

ATTACHMENT A

**SUMMARY OF SWRCB'S ADMINISTRATIVE LAW DUTIES
IN MAKING 303(D) LISTING DETERMINATIONS**

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Although the Listing Policy gives the SWRCB broad discretion to list water bodies as impaired pursuant to section 303(b) of the Clean Water Act (CWA), compliance with the Listing Policy by the SWRCB cannot justify 303(d) listings that are otherwise arbitrary and capricious. In *United States v. State Water Resources Control Board*, (1986) 182 Cal. App. 3d 82, a case involving the SWRCB's adoption of a plan establishing new water quality standards for salinity control and for protection of fish and wildlife, the court explained the standard of review applied to the SWRCB's quasi-legislative actions under the principals of California administrative law:

In performing its regulatory function of ensuring water quality by establishing water quality objectives, the Board acts in a legislative capacity...A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute.

Similarly, under principals of federal administrative law agency actions taken under the CWA are reviewed under the arbitrary or capricious standard as set forth in section 706(2)(A) of the Administrative Procedure Act (APA). *Texas Municipal Power Agency v. United States EPA*, 836 F.2d 1482 (5th Cir. 1988). Therefore, although the SWRCB does have a fair amount of discretion in the 303(d) listing process, it still is obligated to make reasoned determinations in accordance with the provisions of the CWA and the principles of state and federal administrative law. This "check" ensures that the resources that must be expended to develop TMDLs, and to comply with TMDL regulations that result from 303(d) listings, have actual water quality benefits.

Although Section 303(d) does not contain a specific scientific standard to be applied to listing determinations, the Supplemental Report of the 2001 Budget published by the California Legislature, which provided one basis for the development of the Listing Policy by the SWRCB, required that the SWRCB establish criteria to "ensure that data and information used for identification of impaired water bodies are accurate and verifiable." Section 6.1.4 of the Listing Policy states that "the quality of the data used in development of the section 303(d) list shall be of sufficient high quality to make determinations of water quality standards attainment." Further, EPA regulations, 40 C.F.R. 131.11(a), require that water quality criteria must be based on "sound scientific rationale." Many of the proposed listings at issue, including the proposed listing of Ammonia and PCBs do not appear to be based on either "accurate and verifiable" data or "sound scientific rationale."

EPA Guidance on the 303(d) listing process also shows that with respect to some of the proposed listing recommendations the SWRCB is not relying on appropriate evidence. In EPA's Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act (July 2003), EPA discusses the assessment of data and information representativeness and states that "approaches should strike a balance between the extremes of (1) arbitrarily considering all grab samples to be representative of merely the instant in which, and the cubic foot of water from which, each was taken; and 2) arbitrarily assuming that each such sample is representative of conditions over several years, and over hundreds of stream miles or thousands of lake acres." Further, the guidance document goes on to provide that – although data should not be excluded solely on the basis of age – states may choose to not use certain data if it is determined that the data is not representative of current conditions and in such cases states may choose to schedule follow up monitoring to obtain data that is representative of current conditions. EPA's Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) and 314 of the Clean Water Act (July 2005) states that "older data should be evaluated with care." The Guidance goes on to give an example involving 10-year-old data. At the time the data was collected, the pollutant exceeded the applicable WQS, but since that time sources of the pollutant were required to reduce the levels of the pollutant in their effluent and few changes had been made to increase the loading of the pollutant in the watershed. This example seems to be particularly applicable to the recommended listing of diazinon. A phase-out of residential use of diazinon began in 2001 and was completed in 2004 with the ban of all sales of diazinon for outdoor residential use. In addition, the conditional irrigated lands waiver adopted by the LARWQCB in 2005 (Order No. R4-2005-0080) is another source control that should reduced the loading of the pollutant in the watershed. The Guidance points out that, under such conditions, it would be reasonable to rely on more recent data reflecting the source reduction measures and indicating that the water segment was meeting applicable standards. Further, section 6.1.5.3 of the Listing Policy states, "If the implementation of a management practice(s) has resulted in a change in the water body segment, only recently collected data [since the implementation of the management measure(s)] should be considered." Applying the Guidance and Listing Policy, SWRCB should take into account the EPA ban and other source control measures and rely preferentially on post-ban data, which would then support the finding that a diazinon listing for this reach is not warranted.

