

STATE WATER RESOURCES CONTROL BOARD

PUBLIC HEARING

WATER QUALITY CONTROL POLICY FOR DEVELOPING  
CALIFORNIA'S CLEAN WATER ACT SECTION 303(D) LIST  
AND DRAFT FUNCTIONAL EQUIVALENT DOCUMENT

WEDNESDAY, JANUARY 28, 2004  
10:00 A.M.

JOE SERNA CAL/EPA BUILDING  
COASTAL HEARING ROOM  
SACRAMENTO, CALIFORNIA

ORIGINAL

REPORTED BY:

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APPEARANCES

STATE WATER RESOURCES CONTROL BOARD:

ARTHUR G. BAGGETT, JR., CHAIR  
GARY M. CARLTON  
NANCY H. SUTLEY

STAFF:

CRAIG J. WILSON  
LAURA SHARPE  
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COUNSEL:

MICHAEL LEVY

HEARING PARTICIPANTS:

TOM MUMLEY  
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SARAH NEWKIRK  
BILL JENNINGS  
LEO O'BRIEN  
ALAN LEVINE  
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1 SACRAMENTO, CALIFORNIA

2 WEDNESDAY, JANUARY 28, 2004, 10:00 A.M.

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4 CHAIRMAN BAGGETT: Good Morning. This is the  
5 time and place for a public hearing before the State Water  
6 Resources Control Board, regarding the proposed water  
7 quality control policy for development of California's  
8 Clean Water Act Section 303(d) list.

9 This is the first of two public hearings on the  
10 draft policy. The second will be on February 5th down in  
11 Torrance.

12 I am Art Baggett, Chair of the Board, here with my  
13 colleagues Nancy Sutley and Gary Carlton. And the staff  
14 that have been working on this for the last year or so.  
15 We have Craig J. Wilson, Patricia and Melenee Emanuel,  
16 Laura Sharpe and Mike Levy from the Office of Chief  
17 Counsel.

18 California Water Code Section 13191.3(a) requires  
19 that the State Water Board develop guidelines describing  
20 the process by which the State and Regional Boards shall  
21 comply with listing requirements of the Clean Water Act,  
22 Section 303(d). The policy will ultimately establish a  
23 standardized approach for developing California's list.  
24 This hearing is being held to solicit comments on the  
25 proposed policy's recommended procedures for evaluating

1 the information solicited in the form of listing or  
2 delisting candidate water bodies for the 303(d) list. The  
3 policy addresses prioritization of listed water bodies and  
4 eventual development and implementation of TMDLs.

5 The State Board staff has prepared a draft  
6 Functional Equivalent Document for the draft policy in  
7 compliance with CEQA. And FED represents an analysis of  
8 the environmental issues and alternative to be considered  
9 by the State Board in adopting the proposed policy. In  
10 today's hearing, the order of procedure will be a brief  
11 presentation by staff, followed by testimony from  
12 interested parties.

13 I think you all know the blue card drill if you want  
14 to speak.

15 We also will receive written comments regarding the  
16 policy and encourage those if you can summarize your  
17 comments today, it would be helpful.

18 The hearing will not be conducted in accordance with  
19 technical rules of evidence. Testimony that is reasonably  
20 related to the proposed policy will be accepted. Written  
21 and oral comments are all part of the record. To expedite  
22 today's proceedings, oral presentations should be limited  
23 to no more than five minutes. Please before you begin  
24 your testimony, if you can identify yourself, your name  
25 and your address, for the Court Reporter, it will be

1 helpful. If you have a card, you can leave it; that is  
2 also helpful.

3 If you agree with the previous speaker's comment, as  
4 always, if you can just note that agreement instead of  
5 repeating argument, I think it would help in the interest  
6 of time. Help us all.

7 The administrative record will remain open until  
8 February 11th, 2004. Following the close of the record,  
9 the State Board staff will review and respond to all  
10 comments in writing. Written responses will be included  
11 in the final FED with the revised policy as necessary.  
12 Staff will make the revised policy available to interested  
13 parties at least 15 days before consideration by the  
14 Board. Interested parties will be notified of the date  
15 and place of the future Board workshop and then the  
16 subsequent meeting where the proposed policy will be  
17 considered for adoption.

