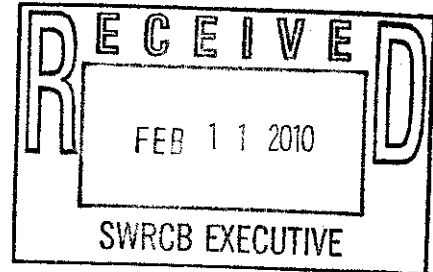


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Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Submitted via email: commentletters@waterboards.ca.gov



Subject: Comment Letter – Proposed CEQA Regulations.

Dear Ms. Townsend:

Thank you for the opportunity to comment on the proposed regulations for implementing the California Environmental Quality Act (CEQA) in water programs. Although the intent of the proposed revisions is to streamline the regulations and clarify roles, I believe this is an opportunity to encourage the Regional Water Boards to better examine the cumulative impacts of multiple TMDLs in specific watersheds. In addition, specifying that the 303(d) listing process is subject to CEQA would facilitate a broad-based examination of the statewide impact of the impaired waters (TMDL) program and consideration of the potential benefits of the prioritization of watersheds. The proposed regulations will need to be expanded, but can address these issues.

Assessing TMDLs cumulatively in a particular watershed and prioritizing watersheds helps implement key goals of the Board's Strategic Plan¹ (see Plan elements 1.1.1 and 1.1.2). Specifically, the assessment of cumulative impacts would allow the Board to "*focus resources to comprehensively address all impairment constituents in individual priority watersheds.*" These regulations could be structured to ensure that watershed planning – as summarized in the TMDL CEQA document – would provide an assessment of cumulative impacts from all impairment-causing pollutants.

These comments are intended primarily for those activities managed as certified regulatory programs (CRP). These activities ("projects" under CEQA) often have the potential for substantial impacts on individual waterways and statewide; adverse impacts could potentially be avoided by a broader investigation of alternatives.

Comment 1. The regulations should ensure assessment of the cumulative impacts of TMDLs

Although required under CEQA, cumulative impacts appear to have been addressed for TMDLs only recently². As a basin planning activity, TMDLs are a certified regulatory program (CRP), and perhaps for this reason, cumulative impacts may not be consistently addressed for all projects.

¹ Water Board Strategic Plan Update: 2008 – 2012, posted [here](#).

² For example, the San Francisco Bay Mercury TMDL (2006) has no assessment of cumulative impacts (except box checked "no impact"). The more recent SF PCB TMDL (2008) does explicitly address cumulative impacts, but to a limited extent.

Currently TMDLs tend to be issued piecemeal, the timing based, at least partially, on when the waterway is listed. The waterway listing is generally based on when sufficient monitoring data becomes available to support the listing. CEQA addresses this irregular or intermittent-type of project occurrence by requiring assessment of cumulative impacts. A cumulative impact under CEQA "consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." Currently, the focus of the TMDL substitute environmental documents (SEDs) appears to be on the individual TMDL, without necessarily including an investigation of how the TMDL and the required controls relate to other TMDLs planned (or likely to be implemented) for the same waterway.

The types of problems that could be addressed and the benefits of requiring cumulative impact assessments in SEDs include the following:

- 1) *The aggregate effects of serial TMDLs are not currently assessed - point-in-time assessments need to be expanded to meet the intent of CEQA* – As discussed above, a key goal of CEQA is to assess not only the project under consideration, but related projects that are likely to be implemented in the future.
- 2) *TMDLs that are reasonably likely in the future could also be assessed* - For example, nearly all trash 303(d) listings are currently in Region 4. Region 2 is now proposing to list multiple waterways for trash. From a planning standpoint, it makes sense to assume that waterways in dense urban areas will ultimately be listed for trash. This is just common sense – basin planners and those implementing controls for early TMDLs should take this into account.
- 3) *Significant benefits would result from examining issues related to the compatibility of control facilities* - For example, the first TMDL on the Los Angeles River was the trash TMDL adopted in 2001. The dischargers began planning for and implementing controls. One of the dischargers, Caltrans, began installing "GSRDs" a substantial, full-capture trash treatment system.³ These devices provide positive control of trash, but have limited maintenance requirements – an essential attribute for controls in constrained rights-of-way. Then, in 2005, the Regional Board issued a metals TMDL for the river (in effect in 2008, with the implementation plan due 2010). The treatment controls for metals are substantially different than those for trash. It is possible that some prior controls may need to be redone to accommodate controls that address the cumulative impairment (both trash *and* metals). The river is also listed for bacteria. Bacteria controls are potentially even more treatment intensive, possibly requiring holding tanks and disinfection. Will the controls for the bacteria TMDL be compatible with the controls needed for the earlier TMDLs? A SED assessment of cumulative impacts could identify the potential benefits of implementing TMDL controls in a coordinated manner as part of a watershed plan. And, watershed planning is a long-term goal of the Boards, going back to the era of the 208 Areawide Plans.
- 4) *Assessment of cumulative impacts may result in a better examination of "reasonably foreseeable" impacts* - TMDL SEDs typically examine the expected impacts of "enhanced" BMPs that are often the first step in meeting allocations. If the enhanced BMPs are not adequate, then the TMDL indicates that more substantial controls would be required; however, these impacts are not identified.

