SAN DIEGO COASTKEEPER

August 9, 2017

San Diego Regional Water Quality Control Board
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Re: Comment – CWA Section 305(b)/303(d) Integrated Report, Attn: Xueyuan Yu

Sent via email

Dear Chair Abarbanel and Board Members:

Thank you for the opportunity to comment on the draft 305(b)/303(d) Integrated Report for the San Diego Region. San Diego Coastkeeper (Coastkeeper) is a non-profit organization working to protect and restore San Diego County's fishable, swimmable, drinkable waters.

We wish to begin by taking this opportunity to voice our strong support for the efforts of the Regional Board that have led to the inclusion of 236 new listings decisions in our region.

Our comments below offer support for several elements of the Draft Report, include recommendations applicable to the 305(b) and 303(d) processes and decisions, and point out where both the process and Draft Report fail to comply with regulatory and legal requirements of the Clean Water Act and state policy and guidance.

Data and Information Consideration is Inconsistent with Legal Mandates of the Clean Water Act

In order to adequately identify the current state of waterbody health and address impairments to those waters, sections 305(b) and 303(d) of the Clean Water Act and associated regulations require states to assemble and evaluate all existing and available data and information, including data on waters for which water quality problems have been reported by government agencies, members of the public, and academic institutions.[1] The state's own policy directive to consider all information is likewise purposefully broad and includes narrative or photographic information, as well as information and data that lacks rigorous quality control when used in combination with other existing data.[2] Furthermore, Clean Water Act regulations specifically require a 305(b) report to be submitted biennially that includes, "a description of the water quality

[1] *See* 40 C.F.R. §130.7(b)(5), "Each state shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list…"; *see also* 40 C.F.R. § 130.8.
[2] See Updated 2015 Listing Policy, p. 21., "Data without rigorous quality control can be used in combination with high quality data and information," and, "All data of whatever quality can be used as part of a weight of evidence determination."

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of all navigable waters…"[3] Thus, the governing federal and state regulations and guidance dictate not only the scope of what information must be considered, but the timeliness with which it must be considered, assessed, and utilized.

Despite this clear intent to address impaired waters in a timely and continuous manner, the Solicitation of Data and Information and submittal of the report in this cycle is limited to data received prior to August of 2010. As the July 2016 Draft Staff Report itself points out, information and data gathered and submitted after August 2010 will not be considered until the next integrated report update in 2020. This limitation to 2010 data is illegal, as the Clean Water Act requires that descriptions of water quality and assessment of impairments are based on *current* or *contemporary* descriptions and impairments, and not water quality descriptions and impairments as they existed a decade or more ago.[4] The result of the failure to review all readily available data is that the List likely does not set forth the full extent of impaired waters in our region.

Furthermore, the process as it now exists does not and cannot allow for timely and effective action to address the poor quality of our region's and state waters. This undermines the very purposes of developing the list and assessing our waters, which is to enable identified impairments to be remedied. As it stands now information and data acquired by our own water quality monitoring staff and volunteers in late 2010 and since will not be used for 303(d) identification and listing purposes or 305(b) assessment purposes for up to 10 years after that data and information was acquired.[5] This is not only absurd, but also illegal, and counter to the clear language and intent of the Clean Water Act and its governing regulations.

Regardless of any agreement the State Board may have reached with the USEPA, the limitation of data and information and associated time constraint are contrary to Clean Water Act regulations, the Updated 2015 State Listing Policy, and ongoing EPA guidance, each of which requires the evaluation and assessment of *all* existing data and information. As such, both the State and Region 9 Water Boards are required to consider valid data and information generated after August 2010 in the current 305(b) and 303(d) process to ensure compliance with federal and state requirements.