18 With that, Craig, did you have any opening comments?

19 MR. CRAIG J. WILSON: Thank you and good  
20 morning. My name is Craig J. Wilson. I am chief of the  
21 TMDL Listing Unit in the Division of Water Quality at the  
22 State Water Resources Control Board.

23 I would like to begin my presentation with a brief  
24 overview of the Section 303(d) requirements and the  
25 process that led to the development of the policy. Then I

1 will very briefly describe the documents that are the  
2 subject of this hearing.

3 Section 303(d) and the accompanying federal  
4 regulations require states to regularly identify water  
5 bodies that cannot achieve applicable water quality  
6 standards after certain technology-based controls have  
7 been implemented. In complying, California has developed  
8 successive lists of waters not meeting water quality  
9 standards biennially since 1976.

10 After 1996, public attention increasingly focused on  
11 an important consequence of Section 303(d) listing, which  
12 is the development and implementation of total maximum  
13 daily loads or TMDLs. Simultaneously, public demand for  
14 regional consistency and transparency in the listing  
15 process intensified.

16 In response, the Water Code now requires the State  
17 Board to prepare guidelines for listing and delisting  
18 water bodies on the Section 303(d) list. These guidelines  
19 contained within the draft policy provide consistent and  
20 transparent approaches for the identification of water  
21 quality limited segments using a standard set of tools and  
22 principles to evaluate data. It also provides a  
23 scientifically defensible approach to address the  
24 identification of these waters on the list and a  
25 transparent public participation process.

1 State Board regulations independently require that  
2 an environmental review equivalent to a California  
3 Environmental Quality Act or CEQA document accompany a  
4 policy proposed for State Board adoption. State Board  
5 staff has developed a functional equivalent document, an  
6 FED, that contains, as required by regulation, a brief  
7 description of reasonable alternatives to and mitigation  
8 measures for the proposed activity.

9 The purpose of the FED is to present alternatives in  
10 State Board staff recommendations for the policy and to  
11 guide the development of the 303(d) list. The FED  
12 identifies eight main issues. First, the scope of the  
13 policy. Second, the structure of the 303(d) list. Third,  
14 the weight of evidence for listing or delisting. Fourth,  
15 listing or delisting with single lines of evidence.  
16 Fifth, listing and delisting with multiple lines of  
17 evidence. The sixth part is statistical evaluation of  
18 numeric water quality data. Seventh part is policy  
19 implementation. And lastly, is TMDL priority ranking and  
20 completion schedule.

21 The 2001 Budget Act Supplemental Report also  
22 requires the use of the weight of evidence approach in  
23 developing the policy. And it requires the use of  
24 criteria to ensure that data and information used are  
25 accurate and verifiable.

1           The FED discusses and the draft policy contains a  
2 weight of evidence approach that uses both single and  
3 multiple lines of evidence. It provides for alternate  
4 data analysis procedures and an alternate, a way for  
5 Regional Boards to identify alternate exceedance  
6 frequencies. The FED also recommends approaches for  
7 evaluation of numeric data consistent with the expression  
8 of numeric water quality objectives or water quality  
9 criteria. Lastly, the FED assesses the potential adverse  
10 impacts of the recommended policy.

11           In conclusion, the intent of the proposed policy is  
12 to provide the Regional Boards with flexibility before  
13 listing decisions are made, while at the same time  
14 providing a listing process that is consistent,  
15 transparent and based on a standard scientifically  
16 defensible approach for placement of waters on the 303(d)  
17 list.

18           Should the need arise during the hearing, we are  
19 prepared to answer any questions that you may have. This  
20 concludes my presentation. If you have any questions now,  
21 I would be happy to answer them.