³ More information on the Gross Solids Removal Devices (GSRD) is available at:
http://www.dot.ca.gov/dist07/Publications/Storm_Drain/

For example, the San Francisco Bay PCB TMDL requires stormwater dischargers to reduce the PCB loading from 20 kg/yr to 2 kg/yr. This is a significant reduction. The TMDL recommends starting with BMPs and hot spot investigation, but there is a real probability that substantial treatment facilities or basins could become necessary, especially when assessed in conjunction with the mercury TMDL and a future dioxin TMDL for the Bay. However, the PCB staff report is dismissive of the possibility for substantial controls and does not assess the impacts. *Example:*

Project cumulative impacts – land use: The TMDL does not envision the use of multiple, large detention basins capable of treating all Bay area stormwater. Much of the available land in the Bay Area has been developed for housing, industrial or commercial purposes. Stormwater management agencies are required to conduct pilot studies to evaluate the effectiveness of such control measures prior to strategically implementing them. Therefore, there is no basis to conclude that the proposed project would result in cumulative impacts to land use. [*PCB Staff Report Pg. 111*]

Although this is a discussion of possible impacts on land use, it too readily dismisses the possibility that detention basins or other substantial controls may be needed to achieve the required 90% reduction in PCB loading plus reductions in mercury and perhaps even greater reductions in dioxins. A CEQA cumulative assessment in a SED based on a watershed plan could better identify cumulative impacts as well as total cost burden to the dischargers.

Proposed alternative text (in addition to the Board's current proposed amendments):

§ 3777. Substitute Environmental Documentation: Requirements for Adoption or Approval of Plans or Policies.

(a) The Draft SED shall consist of:

(1) A written report prepared for the board, containing an environmental analysis of the project;

(2) [*New*] An assessment of cumulative impacts. A SED prepared for basin plan amendments to incorporate total maximum daily load (TMDL) shall assess the cumulative impacts of the previous and reasonably foreseeable future TMDLs for individual watersheds, including treatment and other controls intended to implement allocations. The SEDs prepared for the adoption of the regional and statewide 303(d) lists shall include an assessment of alternatives, including prioritization of watersheds for TMDL preparation and implementation and state or areawide source control. [*this second sentence applies to comment #2*]

(3) [*Previous (2)*] ...

Comment 2. 303(d) list – Adoption of the 303(d) list of impaired waters should be accompanied by an environmental assessment

The proposed regulations in Article 2 - *Exemptions* - do not include the 303(d) list as exempt from the requirements of CEQA. Nevertheless, CEQA requirements have apparently not been applied in the past to the list adoption process at either the Regional Board or State Board level. The rationale may be that the list has no impact; the impacts are attributed to the resulting TMDLs. However, as discussed below, the placement of a pollutant/waterbody on the list has immediate impacts and therefore the listing process should be assessed directly by CEQA or as a CRP. In addition, and more importantly, the adoption of the statewide list on roughly a 4-year cycle presents possibly the only opportunity to provide an overall programmatic assessment of the TMDL program, including an identification of alternatives to address problem pollutants.

Following are examples of the immediate impact of listing a pollutant/waterway on the 303(d) list.

- 1) *Listing may trigger policies or regulations governing how listed contaminants are addressed in NPDES permitting* - As an example, the Receiving Water (RW) Risk Factor Worksheet for the recently-adopted Construction General Permit uses the presence of sediment on the 303(d) list as a factor in its scoring, even in the absence of a TMDL.⁴ This directly, and immediately, affects the type of controls implemented.

