in this,  
15 unfortunately, the 303(d) List kind of tilts us toward the  
16 negative work. But the SWAMP data, which was the body of  
17 evidence that dominated kind of the available water quality  
18 information in this process, there was a lot of  
19 systematically collected data that suggested the water  
20 quality is quite good. And I run across that, instances of  
21 that in my work a lot. I am inspired by the water quality  
22 that still exists in our urban creeks, you know, and to see  
23 trout in the Bay Area in the cities. And there actually is  
24 a positive in all this. You know, the efforts to restore  
25 stream functions have gained ground in this region and we

1 have seen improvements of urban creeks. And there is the  
2 synthetic type non-degradable pollution, like plastic  
3 debris, like other chemicals that we have talked about, that  
4 get into these systems and really undermine our efforts to  
5 make the streams not only community assets, but also these  
6 treatment functions within the watershed that improve San  
7 Francisco Bay and its ability to support beneficial uses.  
8 So there actually was, you know, between the lines in all  
9 this, the fact that all this data was collected, it would  
10 show that there is not impairment everywhere; in fact, quite  
11 good water quality in a lot of our region. So I wanted to  
12 point that out. And I just -- I think I will leave it at  
13 that. You know, I thought that the Water Board staff has  
14 really done justice to this process. There is very little  
15 staff resources available for this and it would be my hope  
16 that the water quality assessment effort could get more help  
17 from the Federal Government because it is a Federal  
18 requirement to look at this every two years and it is an  
19 important process because it does set the stage for what  
20 priorities that we collectively work on. I think staff  
21 drilled down to the priority issues that we are facing, that  
22 we need in the next decade, really, to address as a region.  
23 Thank you.

24 Chair Muller - Thank you. Any further comments?

1           Dr. Singh - I have some comments. You know,  
2 pollution is a big problem. Since the last meeting we had in  
3 January, I [inaudible] at a few sites and also I went to  
4 [Inaudible] Park in Los Gatos to see how they manage that  
5 place. I tell you I found the pollution, there were either  
6 cans or bottles, or paper or plastic. Most of the  
7 pollutants along the creek constitute these four items. And  
8 they are not only a pollution, a big pollution problem, but  
9 also they are disgusting and also they are aesthetically  
10 really bad looking. Some of these pollutions are occurring  
11 along the creeks where the creeks are accessible or maybe  
12 they are poorly managed. I only saw a sign, "No littering,  
13 \$1,000 Fine" for littering, but I have mentioned before, I  
14 think that is the law, but there is no enforcement. There  
15 is [inaudible] and all of us are paying for it. And I think  
16 it will need an outreach program, public education,  
17 enforcement, as well as the cleaning -- just cleaning is not  
18 the end to this whole task because the continuous wasting of  
19 public money, your tax money, has to be more than something  
20 done. And some of the beaches where there is no use, that  
21 should be made inaccessible like fencing and other. Some  
22 creeks I saw along the way, they have fencing. Some of the  
23 places have a regular program of cleaning and some of the  
24 places were neglected. I will appreciate -- the staff has  
25 done a great job. But what I am disappointed here, some

1 of -- most of the comments I did not find credible, but some  
2 of the comments were credible. And I thought we should take  
3 it seriously, some of the comments. What I found, that this  
4 list is based upon old data. And you could validate a list  
5 today on some kind of current data, but I know there is a  
6 problem of collecting data, and the funding, and the staff  
7 time. Some extrapolation has to be done. But some of the  
8 comments which I found credible, which the remote upper  
9 reaches, I looked at some of the creeks [inaudible] that do  
10 not even have a trail. And I do not know if you can fly by  
11 airplane, or send somebody hitchhiking over there, to  
12 examine the upper reaches. It is cash resources, tax money,  
13 and every city is suffering, sending them and condemning the  
14 whole reach. I thought those comments were credible by  
15 people and we should consider that, to exclude inaccessible  
16 areas. Also, something like the City of Oakland, and  
17 Alameda County, could have been checked, even if it got  
18 delayed by March, we can approve it in March, it is not the  
19 end of the world. And we should take it seriously, some of  
20 these comments that we found there is some credibility. And  
21 I found that if 80 percent of the comments -- and 85 percent  
22 of the comments are not credible, we tend to neglect every  
23 comment. And I will respect the opinion of the people who  
24 are engaged and who care; some people do not care. So what  
25 I am unhappy about this thing, somewhere we have the