<u>Off-Cycle Considerations and Waterbody Prioritization</u>

We strongly urge the San Diego Regional Board to allow for and consider regular (biennially) off-cycle considerations and examinations of data for 303(d) listing. As the Draft Report states, "it is anticipated that the process will allow for those Regional Boards that are "off cycle" to still examine high priority data and make decisions related

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[3] See 22 USC §1315(b)(1)(A); *see also* 40 C.F.R. § 130.8 (section 305(b) report must include a "description of the water quality of all waters of the United States"); 50 Fed. Reg. 1,774 (Jan. 11, 1985) (CWA "305(b) …report must include recommendations on current and future program activities needed to address problems in priority areas… [40 C.F.R. § 130.8] emphasizes the role of the section 305(b) report as the primary water quality problem assessment document under the Act.")

[4] 33 U.S.C. § 1315(b)(1)(A); 40 C.F.R. §§ 130.7(b)(5), 130.8; *see also* 50 Fed. Reg. 1774 (Jan. 11, 1985).

[5] Coastkeeper and other organizations and institutions have gathered and submitted a wealth of data since August 2010.

directly to listings and de-listings and submit them for inclusion into the current listing cycle as appropriate."[6]

The Draft Report continues, "should the San Diego Water Board identify a priority waterbody(ies) for assessment or re-assessment during the interim time period, an off-cycle waterbody or pollutant specific report may be drafted for submitted during another Region's reporting period."[7] We believe, however, that adequate identification of "priority waterbodies" cannot occur based on outdated information. To ensure the most current data is utilized in assessment and prioritization we encourage the Regional Board to carry out within the next year a broader regional solicitation for all data and information available on our region's waterways, and put into place a process to assess that data and information for 303(d) inclusion on an expedited basis. Based upon the data submitted, the Regional Board could then use current data and information to determine priority waterbodies and plans for addressing impaired waters.

California Stream Condition Index and Biological Stream Integrity

Coastkeeper strongly supports the utilization of the California Stream Condition Index (CSCI) to evaluate the biological condition of wadeable streams in the San Diego Region. More specifically, we strongly support the utilization of benthic macroinvertebrate data and the CSCI to assess stream beneficial use attainment pursuant to CWA 303(d) and 305(b). The robust reference pool and predictor methods of the CSCI provide a large and consistently defined reference data set that allows for a comparative assessment of wadeable streams in our region. Moreover, the CSCI was developed specifically, "for use in regulatory applications that affect the management of individual reaches," and thus the application of CSCI to the 303(d)/305(b) process is appropriate and welcome.[8]

Invasive species

We strongly support the listing of San Mateo Creek for invasive species. We wish, however, to point out an inaccuracy in the Draft Report as it relates to listing under Category 4C of San Mateo Creek due to the presence of invasive species. The Draft report notes that invasive species are a, "pollution causing an impairment", and in Table 3 of the Draft it lists "None" under Category 5 Associated Pollutant(s).[9] In fact, invasive species are "biological materials" within the definition of "pollutants" as described in the Clean Water Act (and thus, requiring listing under Category 5)[10], and "invasive species" is consistently categorized as a "pollutant" in other listed waterbodies throughout the state.[11] We respectfully request the Draft Report revise this listing for invasive species in

[6] Draft Report, p. 3.
[7] Draft Report, p. 4.
[8] *See generally, Bioassessment in complex environments: designing an index for consistent meaning in different settings*, and p. 268.
[9] Draft Report, pages 16 and 21.
[10] *Northwest Environmental Advocates, et al. v. US EPA*, 2005 U.S. Dist. LEXIS 5373 (N.D. Cal. 2005).
[11] *See, for example*, listings for invasive species as "pollutants" in Las Virgenes Creek, Lindero Creek Reach 1, Malibu Creek, Cosumnes River (Upper), and Delta Waterways, among others.

San Mateo Creek as “pollutants”, rather than “pollution”, and place the listing under Category 5.