22                   CHAIRMAN BAGGETT: No.

23                   Thanks, Craig.

24                   MR. CRAIG J. WILSON: Thank you.

25                   CHAIRMAN BAGGETT: With that, Tom Mumley from

1 Regional Boards. And then we have the gang of seven.

2 MR. MUMLEY: Good morning. My name is Tom  
3 Mumley, and I have the title of the Statewide TMDL Program  
4 Manager, but I am also chief of the Planning and TMDL  
5 Division at San Francisco Bay Regional Water Quality  
6 Control Board. I am here today representing the Regional  
7 Board participants on the TMDL Roundtable. And I have a  
8 difficult mission of communicating to you that the  
9 Regional Board staffs have some significant concerns with  
10 the proposed policy.

11 We think that there are technical, procedural and  
12 legal shortcomings. We also feel that there are  
13 constructive opportunities to fix them. Probably of most  
14 concern to us is that proposed policy has some  
15 inconsistencies and conflict with water quality standards,  
16 the surface water and monitoring program and our newly  
17 proposed TMDL guidance. Again, these inconsistencies and  
18 conflicts can be fixed with some constructive changes.

19 As you may know, that the Regional Board  
20 participants of the TMDL Roundtable along with a number of  
21 our staff -- we had over 50 Regional Board staff working  
22 on a number of work groups, generating 32 recommendations  
23 for consideration in development of this policy. What we  
24 find is that a majority of our recommendations are not  
25 reflected in the proposed policy, and we believe a number

1 of our recommendations would serve as constructive  
2 correction of some of the shortcomings that I alluded to.

3 We intend to provide detailed written comments to  
4 communicate our issues and our constructive resolution of  
5 them and in particular to improve the integrity and  
6 ultimately the implementation of the policy. We would  
7 like to make sure you realize that we clearly want to work  
8 in partnership with this process. The Regional Board  
9 staff are going to be charged with implementation of this  
10 along with the action by their Boards, and we do represent  
11 large number of practitioners in the sector side of doing  
12 assessments. So we hope that our constructive comments  
13 can be considered as we move forward.

14 Right now I would just like to highlight four  
15 critical issues that we would like to have considered.  
16 And as I said, more detailed comments will be put forward  
17 to writing.

18 The first has to do with the use of a standard  
19 statistical method and the weight of evidence approach.  
20 We endorse the concept of a standard statistical method as  
21 long as it is complemented with opportunity to apply a  
22 full weight of evidence approach. We find the current  
23 policy doesn't do that.

24 It promotes a stand-alone by -- a stand-alone  
25 standard statistical approach based on a binomial

1 approach. We have some concerns with that approach in and  
2 of itself, but we can live with it if the policy provided  
3 a more broader weight of evidence procedure for allowing a  
4 weight of evidence effort. In other words, if there is  
5 evidence of impairment and the binomial approach does not  
6 result in a determination of impairment, that we would  
7 receive when applying other methodologies to weigh those  
8 lines of evidence to conclude whether indeed there is  
9 impairment.

10 The current policy proposal has an alternative data  
11 analysis clause in it, but we feel, as applied, is rigid  
12 and does not give us full range of tools that we would  
13 want to use in such a weight of evidence approach. And in  
14 particular those of us who would be charged with applying  
15 that have problems understanding how that alternative data  
16 evaluation would be applied, and that in and of itself is  
17 cause for concern. If we don't understand it, then it  
18 will be subject to interpretation by others as well.

19 Another critical issue is that we believe that in  
20 many places the policy is confusing, redundant, includes  
21 unnecessary direction. The ideal policy here will be  
22 short, to the point. Folks seeing requirements on making  
23 listing decisions and allowing for supplemental technical  
24 modules to deal with guidance and direction on data  
25 uncertain, more technical aspects of things.

1           For example, just a couple of examples to point that  
2 out. The policy unnecessarily repeats the application of  
3 the binomial approach over and over again, where we think  
4 it could be stated right up front and how it would apply  
5 to the various categories. And there is another clause  
6 that shows up later in the policy regarding interpretation  
7 or application of narrative water quality objectives. And  
8 it states that the policy would supersede any statewide  
9 plan or regional Basin Plan in terms of any conflict. We  
10 don't understand why that is there. The only reason there  
11 would be any conflict would be interpretation or the  
12 definition of water quality standard or its  
13 implementation. And clearly, the purpose of this policy  
14 is not to revise water quality standards, so that appears  
15 totally unnecessary.

