



December 19, 2014



State Water Resources Control Board Members  
c/o Jeanine Townsend, Clerk  
1001 "I" Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814

Sent via email to:  
[commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**Re: Comment Letter – TMDL Listing Policy Amendments**

Dear Board Members:

The Partnership for Sound Science in Environmental Policy (PSSEP) presents these comments on the *Proposed Amendments to the Water Quality Control Policy for Developing the Clean Water Act Section 303(d) List* ("Draft Amendments"). PSSEP is an affiliation of private companies and municipal and business associations who support the adoption and implementation of reasonable environmental regulations that are based on sound, objective science.

PSSEP was organized in 1999 shortly after San Francisco Bay was listed by U.S. EPA as being impaired for dioxin under Section 303(d) of the Clean Water Act. Our group continues to be active on many TMDL issues, both in San Francisco Bay and throughout the state. Some of our members have historically and are currently funding TMDL development efforts at the Regional Board level and, as a result, we are keenly interested in the TMDL Listing Policy. We have the following comments for State Board consideration regarding the Draft Amendments to the TMDL Listing Policy.

At the outset, we wish to note that these Draft Amendments are the first-ever proposed to the TMDL Listing Policy, which was adopted ten years ago, and after nearly five years of *extensive* public stakeholder involvement and input from what was known as the "AB 982 Public Advisory Group," created by the Legislature. (Water Code §13191; Stats.1999, c. 495, §1). According to the Functional Equivalent Document approved by the State Water Board in conjunction with adopting the initial TMDL Listing Policy:

"The SWRCB's goals for this Policy are to provide:

- ◆ consistent and transparent approaches for the identification of water quality limited segments using a standardized set of tools and principles to be used by the RWQCBs to evaluate data;

- ◆ scientifically defensible approaches to address the identification and listing of water bodies on the section 303(d) list; and
- ◆ a transparent public participation process.” (SWRCB *Functional Equivalent Document: Water Quality Control Policy for Developing California’s Clean Water Act Section 303(d) List*, September 2004.)

It is important to reflect on these goals in the context of discussing any proposed changes to the TMDL Listing Policy for at least two reasons. First, to gauge the effectiveness of the TMDL Listing Policy since it was adopted in 2004, and second, to ensure that any proposed changes to the TMDL Listing Policy are consistent with those goals embraced by the State Water Board when the TMDL Listing Policy was first adopted.

In general, PSSEP believes the 2004 TMDL Listing Policy has proved remarkably effective in meeting the stated goals of the State Water Board in initially adopting it. The Listing Policy has given the Regional Boards **and all interested stakeholders** a concise, consistent, and objective means of determining whether specific water bodies in California are “impaired” (*i.e.*, do not meet adopted water quality standards). Proof for this statement is best found in an analysis of how many “contested” water body listings and/or de-listings have occurred in the past ten years since the TMDL Listing Policy was adopted. While there may have been isolated incidents where some of these proposed listings or de-listings have been contested, PSSEP is not specifically aware of them in significant numbers.

That said, however, we also recognize that there is always room for improvement with any regulatory policy, particularly after ten years of its implementation. To that end, we are pleased to support the **concept** revisions as indicated below, but have some concerns about one of the proposed changes.

#### **TMDL “Listing Cycles”** (Draft Amendments, §6.1.2.1)

The current TMDL Listing Policy requires all Regional Boards to develop proposed changes to their respective lists of impaired water bodies every two years, also known as a “listing cycle.” This process has proven to be cumbersome and resource-intensive, and is seen by many to be an inefficient dedication of limited staff resources, particularly in regions with smaller staffs.

Staff proposes to change this approach by enabling the State Water Board to identify which Regional Boards shall administer the listing process for a particular listing cycle, therefore obviating the need for every Regional Board to expend limited resources during that cycle. In general, PSSEP supports this *concept* of streamlining the TMDL listing process. A strong argument has been made that, except in unusual circumstances, most of the obviously-impaired water bodies in the state have already been listed in most regions. As such, to continue to require each Regional Board to conduct a formal TMDL listing update process can logically be seen as inefficient and unnecessary. The proposed amendment to the TMDL Listing Policy would enable the Regional Boards to work with the State Water Board in determining whether a formal List update is required and, if not, substantial staff time and resources can be saved.