4C Listings and Multiple Category Listings

We support the Regional Board’s actions in concurrently listing nearly 30 waterbody segments as impaired for Habitat Alteration and Hydromodification (4C listings) in addition to existing Category 5 listings for those waterbodies. Existing EPA guidance documents recommend placing water body segments into multiple categories as applicable.[12] Like the San Diego Water Board, Coastkeeper believes adherence to this practice is important for informational purposes related to human and ecological health. Multiple listings serve to further refine strategies needed to address ongoing impairments while focusing efforts on those conditions impairing beneficial uses. As such, Coastkeeper urges both the State and Regional Boards to work together to devise a uniform system whereby an assessed waterbody segment can be placed into multiple categories depending on which specific beneficial uses are, or are not, being met.

To that end, while we acknowledge the USEPA’s 2015 Guidance document’s finding that TMDLs are not required for water body impairments assigned to Category 4C, we also urge the Regional Board to employ the use of all tools at its disposal to ensure these waterbodies are addressed not only for chemical and/or biological impairments, but for pollution-impaired waters as well. The State Board’s Impaired Waterways Guidance makes clear that, “the Porter Cologne Water Quality Control Act charges the SWRCB and the RWQCBs with the responsibility of protecting the beneficial uses and quality of all waters of the state, irrespective of the cause of the impairment.”[13] A host of regulatory tools remain available to the Regional Board and include individual or general waste discharge requirements, enforcement actions, interagency agreements, Basin Plan amendments, or policy adoptions. Coastkeeper urges the Regional Board to prioritize restoration of waters listed as impaired for habitat alteration and hydromodification despite the fact that the EPA does not require TMDLs for pollution-caused impairments.

Trends and Weight of Evidence Analyses

We encourage the Regional and State Boards to more actively solicit, encourage, and consider evidence under both “Trends” (Section 3.10 of Listing Policy) and “Weight of Evidence” (Section 3.11) approaches in the off-cycle and upcoming integrated report processes. Under the weight of evidence approach, “when all other Listing Factors do not result in the listing of a water segment but information indicates non-attainment of standards, a water segment shall be evaluated to determine whether the weight of evidence demonstrates that the water quality standard is attained. If the weight of evidence indicates non-attainment, the water segment shall be places on the section 303(d) list.”[14] Furthermore, “all data of whatever quality can be used as part of a weight

[12] *See, for example,* 2005 and 2015 EPA Guidance Documents.
[13] SWRCB Impaired Waterways Guidance, p. 1-4.
[14] Updated Listing Policy, p. 21.

of evidence determination."[15] Additionally, under a Trends analysis approach it would appear that allowances for data and information that are not accompanied by a QAPP would still need to be considered and used.[16] We believe that there is potential to add additional water body segments to the 303(d) list, and encourage use of these approaches in future analyses.

TMDLs and Insufficiency of 4B Listings Determinations

We once again express our serious concerns over the Regional Board's chosen strategy to employ TMDL-alternatives as opposed to TMDLs in addressing impaired waterways. Our concerns with this approach are heightened by the fact that such alternatives are not subject to a rigorous and transparent showing, such as a reasonable assurance analysis, that actions taken under those alternatives will result in outcomes sought and the attainment of beneficial uses and, ultimately, de-listings. Furthermore, the EPA's most recent Guidance expressly states that the Vision document (to which the Regional Board cites for its preference for TMDL-alternatives), "does not alter CWA 303(d) regulatory obligations to identify impaired or threatened waters and to develop TMDLs for such waters."[17] The Guidance continues, "TMDLs will remain the most dominant analytic and informational tool for addressing such waters."[18] The Region 9 Draft Report, however, lists zero TMDLs in development since 2012, and six "TMDL Alternatives" undertaken in that same time frame. Despite the EPA's clear and continued preference for TMDLs moving forward, by all appearances the San Diego Regional Board has chosen to refrain from developing new TMDLs altogether.

The Draft Report itself acknowledges USEPA guidance that states schedules should be expeditious and normally extend from eight to thirteen years in length, but could be shorter or slightly longer depending on state-specific factors.[19] The timeline for completing TMDLs – or TMDL alternative processes – for *new* listings should be no longer than 13 years, or a completion date of 2027. Previously listed waterbody impairments are expected to be addressed prior to that date. However, given the move away from TMDLs in our region and a move towards TMDL alternatives or other regulatory processes, we have strong concerns that there is, and will continue to be, a lack of assurance that impaired waters will be addressed in an effective and expeditious manner.