16           And another concern is that in a few places the  
17 policy goes beyond just to call for assessing waters and  
18 determining a change in water quality standards. And we  
19 feel this is somewhat problematic given our limited  
20 resources and the constraints that we are already faced  
21 with as we can point out. Our surface water ambient water  
22 monitoring program will generate data that falls far short  
23 of applying this policy in many circumstances, but as  
24 proposed the policy also calls for going beyond just  
25 assessing water, but calls for identifying sources of

1 pollutants and even in some cases could force us into the  
2 challenge of identifying the solution of the problem. And  
3 we feel those issues should be better served throughout  
4 applying our TMDL guidance which allows for a broader  
5 process or a transparent process for going forward and  
6 doing the appropriate amount of source analysis,  
7 determining what pollutants are, where they are coming  
8 from and ultimately what the solution is.

9 And lastly we feel that the way the policy proposes  
10 setting priorities and scheduling is not consistent with  
11 current practice and with the regulation, and we propose  
12 some alternative language that is more consistent.

13 So to summarize, we intend to submit written  
14 comments and propose provisions for your consideration.  
15 And most importantly we commit to providing assistance, as  
16 we have to date and will want to in the future, to ensure  
17 that the policy is workable and effective. Particularly  
18 we have some strong ideas and support for proving the  
19 technical procedure and legal validity of the policy.

20 Thank you for your consideration.

21 MEMBER CARLTON: One question for you, Tom.  
22 In your historic role as the TMDL coordinator, I think you  
23 had the opportunity to observe how the listing process  
24 historically has come out of the regions and has created  
25 quite a few inconsistencies, which has to be dealt with

1 here at this Board and then later at EPA.

2 How do you see the balance between what we are  
3 trying to do here to improve consistency and maintain the  
4 flexibility that you want without continuing to have these  
5 kinds of inconsistencies?

6 MR. MUMLEY: Obviously, that is the challenge  
7 at hand. I appreciate what you are saying. I first got  
8 involved in the listing process in 1988 and probably most  
9 of the listing cycle since. Up to now we have had no  
10 guidance, and we were operating under the threat of legal  
11 challenges associated with underground rules. So the  
12 process just promoted inconsistency, if you will. The  
13 most important way to resolve this is documentation that  
14 because not all water quality standards are created equal,  
15 not all water bodies and watersheds are created equal. Is  
16 problematic to promote the one-size-fits-all approach.

17 Procedurally what would fit is that all listing  
18 recommendations or decisions must be documented. So  
19 evidence that is used must be clearly stated. Threatened  
20 indicators or thresholds or definitions of the standards  
21 used should be clearly stated so it would be very  
22 transparent.

23 And I believe in doing -- just by focusing on that  
24 aspect, we would get much more consistency because we  
25 would strive to be -- the policy would allow us then to

1 probably collaborate more on how to make decisions where  
2 in the absence of a policy and any guidance we were  
3 threatened with the challenge of underground rules.

4 So I think, again, that we have recommended in our  
5 recommendations that we could establish some, if you will,  
6 high bars where we have sufficient data that there would  
7 be no question, that we would have consistency for listing  
8 where there is lots of evidence. But at the same time a  
9 transparent process, requiring a lot of documentation,  
10 would be the vehicle to deal with all the variable  
11 challenges that we have throughout the state.

12 MEMBER CARLTON: Thank you.

13 CHAIRMAN BAGGETT: Thanks. Thanks, Tom.

14 Enviro PAG. Do you know what order you are in?  
15 Linda Sheehan.

16 MS. SHEEHAN: Good morning. Linda Sheehan with  
17 the Ocean Conservancy. I will provide a card with my  
18 address for the record.

19 We are here today, obviously, to develop a sound  
20 state policy for identifying waters that are impaired for  
21 purposes of the 303(d) listing. The policy that is before  
22 you, while a significant amount of effort has gone into  
23 it, doesn't do that. There are still some very major  
24 deficiencies in that. Today, various members of the  
25 environmental community are going to talk about the

1 different aspects of those deficiencies, and give you an  
2 overview. What we intend to do is provide far more detail  
3 in our written comments along with specific suggestions  
4 with respect to revisions of the policy that we think will  
5 address most of these deficiencies.