1 running mill type of operation over here, that as we  
2 sometimes do not take every comment seriously, some of the  
3 comments we should have taken seriously and maybe  
4 investigate it a little bit. Not every site, but some of  
5 the comments we find credible. And I do not think if we  
6 find it reasonable we can make exceptions to that. So what  
7 I -- there is only so much resources. Every city is firing.  
8 The City of San Jose is laying off people, and \$63 million  
9 short of money, even though they do have furlough on Friday.  
10 I am a retired person of California, first, so I cannot be  
11 laid off, and my furlough does not work. But everybody is  
12 suffering -- ten percent cut in time and I know everybody is  
13 suffering. So I am an analytical person. I have been an  
14 Engineer all my life. I have written Environmental Impact  
15 Reports and contributed about 100 of them. And I care about  
16 the environment, but also I am a pragmatic person; I am not  
17 ideological person. I like to balance. Balance in our  
18 life, balance in our activities, we always appreciate it and  
19 we can do it. We can carry too far to go in ideology, and I  
20 really believe that the City of Oakland in their  
21 presentation this morning was credible to me. So to that  
22 extent, I differ with some of my colleagues on that point,  
23 but I feel like some of the comments were very serious  
24 comments and we just did not really answer them correctly.

25 Chair Muller - Thank you, Dr. Singh.

1 Dr. Singh - Thank you.

2 Chair Muller - Vice Chair?

3 Vice Chair Young - I support the action that we  
4 are taking today and trash has captured most of our time and  
5 interest in reviewing the 303(d) List this year, and I think  
6 it is appropriate. It is a huge problem. I want to  
7 compliment the staff on their approach to the trash issue of  
8 coming up with the Rapid Trash Assessment Methodology,  
9 getting it peer reviewed, and then following it very  
10 closely. These are not random judgments. I think you did a  
11 very good job of being methodical, transparent, and  
12 exercising good judgment in determining what to put on the  
13 list. We do have the glitch that I think all of us feel  
14 badly about, about the time lag between the time that we are  
15 taking this decision, and the time that we were able to  
16 accept the evidence for it. And certain sites may get  
17 unjustly caught up in the middle because of that, and that  
18 is unfortunate. So we can, I think, do something about that  
19 time lag in the future, hopefully. But what I would like to  
20 suggest to staff and you should feel free to comment on it,  
21 is that now we have a procedure sort of for the first time  
22 that we can follow, that is available to all of the  
23 community to look at, for putting sites on the 303(d) List  
24 because of trash. What I think is not so clear is how you  
25 get off. One of our first jobs now, you know -- Richard,



1 you thought you were home free, but you are not -- is to  
2 come up with a procedure for getting off the list. You  
3 know, what do we require in terms of going up and down the  
4 reach? What do we require in terms of repeated sampling?  
5 You know how to do it, I am quite sure. I would hope that  
6 we could put forward that methodology for not only peer  
7 review, but also for public comment and as information to  
8 folks like the City of Oakland who want very quickly to de-  
9 list some areas that we are probably going to list as a  
10 result of this action. So we have work to do to come up  
11 with a protocol for de-listing and for showing that areas  
12 are no longer impacted. All right, that is for trash. I do  
13 want to do an honorable mention again on the PBDE issue. As  
14 a former and current environmental advocate, it is extremely  
15 frustrating when the process seems to get stuck at the point  
16 where we all have to say, "Well, we don't have good  
17 thresholds, we don't have good benchmarks." If we are in a  
18 situation where we are never going to get good benchmarks,  
19 then it is extremely frustrating. I think we had this  
20 conversation both in the documents and last month, but I  
21 wanted to raise the issue once again, just to elevate the  
22 visibility that we have got certain congeners of PBDE's that  
23 have now been banned on the state level. I understand that  
24 we are looking for data and benchmarks that show harm to the  
25 aquatic beneficial use, as opposed to the human health

1 beneficial use, and they are two different things. But I  
2 hope we have a plan to get to benchmarks as rapidly as is  
3 reasonable with SFEI, and that our monitoring also is  
4 designed to be able to feed into the benchmarks. So enough  
5 said. I think we have been around that circle before. I  
6 understand the staff's comments and I understand why we are  
7 doing what we are doing today, but I sure do not want to  
8 have to do it next time around.

9 Mr. Moore - Can I chime in on the PBDE thing?

10 Chair Muller - Sure.

11 Mr. Moore - Just really quickly. I had not  
12 mentioned that, but I thought I would go ahead and support  
13 Dr. Young in that, and that the next time we take this issue  
14 up, and if we are not in a position where we have a  
15 benchmark we can rely on, but if we see a continuing  
16 declining trend that we are observing now, I think there is  
17 a basis in water quality standards to list and it is based  
18 on anti-degradation. And I wanted to make that point.

19 Chair Muller - Very good. Thank you. And I will  
20 ask for staff recommendation, but, again, as everyone has  
21 commented here, I think unfortunately we have worked many  
22 years and we get a lot of action after years of past  
23 information, and that is kind of the way the Water Board  
24 works, has been my experience. So a lot of times we will  
25 have an enforcement action from three or four years ago

1 type of thing. So that is our system, and it kind of takes  
2 a little bit of time, longer time, and I hope you understand  
3 how that is how we have to work, and it is not like we make  
4 this up as we go along. So I appreciate, again, the work we  
5 are all doing, and I think, finally, this is a good start  
6 for the trash world as we have all said, and from my  
7 perspective, and so we will ask for staff's recommendation.

