CALIFORNIA COASTKEEPER ALLIANCE

December 22, 2014

Chair Felicia Marcus and Board Members
c/o Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Sent via electronic mail to: commentletters@waterboards.ca.gov

RE: Comment Letter – Listing Policy Amendment

Dear Chair Marcus and Board Members:

California Coastkeeper Alliance ("CCKA") is a network of twelve Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state, for the benefit of Californians and California ecosystems. Heal the Bay is an environmental organization dedicated to making Southern California coastal waters and watersheds safe, healthy, and clean. On behalf of CCKA and Heal the Bay, we appreciate the opportunity to provide comments on the State Water Resources Control Board's ("State Water Board") November 21, 2014 Proposed Amendment to the Water Quality Control Policy for Developing the Clean Water Act Section 303(d) List ("Listing Policy Amendments"). CCKA and our network of California Waterkeepers and Heal the Bay are deeply involved, and have decades of combined experience, in the 303(d) listing process. Our groups monitor and report changes to the health of local waters, submit data to the State and Regional Water Boards, advocate for the listing of impaired waters, and are involved in efforts to clean up and restore impaired waters.

In 1972, Congress enacted the federal Clean Water Act (CWA) with the goal to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters."[1] Section 303(d) of the Clean Water Act is an essential means to achieving the goal of restoring waters to conditions safe for swimming, fishing, drinking, and other "beneficial uses" that citizens currently, or used to be able to enjoy.[2] Section 303(d) is the Clean Water Act's "safety net"[3]; it is both the bedrock component and the backstop for ensuring the goals of the Clean Water Act can be achieved when initial efforts fail. Section 303(d)'s listing process is the essential step in documenting impaired waterbodies and taking the initial actions toward resorting the health of our waterways as mandated by the Clean Water Act.

CCKA and Heal the Bay support the State Water Board's efforts to improve the 303(d) listing process in ways that both make the best use of limited agency resources and improve data transparency. However, we are concerned that the proposed Listing Policy Amendment, as drafted, would not ensure that waterbodies are assessed every two years and does not facilitate the submission of all readily available evidence. We are particularly concerned about Policy Amendment provisions that impose undue burdens on or create barriers to the public's ability to report local water quality issues and to list impaired waterways. We urge the Board to consider offer these comments and to address these issues with the Listing Policy Amendment.

[1] 33 U.S.C. § 1251(a).
[2] 33 U.S.C. § 1313(d)(1) and (2); *see also* 40 C.F.R. § 130.7(b)(1).
[3] Houck, Oliver A., *The Clean Water Act TMDL Program* 49 (Envtl. Law Inst. 1999).

A. THE STATE WATER BOARD SHOULD REQUIRE ALL REGIONS TO BE ASSESSED DURING EVERY TWO-YEAR LISTING CYCLE.

The State Water Board is proposing to amend the Listings Policy to "clarify that the 303(d) List is not required to include assessments from all regions every listing cycle."[4] The Clean Water Act requires states to identify *all bodies of water* for which technologically-based effluent limitations are insufficient to maintain water quality standards.[5] Specifically, Section 303(d)(1)(A) states that each "state shall identify those waters *within its boundaries* for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters."[6] The U.S. EPA's Guidance on 303(d) Listings also concludes that the Clean Water Act requires states to provide – *every two years* – an "assessment of the quality of *all their waters* and a list of those that are impaired or threatened.[7] The Clean Water Act is explicit – all bodies of water within a State's boundaries shall be assessed for impairment every two years.

U.S. EPA Guidance contradicts the State Water Board's assertion that the "U.S. EPA staff have indicated that they support [a rotating basin] approach." The U.S. EPA describes the "rotating basin approach" as concentrating available monitoring resources "in one portion of the state for a specified period of time, thus allowing for data to be collected and assessed in a spatially and temporally focused manner. Over time, every portion of the state is targeted for this higher resolution monitoring and assessment effort…"[8] However, while the U.S. EPA endorses the rotating basin approach, it does so only while making it clear that "states are expected to actively solicit data and information on a *State-wide basis for all waters within their jurisdiction*."[9] The U.S. EPA goes on to find that "the state must consider *all existing and readily available data and information* during the development of its [303(d) Listing] Report, *regardless of where in the state the data and information were generated*."[10] The rotating basin approach is a strategy to focus monitoring resources, but does not excuse the State Water Board from assessing all waterway segments within California's boundaries every listing cycle.