6 Just as an outline of what people will address  
7 today, the policy fails on three grounds: science, legal  
8 and actual practical application, the policy aspect of it.  
9 With respect to the science, you've heard that this is  
10 statistically scientifically defensible binomial model  
11 approach. We have actually hired Ph.D. statisticians to  
12 do an analysis of this policy in terms of how it is  
13 applied in the assessment of whether water bodies are  
14 impaired or not. And we find there are a number of  
15 significant flaws with how it is developed and how it is  
16 applied.

17 And we can go into that in more detail. But  
18 basically it skews error very significantly in favor of  
19 not listing waters that are impaired. And we've got quite  
20 a bit of detail on that, as well as suggestions on how to  
21 rectify that situation. I think the fact that the  
22 guidance doesn't explain the methodology by which the  
23 binomial model was developed and its implications and the  
24 policy decisions behind it, as is required by EPA  
25 regulation and guidance, illustrates the fact that there

1 are a number of deficiencies, and that you can't actually  
2 make that explanation. You can't show how this model  
3 actually identifies impaired bodies because it doesn't.

4 The second major area of deficiency is, of course,  
5 with respect to the law. And I think you have heard some  
6 concerns today, and you will hear more about different  
7 legal concerns with respect to the policy. Number one is,  
8 obviously, CEQA. The draft FED talks about not having any  
9 significant adverse environmental impacts with respect to  
10 the application of the policy because it is both  
11 consistent and scientifically defensible. We'll show that  
12 it is not scientifically defensible. And one of the  
13 problems is that it is trying to be consistent. It's  
14 trying to develop this binomial model. This sort of black  
15 and white approach. And the whole thing really hinges on  
16 this binomial model being appropriate.

17 In fact, you can't apply that consistently. There  
18 is just no way to apply that across all pollutants, all  
19 stressors, all streams, applications across the state; you  
20 just can't do it. There may be a number of areas where  
21 you can, but a blanket approach is not going to work.

22 What you need to do is have -- if you are going to  
23 go that way, we have some concerns about that, to have  
24 appropriate alternative data evaluation process which we  
25 don't have in the policy. The policy has a discussion of

1 that. It is unclear. It seems to be based on many of the  
2 same restrictions that are applied to the binomial model.  
3 And there are a number of other issues in terms of  
4 application and as you've heard today is going to be very  
5 difficult to apply.

6 It is also not based on the weight of evidence  
7 approach that the Supplement Budget Act Report of 2001  
8 requires that you address in your alternative data  
9 evaluation policy.

10 So I think that that could be significantly beefed  
11 up to address that legal concern. With respect to legal  
12 antidegradation, is a big issue. We believe the policy  
13 violates antidegradation requirements by allowing  
14 significant degradation of state waters. Again, tied to  
15 this idea that the binomial model over counts errors and  
16 allows for a much more significant ignorance of impaired  
17 waters, and, therefore, allowing them to continue to  
18 degrade rather than listing them and cleaning them up.

19 It also ignores water quality standards, especially  
20 with respect to toxicity and CTR. It violates the  
21 regulations in EPA regulations requiring the state to  
22 develop existing and readily available data. And the  
23 information that the policy guidelines go into, data  
24 quantity, data quality, data age, other aspects of using  
25 the data that are quite restrictive, much more restrictive

1 than many other states. It violates the rule that a state  
2 look at all reasonably available existing data. You can  
3 put some limits on how the data is used, but all of it  
4 needs to be considered, and there needs to be a process,  
5 perhaps through the alternative data evaluation process,  
6 where all of these different types of data are considered  
7 in some way rather than just reject the whole pot.

8 And then one of the other significant legal issues,  
9 of course, is something we've raised before, is it doesn't  
10 address threatened waters. It has to address threatened  
11 waters, how waters are going to be addressed that will  
12 fail water quality standards before the next listing  
13 cycle.