Section 6.1.4 of the Listing Policy requires that "the quality of the data used in development of the section 303(d) list shall be of sufficient high quality to make determinations of water quality standards attainment." In addition, Section 6.1.3 of the Listing Policy allows for the use of evaluation guidelines that are "applicable to the beneficial use." Thus, the water quality standards used to evaluate data and determine the potential for impairment of beneficial uses must be applicable and appropriate in order to accurately determine if a water quality segment actually is impaired. Several proposed listings, including listings for aluminum and nitrate plus nitrite, reference an MUN beneficial use designation for Reaches 5 and 6¹ of the SCR. However, Table 2-1 of the

¹ LARWQCB reach numbers are used throughout this document, consistent with those used in the Draft List.

Basin Plan designates these reaches as MUN*, or *conditional potential* MUN, which is a non-enforceable, conditional use designation. Therefore, MUN cannot properly serve as the basis for water quality objectives or CWA 303(d) listings for Reaches 5 and 6 of the SCR.² The proposed listing for Aluminum relies on exceedances of a secondary maximum contaminant level (SMCL), which is a *secondary, aesthetic drinking water* standard. SMCLs are not applicable to surface water bodies, but are non-enforceable guidelines that are intended to assist public water systems in managing their drinking water for aesthetic considerations. Further, SMCLs are intended to be applied to drinking water at the point of delivery, and are inappropriate for evaluating ambient water quality in surface waters. It is critical to accurate listings that evaluation standards that are appropriate and applicable to SCR Reaches 5 and 6 and their designated beneficial uses should be chosen in making listing determinations.

With respect to the accurate reflection of water body segment water quality, several listings proposed for SCR Reaches 5 and 6, including listings for diazinon, aluminum, chlorpyrifos and PCBs rely on sample data and exceedances not from the SCR, but from other water quality segments, such as Bouquet Canyon and Castaic Creeks. While these creeks are within the SCR watershed, sample results in these creeks are not as a scientific matter necessarily indicative of water quality status in the SCR mainstem. Whether the sample data in these creeks is indicative of water quality in SCR reaches 5 and 6 depends upon a number of confounding factors, including hydrologic conditions, flow rates and volumes, and natural water quality function within the various surface water body segments. Pursuant to EPA's Guidance for 2004 Assessment, Listing and Reporting Requirements (July 2003), data that is not representative of current water quality conditions should not be used to support listing of a water body. Similarly, the Listing Policy requires use of accurate data to support listings. In addition, federal Clean Water Act regulations provide for the evaluation of listings based on analysis of water quality status associated with water body segments. 40 CFR 130.2(j). Similarly, the Listing Policy makes it clear that "At a minimum, data shall be aggregated by the water body segments as defined in the Basin Plans," and "data must be measured at one or more sites in the water segment in order to place a water segment on the section 303(d) list." These rules make sense because they are designed to assure that the data used to support a listing are representative of, and accurately depict the status of the water body segment proposed for listing. Pursuant to these rules and consistent with appropriate technical practices, samples and exceedances collected and recorded from other water bodies, defined in the Basin Plan separately and distinctly from SCR Reaches 5 and 6, should be evaluated separately, and should not be used as the primary line of evidence supporting a listing for a the SCR mainstem.

² On December 5, 2001, the U.S. Federal District Court issued an order that effectively invalidated EPA's requirement that the asterisked MUN designated uses (MUN* uses) in the Los Angeles Basin Plan be immediately enforced. See Order granting plaintiffs' motion for summary judgment and remanding action to EPA, No. CV 00-08919 R(RZx), City of Los Angeles et al. v. United States Environmental Protection Agency..., dated December 18, 2001. See also letter dated February 15, 2002, from Alexis Strauss, USEPA Region IX, to Celeste Cantu, Executive Director, California SWRCB: "...waters identified with an ("*") in Table 2-1 do not have an MUN as a designated use until such time as the State undertakes additional study and modifies its Basin Plan."