

AB 982 Public Advisory Group:

*Draft Consensus Points on the
Effectiveness of California's Efforts to
Develop Total Maximum Daily Loads
(TMDLs) to Restore Impaired Waters*

November 16, 2000

INTRODUCTION AND BACKGROUND

This summary of draft consensus points is the product of the AB 982 Public Advisory Group, which was created in response to legislation signed by Governor Gray Davis in September 1999.

AB 982 reflects the intense public interest that has been building in recent years regarding the State of California's compliance with TMDL requirements of the federal Clean Water Act. "TMDL" stands for Total Maximum Daily Load, the name given to these pollution restrictions which are integral to the achievement of the general goals of the Clean Water Act.

Specifically, TMDLs are a principal tool by which waters that remain polluted even after discharge restrictions have been put in place may be restored and protected. TMDLs have relevance in California because, according to the State Water Resources Control Board, today California has over 500 waters, or segments of waters, which are considered polluted.

The AB 982 Public Advisory Group is unusual because of the range of stakeholders and interests represented (twenty-four representatives of environmental groups, industrial dischargers, municipal governments, agricultural interests and other stakeholders from across California).

The consensus points derived during the PAG's meetings are reflected *verbatim* in this summary report. These consensus points reflect the uniform agreement of the PAG and will be supplemented by a full TMDL report from the PAG in the coming weeks. The full report will provide important context for these consensus points from the perspective of the PAG as well as its Regulated and Environmental Caucuses (and will also reflect appropriate refinements). In addition, there were a number of points about which the PAG did not reach consensus, and these issues will be reflected in the full report. The PAG believes that its consensus recommendations, if implemented by the State of California, would chart a new and significantly improved course for California's TMDL Program.

Finally, by way of introduction, the PAG notes that it has drafted this report and its recommendations in a way which it hopes will clearly and simply communicate complex issues. As such, it is not the intent of the PAG that its report or recommendations be viewed as resolving, or even addressing, legal disagreements regarding the TMDL program. Similarly, because this report often does not treat subjects exhaustively, no legally-relevant inference should be drawn based on what is, or is not, written in the report. In short, the PAG's recommendations, and its report as a whole, intentionally uses simple, non-legal language to address important issues regarding the TMDL program. It should be understood in these terms.

1. DRAFT SUMMARY MAJOR RECOMMENDATIONS

The PAG believes that:

1. The Legislature and the Davis Administration should dramatically increase resources available to the SWRCB and the Regional Water Quality Control Boards in order to implement the TMDL Program in California.
2. The Davis Administration, working cooperatively with the California Congressional Delegation, should aggressively pursue additional federal funds to assist in the implementation of the TMDL Program in California.
3. Through implementation of a variety of means recommended by the PAG, the SWRCB should assume greater responsibility for assuring that State and Regional Board staff have sufficient technical expertise at its disposal to efficiently develop high quality TMDLs.
4. The PAG's recommendations related to the Surface Water Ambient Monitoring Program for the State of California should be implemented immediately.
5. Taking advantage of the internet and other information technology, the SWRCB should assure that information generated from monitoring and TMDL related programs is readily accessible to the public.
6. The SWRCB should better coordinate with other agencies where needed to assure full implementation of TMDLs.

2. LISTING OF IMPAIRED WATERS

California's current (1998) 303(d) list has 509 water bodies listed, many for multiple pollutants. The list is usually revised every two years, however a federal rule suspended the 2000 submittal. Therefore, the next revision of the list is due in April of 2002.

The PAG developed three general consensus points on this issue:

• *The PAG finds that there are inadequate resources for the state to fulfill its obligations under the TMDL program. The PAG recommends adequate resources for development and implementation of effective TMDLs statewide. The PAG recommends that Regional Boards assess and request resource needs for the 303(d) listing process and TMDL development and implementation, through the State Board from the Legislature.*

• *The State Water Resources Control Board should formally adopt a Policy to maximize the Regional Water Quality Control Board's consideration of existing data during the 303(d) process.*

• *The State Water Resources Control Board should formally adopt a Policy, and a means to implement the Policy, for the Regional Water Quality Control Boards on what constitutes reasonable minimum acceptable credible information. The Policy should also include the methods for determining whether to list or de-list water segments on the Section 303(d) list consistent with Federal law.*

The Recommendations on Ambient Monitoring by the AB 982 Public Advisory Group Report to the State Water Resources Control Board, submitted in October 2000, represents unanimous agreement between the Environmental and Regulated Caucuses on the establishment of a SWAMP.

2. TMDL DEVELOPMENT

The PAG consensus points about TMDL development were primarily based around the PAG's recognition that there is a need for increased monetary resources for TMDLs to be developed efficiently and correctly.