14 Finally, with respect to policy and the practical  
15 application of what is going to be a new regulation. The  
16 concern is that not only does it not allow for the clear  
17 identification of impaired water bodies, it's just almost  
18 impossible to implement. The Regional Boards, who  
19 actually will do this work, are saying we don't understand  
20 how we are going to implement this in real life. EPA has  
21 raised concerns in the past on the past listing cycle with  
22 respect to actual application of this policy in terms of  
23 throwing waters back.

24 So it seems to be a little bit of passing the buck.  
25 It is hard to write this policy, but we can't write a

1 policy that is impossible to implement, that is just going  
2 to result in other people doing the work anyway. It is  
3 going to result in more work at the Regional Boards, more  
4 work at EPA and ultimately more work at the State Water  
5 Board level where you have to be reviewing all these  
6 different applications and petitions for water bodies to  
7 be looked at again because the original policy was  
8 unclear. It is also from a policy perspective  
9 discourages sound monitoring. Because if you are hinging  
10 everything on the binomial model, which seems to be the  
11 real focus of the policy, since alternative data  
12 evaluation is deemphasized, then there is no real  
13 incentive to collect a whole lot of monitoring data and  
14 list a whole lot of water bodies as being impaired.

15 And then finally, I think it just bears  
16 reemphasizing from a policy perspective that this doesn't  
17 even balance error between not listing impaired water  
18 bodies versus accidentally listing clean water bodies. It  
19 doesn't even balance it. It skews it in terms of  
20 precautionary principle upside-down. And instead of  
21 having a policy to try to protect clean waters, we have a  
22 policy where we are speeding towards rapidly dirty waters.  
23 And I don't think that this is a policy that this state  
24 wants to take.

25 We will go into each of those comments in somewhat

1 more detail today just as an overview. And then, again,  
2 our written comments will have much more specific  
3 suggestions on how to address a lot of these issues.

4 Thank you.

5 CHAIRMAN BAGGETT: Do you all know what order  
6 your are in?

7 Sarah Newkirk and then Bill Jennings.

8 MS. NEWKIRK: Good morning, Chairman Baggett,  
9 Members of the Board. My name is Sarah Newkirk, and I  
10 represent Water Law & Policy Consulting.

11 When I saw the Functional Equivalent Document, I saw  
12 that the listing criteria for many of the parameters, in  
13 fact, most of the parameters, is this: that water quality  
14 objectives are exceeded in greater than 10 percent of  
15 samples with a confidence level of 90 percent using the  
16 binomial distribution. Now, I am not a statistician, but  
17 when I looked at Table 3.1, showing the minimum number of  
18 exceedances required for listing, I noticed that the  
19 threshold for listing was always higher, substantially  
20 higher, than 10 percent. So I asked some statisticians  
21 what they thought about this, and they had some important  
22 things to say.

23 First, the application of the binomial model, this  
24 application of the binomial model, results in a dramatic  
25 minimization of type one error at the expense of type two

1 error. I am not a statistician either, so let me explain  
2 what I mean. Type one error is an error in which you  
3 would erroneously fail to list a dirty water body, an  
4 impaired water body. A type two error is an error in  
5 which you would erroneously list a clean water body. I'm  
6 sorry, I have those reversed. A type one error is an  
7 error in which you would erroneously list a clean water  
8 body, and that is the type of error that this application  
9 of the binomial model seeks to minimize. Type two error  
10 is failing to list a dirty water body.

11 Now everything in California's policy assumes that  
12 it is preferable to make type two errors in order -- in  
13 other words, to fail to list dirty water bodies. In fact,  
14 the probability of failing to list an impaired water body  
15 under this method is between 80 and 362 times the  
16 probability of listing a clean water body.

17 The implicit assumption here is that in the state of  
18 California we are up to 362 times more comfortable with  
19 having impaired water bodies unattended to than we are  
20 with putting clean water on the list. We find this  
21 assumption unacceptable, especially in light of potential  
22 consequences of not dealing with impairment, contamination  
23 of drinking water, obligation of aquatic communities and  
24 lots of recreational opportunities, among others.