The Clean Water Act mandates that all waterbodies within California's boundary shall be assessed for impairment every two years. The U.S. EPA is clear that it only endorses the rotating basin approach if the State Water Board continues to assess all waterbodies statewide. The State Water Board is required to include assessments from all regions each listing cycle.

B. THE STATE WATER BOARD SHOULD RETAIN THE REQUIREMENT FOR ALL 303(D) LISTS TO BE APPROVED BY THE BOARD MEMBERS AT A PUBLIC WATER BOARD HEARING.

The State Water Board is proposing to amend the Listing Policy to provide the Executive Officer the "discretion and authority to finalize the proposed 303(d) List and submit it directly to U.S. EPA."[11] The Executive Officer should not have the authority to finalize a 303(d) List without a public hearing and vote by the Board members. The State Water Board's explanation for this Policy modification is to promote "efficiencies in the manner in which data is solicited and assessed, and streamlines public participation and review process. The proposal will allow for timelier 303(d) List submittals by the State Water

[4] State Water Resources Control Board, Revised Notice of Opportunity to Comment, 1 (November 21, 2014).
[5] Communities for a Better Env't v. State Water Res. Control Bd., 1 Cal. Rptr. 3d 76, 80 (2003). (33 U.S.C. § 1313(d)(1)(A); see 40 C.F.R. § 130.7 (2002).
[6] 33 U.S.C. § 1313(d)(1)(A).
[7] Category references from U.S. EPA, Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act, 8 (July 29, 2005), *available at* http://www.epa.gov/owow/tmdl/2006IRG/report/2006irg-report.pdf.
[8] *Id.* at 32.
[9] *Id.*
[10] *Id.*
[11] *Supra* note 4.

Board."[12] However, the State Water Board has made no finding that the current approach of holding a final adoption hearing before the Board members delays the Listing processes. In practice, 303(d) listing delays seem to be largely the result of constrained staff resources at the regional level. We are unaware of any instance where a Listing was delayed due to the adoption hearing.

The adoption of 303(d) Lists is a critical component of the Clean Water Act, and should be done with a full public process. As explained above, the Section 303(d) is the Clean Water Act's "safety net" and is essential to restoring waters to conditions safe for swimming, fishing, drinking, and other "beneficial uses" that citizens are able to enjoy.[13] Moreover, the Ninth Circuit has long held that "Congress identified public participation rights as a critical means of advancing the goals of the Clean Water Act in its primary statement of the Act's approach and philosophy."[14] Given the importance of 303(d) Listings, and Congress' intent that public participation be a critical component of the Clean Water Act, we request the State Water Board retain the requirement that 303(d) Listings be approved by the Board members rather than the Executive Officer, or else provide additional information as to the rationale and desired effect of the proposed change.

C. THE STATE WATER BOARD SHOULD ADOPT A DEFINITION OF READILY AVAILABLE DATA THAT DOES NOT EXCLUDE EVIDENCE OR DATA IN SUPPORT OF 303(D) LISTINGS.

The listing of a waterbody as impaired is a collaborative process that enlists the efforts and knowledge of a broad spectrum of stakeholders, from citizen scientist to academic institutions, who together share a concern for the health and restoration of waterways. This incorporation of stakeholder participation ensures that all appropriate lines of evidence and the most relevant data is incorporated into 303(d) listing decisions. To ensure the best data and evidence continues to be incorporated into the 303(d) listing process, and that the State Water Board's Listing Policy Amendment complies with the Clean Water Act, the State Water Board should not adopt a definition of "readily available data" that is too narrow, excludes data or evidence, nor places unreasonable barriers upon the submittal of evidence and data in support of 303(d) listings.

1. The State Water Board should adopt a definition of "Readily Available Data and Information" that does not require data and evidence to be submitted via the California Environmental Data Exchange Network.

The State Water Board's Proposed Listing Policy Amendments state the definition of "Readily Available Data and Information" as:

> [D]ata and information that can be submitted to the California Environmental Data Exchange Network (CEDEN), which can be accessed via www.ceden.org. If CEDEN is unable to accept a particular subset of data and information, the State Water Board or the Regional Water Board may accept that data and information if it meets the formatting and quality assurance requirements detailed in section 6.1.4 of the Policy and the notice of solicitation for the current Listing Cycle.[15]

This proposed definition of "Readily Available Data and Information" will place an undue burden for submitting data and evidence upon stakeholders, particularly those with limited resources to collect and analyze data, which ultimately, will limit the public's opportunity to submit data and engage in the 303(d) listing process.