Another example is the *State Implementation Policy*⁵ which uses 303(d) listing status in determining the need for water quality-based effluent limitations in NPDES permits (see Section 1.3). For bioaccumulative priority pollutants, the SIP also requires that the Regional Water Boards consider whether the mass loading of the pollutant should be limited to representative, current levels pending TMDL development (Section 2.1.1). Compliance schedules may also be limited to specific time periods depending on whether the pollutant in question is on the 303(d) list. These are all impacts *prior* to TMDL completion. The 303(d) listing of dioxins for San Francisco Bay has created a major compliance problem for POTWs discharging to the Bay, and potentially for stormwater, even though a dioxin TMDL is years in the future.

- 2) *Listing may prevent the addition of new discharges to waterways for the pollutant listed* - This potential prohibition occurs even before the TMDL is completed. In the case of *Friends of Pinto Creek v. United States Environmental Protection Agency*⁶, the appeals court held that discharges into waterways that do not meet water quality standards are prohibited, even if the discharge is offset.⁷ This decision potentially has major impacts for prospective discharges (or dischargers with increased loadings)⁸. New dischargers and dischargers increasing loadings (e.g., new developments) are forced to move their discharges to land or otherwise to not discharge.

⁴ See CGP, Appendix 1, Risk Determination Worksheet, posted [here](#).

⁵ Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, posted [here](#)

⁶ "Pinto Creek," posted [here](#).

⁷ USEPA argued that the earlier Supreme Court decision in *Arkansas v. Oklahoma*, 503 U.S. 91, 112 S. Ct. 1046, 117 L.Ed.2d 239 (1992), allowed such discharges, but this argument was rejected by the 9th Circuit.

⁸ Increased or new discharges require an antidegradation analysis, but it is not clear that this analysis adequately addresses the concerns in *Friends of Pinto Creek*.

In addition to the issue of immediate impacts of the 303(d) listing, another concern is that the current approach of not completing a SED results in no assessment of statewide cumulative programmatic impacts of the listing process and resultant TMDLs. An assessment by the State Board of the 303(d) list at the time of adoption would allow a statewide impact analysis of the TMDL program. The alternatives assessed could include, for example, an alternative of focusing more on statewide source control and relying less on discharger BMPs and end-of-pipe treatment. Source controls implemented via legislative or administrative initiatives (e.g., controls on copper brake linings, lead wheel weights, zinc in tires) could be more effective, or at least supplement, discharger controls for many listed pollutants. Relying exclusively on discharger controls has obvious limitations and a 303(d) SED could examine alternatives. Additional source control opportunities could result from the administrative mechanisms such as the AB 1879 Green Chemistry Initiative⁹ or requests that EPA address pollutants through the Toxic Substances Control Act.¹⁰

Other alternatives that could be assessed through a 303(d) list CEQA document include prioritization of watersheds (per the *Strategic Plan*) and the possible need for statewide Use Attainability Analyses (UAAs) for pollutants such as bacteria in constructed waterways. These assessments appear to be required under CEQA and could be very beneficial to the program.

Proposed alternative text: See text shown previously at the end of comment #1.

Comment 3. Board determination of non-applicability of CEQA

One of the proposed additions to the regulations appears to extend the authority of the Board beyond the intent of CEQA.

§ 3720. Purpose.

(a) ...

(b) This Chapter does not apply if the board determines that the activity is not subject to CEQA.

This proposed subsection appears to give the Board unlimited discretion in deciding which activities or projects should be addressed directly by CEQA/CRP provisions. The determination should be based on the CEQA regulations as well as the explicit description of applicability and exemptions in these proposed Title 23 regulations. Proposed section 3720 (b) should be deleted.

In summary, the purpose of these comments is to urge the State Board to structure the regulations such that the Regional Boards provide cumulative assessments of TMDL impacts on watersheds. In addition, the Regional Boards and State Board should examine the impacts of the adoption of the 303(d) list. These suggestions constitute a reasonable alternative to the current proposal (i.e., these proposed CEQA regulations), and should be examined since they potentially could be more effective in providing compliance with CEQA and could benefit water quality. In some cases the proposed watershed approach may be less burdensome to the Water

⁹ Green Chemistry Initiative, described [here](#).

¹⁰ Other states (but not CA) have requested EPA utilize TSCA to address stormwater pollutants.

Boards by consolidating assessment efforts. Completing a "master" SED for a watershed may reduce the effort needed for subsequent TMDLs for the same watershed.

Thank you for the opportunity to comment. If you have any questions please call me at (510) 843-7889 (email: fkrieger@msn.com).

Sincerely,

Fred Krieger

cc: Charles Hoppin, Chair, State Water Board; choppin@waterboards.ca.gov
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