25 Second, the confidence level implicit in the

1 proposed policy amounts to double counting of error. In  
2 other words, the idea behind applying EPA's 10 percent  
3 rule in the first place is to account for possible error.  
4 It is not that we are just comfortable with 10 percent  
5 exceedance rates. So by stacking a high level of  
6 confidence in the binomial model on top of this 10 percent  
7 rule already in a statistical method that favors leaving  
8 water bodies unlisted anyway, you are correcting for  
9 possible error twice, and that is not even to mention the  
10 correction of error that goes on at the lab at the stage  
11 of sample analysis.

12 Under California QAQC policy there are already  
13 controls for these types of errors. Consequently, there  
14 are three levels of control which stack on top of one  
15 another and resulted in a method that basically prevents  
16 the listing of water bodies under most circumstances.

17 Third and finally, the FED claims that type two  
18 error cannot be effectively controlled under most  
19 statistical methods. While this is true under ordinary  
20 circumstances in the binomial model, it is not true in  
21 this case where there is a functional relationship between  
22 the null hypothesis, which is that water bodies are clean,  
23 and the alternative hypothesis which is that water bodies  
24 are dirty. Anytime water bodies are not clean, they are  
25 obviously going to be thought of as impaired.

1           And this functional relationship means that anytime  
2 you increase the likelihood of making type one error, you  
3 consequently decrease the likelihood of making type two  
4 error. Both of these types of errors can be controlled.  
5 And when we try to balance -- we did an analysis that  
6 balanced these types of errors so that the likelihood of  
7 making type one error was equal to the likelihood of  
8 making type two error, we found that water bodies should  
9 be listed when, quite simply, 10 percent of samples  
10 exceeded the threshold. Get's us back to the original 10  
11 percent rule in the first place.

12           This just goes to show that simply by shifting the  
13 decision criteria we can significantly change the outcome  
14 of this model.

15           If you have any questions, I would be happy to  
16 answer them.

17           CHAIRMAN BAGGETT: Thank you.

18           Bill and Leo O'Brien.

19           MR. JENNINGS: Good morning, Chairman Baggett,  
20 Board Members. Bill Jennings representing DeltaKeeper  
21 CSPA, San Joaquin Audubon. We will be submitting written  
22 comments jointly and perhaps individually, and I'll limit  
23 my remarks to a few observations.

24           Observing this process, several things have become  
25 obvious, that this isn't a technically driven bottom up

1 process, but rather it's a top down, I think, politically  
2 driven process that is biased in favor of not listing or  
3 delisting waterways when staff essentially ignored  
4 opinions that don't conform to, I think, their  
5 preconceptions or their predeterminations.

6           Among these are the December '02 submittal by all --  
7 joint submittal by all nine Regional Boards that assails  
8 the binomial method for its lack of flexibility and its  
9 inconsistencies with water quality objectives. In June  
10 '03 EPA submitted a detailed letter, detailing a multitude  
11 of concerns about the binomial approach, its inconsistency  
12 with regulatory requirements and water quality standards.  
13 The Regional Boards in October of '03 again submitted a  
14 joint comment, recommendations, contained a strike-through  
15 of proposed policy. That was ignored. SWAMP staff has  
16 even expressed serious concerns regarding the policy, but  
17 now they've been forbidden from commenting or even  
18 contacting Craig's staff.

19           An illustration of how petty and paranoid this  
20 process has become is that there is a Regional Board  
21 Roundtable strategy session listing, unit staff left the  
22 room and then anonymously eavesdropped on the  
23 conversation. Certainly isn't illegal, but it is  
24 certainly unprofessional and unethical. Rather than  
25 engaging in a transparent collaborative process to develop

1 a workable, protective policy, staff has essentially  
2 circled the wagons, to fend off criticism of a policy that  
3 was largely proposed by the regulated communities. It is  
4 a thinly veiled attack on water quality standards. CTR  
5 and NTR aquatic life criteria are predicated on not being  
6 exceeded more than once in three years. In other words,  
7 an ecosystem suffers irreparable harm if standards are  
8 exceeded in two hours out of 26,280 hours or 0.0076  
9 percent of the time. And these toxic standards are  
10 laboratory derived. They assume pristine water with a  
11 single stressor. They ignore additive or synergistic  
12 interactions, and as such they are marginally protective  
13 as they are.