Importantly, as written there exists insufficient documentation included in the Draft Report and Appendices to support these 4B decisions, and the Draft Report fails to comply with EPA guidance on 4B demonstrations.

In each instance where the Draft Report does list those waterbodies subject to TMDL alternatives, the Report does not include the level of information EPA Guidance

[15] Updated Listing Policy, p. 21.
[16] *See* Updated Listing Policy pp. 7-8, and 21.
[17] 2015 Guidance, p. 1. See also page 1 of *A Long Term Vision for Assessment, Restoration, and Protection under the Clean Water Act Section 303(d) Program* ("Vision").
[18] *Id* at p. 4. The Vision echoes this language on page 9.
[19] Draft Report, p. 8.

documents require and as such contains insufficient information to justify 4B listings.[20] EPA Guidance is clear that Category 4B listings must be accompanied by demonstrations that other measures are expected to address all water-pollutant combinations and attain all WQS within a reasonable period of time.[21] Such demonstrations are expected to be accompanied by, "adequate documentation that the required control mechanisms will address all major pollutant sources and establish a clear link between the control mechanisms and WQSs."[22] For waters impaired by nonpoint sources (the bulk, if not all, of the waters listed in Region 9), demonstrations must be accompanied by specific detailed showings, including, but not limited to identification of the controls to be relied upon and documentation showing how the control measures are generally applicable to the impairment in question and can reasonably be expected to reduce pollutant loadings and ultimately *attain WQSs when fully implemented*.[23] Documentation is considered sufficient if it will:

- Describe the rational for why these control mechanisms will achieve WQSs within a reasonable period of time;
- List the suite of controls proposed for implementation and range of the controls' effectiveness;
- Estimate the number of acres that will be treated by the general class of controls to achieve the target load;
- Document that the water quality should be achieved as soon as practicable once full implementation occurs, *or for controls required as part of an iterative or adaptive management program, provide* ***reasonable assurance*** *that phased implementation will continue until WQSs are achieved,* and document the basis by which implementation of these measures is required.[24]

That Guidance continues that the state should, "provide a reasonable calculation that demonstrates that pollutant reductions (resulting from the implementation of the "other controls") will lead to attainment of WQS".[25] Thus, documentation to support 4B listings

[20] For a full list of those considerations to be included, *see* 2004, 2006, and 2008 Guidance documents for clarification of information needed for 4B demonstrations. *See also* pages 6-7 of the 2016 Guidance. The Draft Report as written fails to include many, if not most, of these requirements for each 4B listing. The 2015 State Listing Policy itself requires a determination in the fact sheets that, "an existing regulatory program is reasonable expected to result in the attainment of the water quality standard within a reasonable, specified time." P. 3.

[21] See 2004, 2006, and 2008 Guidance documents.

[22] 2004 Guidance, p. 5.

[23] 2004 Guidance, p. 6. Emphasis Added.

[24] 2004 Guidance, pp. 6-7. Emphasis Added.

[25] 2004 Guidance, p. 8. Guidance from 2006 and 2008 builds upon these requirements and calls for additional descriptions of, and schedules for, monitoring milestones for tracking progress, an estimate or projection of the time when water quality standards will be met (including an explanation of the basis for their conclusion), a description and schedule of the proposed implementation strategy and supporting pollution controls necessary to achieve WQS, among other things. *See* EPA's 2006 Guidance, pp. 54, 56; *and* 2008 Guidance, pp. 7, Attachment 2.

should be accompanied at the very least by a reasonable assurance analysis and calculations showing how and when such measures will be effective at attaining WQS.[26]