8 Mr. Wolfe - Thank you. I will note that all the  
9 comments are very appropriate and certainly give us guidance  
10 and direction for ongoing and future assessment and listing  
11 processes because the idea in the makers of the Clean Water  
12 Act was that this would be done every two years, and  
13 obviously that has not been the case. In effect, this  
14 consideration of our assessment and listing recommendations  
15 is really the first time this Board has had a chance to re-  
16 visit this since 2002 because the 2004 listing became part  
17 of the 2006 listing, and the 2006 listing was done  
18 essentially all at the State Board. So we are collecting  
19 data as part of this assessment that goes back to the  
20 beginning of this century. And I think the challenge, as  
21 Dr. Singh says, is how can we embrace current data and move  
22 forward with that. And I think, especially given the  
23 discussion about Sausal Creek, I think specifically there  
24 that we do want to move forward with our listing, but, as  
25 Dr. Mumley said, there is a bit of a lag for

1 consideration of this listing by the State Board, one that  
2 we can take a look at that because I do not think we have a  
3 basis to say today that one part of the creek or the other  
4 should or should not be listed, but we can take a look at  
5 that and come back to you with any suggestions or  
6 recommendations on how that might be modified as  
7 appropriate, as we move forward to the State.

8           Mr. McGrath - On that point, I would like to  
9 reinforce what Tom said, that since there is trout habitat  
10 in the stream and the upper stretches are okay, that  
11 certainly provides the basis for the staff to be supportive  
12 in writing of --

13           Mr. Wolfe - And that was going to be my second  
14 point.

15           Mr. McGrath - And then the other thing I would  
16 like you to do is go out and take a look at what structural  
17 measures have been constructed to stop the dumping and be  
18 able to add that to your letter. We want to make sure that  
19 there is the strongest possible support for a community  
20 group, recognize that there is a problem as of this date,  
21 but if things are improved, let us put the best face on that  
22 that we can. And as long as that commitment by the staff is  
23 clear, then I am comfortable with leaving it in an impaired  
24 stage.

1           Mr. Wolfe - And as I was going to note, that  
2 certainly we do not want to impede or stand in the way of  
3 any environmental progress, and have commonly written  
4 support letters to agencies on behalf of proposed projects.  
5 And obviously here is an opportunity on Sausal Creek to do  
6 that again. So with your direction, I think that is  
7 something we do want to pursue. As Dr. Singh says, it is a  
8 challenge when parts of the watershed may not be accessible,  
9 how do you make a call on that? But I think we have enough  
10 information on these creeks, if anything, as David Lewis  
11 says, this is quite conservative, that we want to move  
12 forward with the listing, rather than go into an exercise  
13 saying, "Which 100 meters is in or out," which is  
14 potentially more use of limited resources; that may not be  
15 appropriate for right now. So that is something we can look  
16 at going forward. As Dr. Young says, there is the need to  
17 consider if we are now finally clear on how we are listing  
18 trash, how you de-list trash, how we consider data as we  
19 move forward. And we definitely want to do that as we  
20 progress because, as I say, this is going to become  
21 hopefully a more robust and frequent exercise so that we do  
22 not have to look at data that goes back for six or eight  
23 years, and have that be our data set. So with that, and the  
24 note that, as Mr. McGrath brought up earlier, we need to  
25 change the term "tolerant" to "intolerant" on page 9 in

1 the Response to Comments, I do not see a need to make  
2 further revisions to the staff report and the resolution  
3 essentially approves the additions or changes as noted, and  
4 would transmit the staff report and the Fact Sheets, that  
5 travel would be part of the integrated report that  
6 ultimately goes to EPA. So with that, I recommend adoption  
7 of the Tentative Resolution.

8 Mr. Peacock - So moved.

9 Vice Chair Young - Second.

10 Chair Muller - It has been moved and second. And  
11 I would encourage us to, as Board member Peacock said, to  
12 try to get good news out, in keeping the theme for five  
13 minutes of good news. Roll call vote, please, Mary.

14 Ms. Tryon - Mr. Eliahu - Aye; Mr. McGrath - Yes;  
15 Mr. Moore - Aye; Mr. Peacock - Aye; Dr. Singh - Abstain; Dr.  
16 Young - Aye; Mr. Muller - Aye.

17 Chair Muller - So ordered with one abstention. At  
18 this time, we are going to take a very brief break. I know  
19 we have two more items on the Agenda. Staff, thank you.  
20 And thanks everyone for their patience, but a very quick  
21 break.

22

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NOTARY PUBLIC  
STATE OF CALIFORNIA )      SS.

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a notary public and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF,

I have hereunto set my hand this 16th day of February, 2009.

  
Tahsha Sanbrailo  
Notary Public