Timeliness of Development

- The Legislature should provide adequate funding and staffing to allow the State and Regional Boards to immediately initiate the development and implementation of high priority TMDLs.***
- All TMDLs should be established as soon as possible recognizing varying levels of TMDL complexity.***
- Ways to assist in completing TMDLs more quickly may include: Training (such as EPA's Water Quality Academy); Technical Centers (which would allow RWQCBs to share information and approaches; "Strike forces" or teams of SWRCB staff with specific expertise (e.g., nutrients, metals, sedimentation, etc.) that could address TMDL development in Regions; utilizing staff from other agencies to assist in TMDL development (e.g., on pesticide issues); beginning some difficult TMDLs early as opposed to tackling the easy ones only at first (makes schedules more realistic); group related pollutants to expedite TMDL technical work (e.g. working on multiple pollutants in a water-body).***

Funding and Personnel

- The PAG finds that there are inadequate resources for the state to fulfill its obligations under the TMDL program. Therefore, the PAG recommends there be adequate resources for the development and implementation of effective TMDLs statewide. Further, the PAG recommends that the Regional Boards assess and request resource needs for the 303(d) listing process and TMDL development/implementation through the State Board from the Legislature.***
- The SWRCB and Regional Boards should allocate adequate resources and staff positions to develop and maintain appropriate TMDL expertise in-house.***
- The SWRCB and Regional Boards should develop an efficient process for acquisition and retention of necessary scientific and technical expertise.***

- ***The PAG encourages the RWQCBs to consider TMDL development when approving Supplemental Environmental Projects (SEPs) not otherwise legally required of dischargers.***

Statewide Process for Developing TMDLs

- ***TMDLs should be established and implemented in accordance with the Clean Water Act and, where applicable, the Porter-Cologne Water Quality Control Act and other relevant state and federal laws.***

- ***Regional Water Quality Control Boards should maintain active oversight over TMDL development sufficient to assure unbiased technical assessment.***

Role of Science

- *Science should play a role in the development of TMDLs.*
- *The level of scientific understanding and technical rigor will vary for individual TMDLs.*
- *The State and Regional Boards should encourage, where appropriate, early external peer review.*

Stakeholder Involvement

- *Regional Board should be open to input during the TMDL process.*
- *TMDLs need not be based on consensus but everyone needs to be heard.*
- *The Regional Board should publish schedules for the start of the stakeholder participation process.*
- *Recommended framework for the TMDL development should include opportunities for public input for new listing, for scoping of the TMDL, on the draft TMDL and on final adoption.*
- *Develop a mechanism, including funding, to encourage and maintain balanced stakeholder representation, and assure stakeholders are afforded the opportunity to participate meaningfully, in accordance with TMDL deadlines.*
- *Regional Boards should consider education and outreach as part of TMDL development and implementation. Public outreach and education are important aspects in issue resolution and attaining water quality standards.*

Legacy Contribution of Pollutants

- *Consistent with achieving water quality standards, the Regional Boards should establish a waste load or load allocation for sources of legacy pollutants that are currently contributing to the impairment.*

- *The State and Regional Boards should aggressively use existing legal authorities to identify and hold responsible those parties contributing legacy sources of pollutants causing impairments.*

4. IMPLEMENTATION

- *The Implementation Plan should be an essential part of the TMDL process.*

- *The Implementation Plan should be the blueprint which governs actions by all contributing sources to meet TMDL targets.*

- *Implementation plans should identify specific control and/or management actions for all sources or categories of sources of pollutants consistent with the Clean Water Act, and where applicable, the Porter-Cologne Water Quality Control Act.*

Stakeholder Involvement

- *The Regional Boards should be open to input during the TMDL process.*

- *The Regional Boards should publish schedules for the start of stakeholder participation process.*

- *The Regional Boards should carefully lay out schedules to get TMDLs completed and implemented.*

- ***Regional Boards should consider education and outreach as part of TMDL development and implementation. Public outreach and education are important aspects in issue resolution and attaining water quality standards.***

- ***In certain circumstances, and where deemed appropriate by the Regional Board, the process may be modified to allow for expanded or diminished public participation.***

- ***Develop a mechanism, including funding, to encourage and maintain balanced stakeholder representation, and assure that stakeholders are afforded the opportunity to participate meaningfully, in accordance with TMDL deadlines.***

Offsets

The PAG did not reach consensus on the advisability of establishing an offset program. However, the PAG did identify a number of issues which were relevant to the consideration of the issue and which would need to be examined in order to allow stakeholders to consider the issue further. The specification of this list of issues should not be understood to reflect an implied endorsement of the offset concept, as the offset idea generated reaction on the PAG ranging from fundamentally opposed to cautiously optimistic.

- ***Legal and liability issues; Specification of the manner in which a load allocation (load reduction) would be credited to a specific offset; Site-specific characteristics of waterbodies; Specific characteristics of pollutants; Accountability issues (e.g., how will a load reduction be measured?); Environmental justice implications; Location of the source; Timing of the reduction; Mandatory vs. voluntary reductions; Ongoing responsibility and maintenance of the reductions; Appropriate offset ratio(s); Agency management, including funding for an offset program; Type of source (nonpoint vs. point source); Definition of required pollutant reductions; Whether pollutant reductions that are otherwise required or would otherwise occur should be the subject of offsets.***

Adaptive Management of the Implementation Plan

- ***The implementation plan may include interim milestones for load reductions.***

Cross-Jurisdictional Issues

- *The Regional Boards shall seek collaboration with other government agencies with applicable authorities as needed or required to ensure the efficient implementation of the TMDL.*

- *TMDLs may, in some instances, involve cross-media sources of pollution which will need to be controlled in order to implement the TMDL. Cal-EPA should design and implement a specific mechanism that assures that any TMDL allocation to a source outside the jurisdiction of the Regional Board is adequately enforced and implemented.*