One question we have, however, is what opportunities will exist if, in a given region, interested parties believe a specific water body should be “de-listed” (under the substantive provisions of the TMDL Listing Policy), but that particular region is “off-cycle” for purposes of processing an updated TMDL list for the region? Our interpretation of proposed changes to Section 6.1.2.1 is that only the Regional Board may elect to administer the listing process for one or more water segments if that region is “off-cycle,” and there seems no outward or obvious ability for members of the public to affect that decision. This is potentially a significant issue for dischargers who are complying with NPDES permit requirements that are based on TMDLs for water segments that may qualify for de-listing under the TMDL Listing Policy.

PSSEP urges the State Water Board to direct staff to provide opportunities for the public to seek off-cycle water segment listing changes.

**State Board Administration of Listing Process.** (Draft Amendments, §6.2)

The Draft Amendments would authorize the State Water Board to administer the TMDL Listing Process in a given region if it chooses, after advanced notice in the affected region is provided, and opportunity for public comment on the proposal. We understand that this proposed change is to enable the State Water Board staff to process listing updates in those regions where staff resources are limited.

In general, PSSEP believes this proposed change is a positive one because it will help streamline the overall process.

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**State Board Executive Officer Authority to Finalize and Submit Statewide 303(d) List to USEPA.** (Draft Amendments, §6.3)

With all due respect to State Water Board staff, we believe this proposed change is ill-conceived, and does not achieve the stated goals of the State Water Board when it adopted the TMDL Listing Policy to provide a “a transparent public participation process” for TMDL listing decisions. (*SWRCB Functional Equivalent Document: Water Quality Control Policy for Developing California’s Clean Water Act Section 303(d) List*, September 2004, at page 5.)

Current TMDL Listing Policy requires the State Water Board to hold a public hearing on the final, assembled Statewide 303(d) List, and to take a formal vote (as a Board) on any final decision. The proposed changes to the TMDL Listing Policy would authorize the Executive Director to administratively approve the final Statewide 303(d) List and forward it to USEPA for approval, with two important caveats: (i) such approval is subject to advanced public notice and opportunity to comment on the final Statewide List; and (ii) public comment may only be taken for those proposed Listings (or de-Listings) for which a timely request for State Board review has been made.

Currently, all Regional Board-proposed Listing changes automatically go to the State Water Board for its review, public notice and comment, and final Board approval. This has, at least theoretically, provided interested parties with “two” opportunities to address a proposed new, revised, or de-Listing. Under the proposed amendment, review at the State Water Board level would be “waived” unless an interested party made a timely request for State Board review.

The current Draft Amendments provide simply that either “The State Water Board Executive Director or the State Water Board shall approve the section 303(d) list.” (Draft Amendments, §6.3, at page 27.) It is unclear what standard is to be used by the State Water Board in deferring approval of the statewide 303(d) list to the Executive Director, or even why such deferral is appropriate.

Even if only periodically used, the right and opportunity for interested parties to speak before the State Water Board, *qua* board, is vital to preserving the important transparency identified by the State Water Board when it adopted the initial TMDL Listing Policy in 2004. We urge the State Water Board to preserve this vital public right.

Aside from the policy reasons why the State Water Board Members should reject this proposed change to the TMDL Listing Policy, PSSEP questions whether proposed delegation of the authority to its Executive Director to approve the final statewide

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Section 303(d) list is permissible under state law. Water Code Section 13147 provides that, “The **state board** shall not adopt state policy for water quality control” unless certain conditions are first met. There is no mention of any delegated authority to the Executive Director under Section 13147. Thus, the only question is whether approval of the final, statewide Section 303(d) List qualifies as a “state policy for water quality control.” Given that the 303(d) List is compiled and submitted to US EPA biennially as part of its Clean Water Act Section 305(b) Report, it would certainly seem to qualify as part of state policy for water quality control. Furthermore, inasmuch as many Regional Board Basin Plans include the list of impaired water segments within their strategies for implementation of water quality standards, which in turn must be approved by the State Water Board, it seems logical to conclude that these types of actions fall within the rubric of Water Code Section 13147.

In sum, PSSEP is pleased to support most of the proposed changes to the TMDL Listing Policy. However, we respectfully request that the State Water Board reject the proposed changes to the process leading up to final approval of the statewide 303(d) list which would enable final approval to be carried out by the Executive Director and without any opportunity to appeal such decisions to the State Water Board itself.

Thank you for the opportunity to provide these comments for your consideration.

Sincerely yours,



Craig S.J. Johns  
Program Manager