More recent Guidance discusses TMDL alternatives and lists among the information to be included an, "analysis to support why the State believes that the implementation of the alternative restoration approach is expected to achieve WQS," "an Action Plan or Implementation Plan to document: a) the actions to address all sources…necessary to achieve WQS…; and, b) a schedule of actions designed to meet WQS with clear milestones and dates, which includes interim milestones and target dates with clear deliverables," "an estimate or projection of the time when WQS will be met," and, "identification of available funding opportunities to implement the alternative restoration plan."[27]

Yet the Draft Report contains no such information, plan, reasonable assurance analysis, or calculations. For example, the Fact Sheet for Loma Alta Slough's TMDL alternative approach says only that compliance with the Regional MS4 permit will result in the "desired environmental outcome by 2023." The Fact Sheet for Famosa Slough notes only that, "pollutants will be addressed by implementing the MS4 permit," with no apparent date of expected completion or other accompanying data or analyses. Further, for each of the Pacific Ocean Shoreline and mission Bay Shorelines Trash listings the chosen strategy (without more) is listed as, "collected effort of public, agencies, organizations, and permittees. Methods include street sweeping, education programs on littering, installation of trash-catching devices on storm drains." This, despite the fact that Trash TMDLs have proven to be effective tools in other parts of southern California. Finally, we could not find detailed information of any sort of the 4B listing of Tijuana River and Estuary for in either the Fact Sheets or the separate 4B report. Should the Regional Board decide to attempt to list Tijuana River and Estuary under 4B for any number of waterbody-pollutant combinations, we expect to see all supporting documentation and analyses included.

Furthermore, even when following the requirements of the EPA's Guidance, TMDL alternatives are not held to the same level of rigor and accountability as are TMDLs. In fact, without requiring a rigorous and peer-reviewed reasonable assurance analysis (RAA), or some other form of equally stringent review to ensure actions taken will result in timely outcomes and de-listings, it is possible, if not likely, our waters will remain in a perpetual state of impairment. We therefore urge the Regional Board to reinstate TMDLs that are on hold and engage in the TMDL processes for those waters segments under categories 4b and 5. At the very least we recommend the Regional Board amend the Draft Report to include all information required by EPA Guidance documents for each TMDL alternative listed. Further, we strongly urge the Board, should it decide to continue to move forward with TMDL alternatives, to require that RAAs or similar

[26] We note that plans currently drawn up and accepted under the regional MS4 permit's WQIPs are insufficient when considered in light of EPA Guidance dating back some 12 or more years, as the WQIPs are accompanied by neither a reasonable assurance analysis or calculations showing they will be effective by a time and date certain.

[27] 2016 Guidance, p. 6.

assurances accompany any such TMDL alternative processes in order to ensure actions planned will result in the achievement of beneficial uses.

Finally, we note however the Regional Board decides to achieve compliance with Water Quality Standards in impaired waters, the Board cannot extend compliance deadlines beyond 2010 where pollutants listed in the California Toxics Rule (CTR) are causing the impairment. NPDES permits that include either a TMDL Waste Load Allocation or any alternative means of compliance cannot postpone compliance to the future. Both the Inland Surface Water Plan (ISWP), which implements the CTR for all NPDES permits except stormwater permits, and the CTR itself authorized 10-year compliance schedules for achieving CTR criteria, and included a specific sunset provision of May 2010 for CTR compliance.[28] Thus any NPDES permitting scheme purporting to achieve compliance later than 2010 with CTR standards in waters impaired for CTR pollutants is on its face illegal.

Thank you for the opportunity to comment on the draft 303(d)/305(b) Integrated Report. Please feel free to contact me with any questions or for additional feedback. We look forward to continuing to work together with the Regional Board to achieve fishable, swimmable, drinkable waters in our region through Clean Water Act listings, assessments, and corrective actions implementation.

Sincerely,

Matt O'Malley
Legal & Policy Director

cc:
David Gibson

[28] For more on this, *see* our comments dated March 31, 2016: "Comments for Draft TMDL-Specific Requirements for SWRCB's Industrial General Storm Water Permit, Chollas Creek Metals".