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[12] *Supra* note 4.
[13] 33 U.S.C. § 1313(d)(1) and (2); *see also* 40 C.F.R. § 130.7(b)(1).
[14] *Environmental Defense Center v. U.S. EPA, 344 F.3d 832,* at 856-57 (2003).
[15] State Water Resources Control Board, Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List, 17.

For example, in previous listing cycles, the consideration of impaired waterways and the establishment of TMDLs has been significantly bolstered by evidence collected and submitted by Waterkeeper citizen scientists. In the instance of Ballona Creek, the Los Angeles Waterkeeper's monitoring work has been instrumental in establishing the source, patterns, and paths of recourse for impairments. The requirement to submit all data and 303(d) listing evidence via CEDEN would have disqualified the submittal of significant Ballona Creek information from the outset. In addition, the requirement to submit all data via CEDEN, ~~however,~~ would have constrained the limited monitoring resources available to Los Angeles Waterkeeper, and placed significant barriers upon the organization's ability, and others like it statewide, to contribut~~eions~~ to 303(d) listing process.

Furthermore, the narrow exclusion of data and evidence, as proposed by the Listing Policy Amendments, is in violation of the Clean Water Act. The 303(d) Listing regulations and guidance are unambiguous that all information and data should be considered in making a listing decision. Federal regulations state that "[e]ach State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the [303(d)] list."[16] The regulations further mandate that local, state and federal agencies, members of the public, and academic institutions "should be *actively* solicited for research they may be conducting or reporting."[17] Furthermore, U.S. EPA's 2006 Guidance explicitly states that U.S. EPA's review of California's list will include an "assess[ment of] whether the state conducted an adequate review of all existing and readily available water quality-related information."[18] To that end, the 2006 Guidance also requires states to provide "[r]ationales for any decision to not use any existing and readily available data and information."[19]

Accordingly, as the Clean Water Act makes clear, any and all existing and readily available data and information must be considered to determine the health of the state's increasingly-degraded water bodies. Narrowly redefining the definition of "Readily Available Data and Information", as the State Water Board proposes, established procedures and requirements that will, in effect, exclude existing and readily available data from the 303(d) listing process. To ensure compliance with the Clean Water Act, robust stakeholder participation, and a full assessment of the health of waterways, we urge the State Water Board to redefine the definition of "Readily Available Data and Information" to ensure that all acceptable and relevant evidence and data is accepted in the 303(d) listing process.

2. The State Water Board should encourage, but not require data and evidence to be submitted via the California Environmental Data Exchange Network (CEDEN).

Our organization supports the State Water Board's intentions to adopt a data submittal process that is both transparent and makes the most of limited agency resources. To accomplish these goals, CEDEN is a valuable tool, and we support the encouragement of its use. Requiring the use of CEDEN, however, will unintentionally disqualify the submittal of significant portions and formats of evidence and data in the 303(d) listing process.

The State Water Board should not sacrifice a full consideration of existing and readily available data for the sake of expedience. For this reason, we support the use of CEDEN, but urge the State Water Board to rework the Listing Policy Amendments to encourage, but not require data and evidence be submitted via CEDEN.

The Listing Policy provides a key framework for the identification and eventual restoration of impaired waterbodies. We thank the State Water Board for taking steps to improve the Listing Policy while ensuring the process is transparent and accommodates all essential lines of evidence, prerequisites in

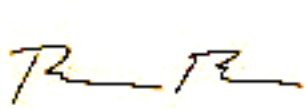
[16] 40 C.F.R. § 130.7(b)(5).
[17] 40 C.F.R. § 130.7(b)(5)(iii) (emphasis added).
[18] *Supra* note 7, at 29.
[19] *Id*. at 18.

fulfilling the requirements of the Clean Water Act and ensuring swimmable, fishable, and drinkable waters for all.

We look forward to continued work together to ensure clean, abundant water for California.

Sincerely,

Sara Aminzadeh
Executive Director
California Coastkeeper Alliance



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