14 Criteria in various Basin Plans are frequently  
15 expressed as maximum or minimal concentrations and  
16 absolutes not to be exceeded. The listing policy proposes  
17 to raise the bar and to require the criteria must be  
18 exceeded in 10 to 33 percent of samples for a water body  
19 to be listed. This is inconsistent with the existing  
20 Basin Plans and certainly inconsistent with federal  
21 regulations.

22 Now rigorous QAQC procedures, perhaps a standard  
23 deviation is the proper way to address sample  
24 uncertainties. The hypothesis testing procedures  
25 described into EPA testing manuals and guidance documents

1 certainly provide adequate protection against indirectly  
2 concluding that waters are toxics when they are not.

3 Staff proposed minimum exceedance thresholds are  
4 absurd, given the state's crippled monitoring program. I  
5 mean, the Toxic Substance Monitoring Program, the Coastal  
6 Fish Contaminate Program, the Mussel Watch, toxicity  
7 testing program, even the ambient monitoring requirements  
8 have all ended, and the SWAMP itself is in disarray.  
9 Several regions have not received monitoring funds for  
10 several years.

11 The minimum sample requirements can only encourage  
12 dischargers to impose increased monitoring budgets or lead  
13 them to structure sample collection to avoid toxic pulses;  
14 in other words, to arrange for the majority of the  
15 sampling to occur when there is not a problem.

16 Under the proposed policy, it is unlikely that  
17 runoff from the rice herbicides, the dormant spray  
18 insecticides or the chlorpyrifos applied to alfalfa would  
19 have ever been listed. As an example, in 2001 and 2002  
20 DeltaKeeper University of California and USGS conducted a  
21 joint program in which we collected samples from Ulatis  
22 Creek among others. There were a series of sampling  
23 points, but Ulatis -- over the two years seven of 42  
24 chlorpyrifos samples exceeded the one-hour criteria by as  
25 much as six times. Five of the 42 samples exceeded the

1 diazinon aquatic acute criteria by as much as three times.

2 Under the proposed policy, Ulati Creek would not  
3 have been listed because it didn't exceed eight samples or  
4 eight samples didn't exceed criteria.

5 If you are collecting monthly samples, acute  
6 toxicity identified in one or two months of every year  
7 would never justify listing, would never rise to the  
8 threshold. The same goes for the low DO in Old and Middle  
9 Rivers in Stockton sloughs. In fact, it is even  
10 questionable whether Spring Creek would have been listed  
11 as far as the runoff from Iron Mountain before they built  
12 the debris dam. Because you had metals, more metals that  
13 come off from all POTW plants in the nation, but it comes  
14 off in toxic pulses in rains, and it is unlike that it  
15 could have ever risen to the threshold to list.

16 Regional Boards must not be placed in procedural  
17 straightjackets. They must have the latitude to employ  
18 weight of evidence and best professional judgment. A  
19 greater than one in three year violation of toxic  
20 standards must trigger listings, as they do in many other  
21 states. Contrary to common dogma, the use of the null  
22 hypothesis has little utility in science. Binomial  
23 methodology is highly controversial. There are hundreds  
24 of peer reviewed papers questioning the indiscriminate and  
25 inappropriate use of that statistical hypothesis test. A

1 binomial approach cannot address spatial or temporal  
2 effects or magnitude. Any policy based on the probability  
3 of failing to list an impaired water body that is 80 to  
4 362 times the probability of listing a clean water body is  
5 DOA, is just not going to fly.

6 You can use a reverse null hypothesis or an  
7 equalized probability, but that is not necessarily  
8 protective. I don't want you to say the 10 percent rule  
9 is not protective, does not comply with water quality  
10 standards. In Florida the binomial method lead to the  
11 delisting of a large number of waterways, which EPA  
12 promptly put back on.

13 So I would suggest or urge the Board to take a deep  
14 breath and direct staff to return to the drawing boards  
15 and convene a facilitated process that involves the  
16 Regional Boards, EPA, the PAG and interested parties to  
17 develop an approach that is functional and protective to  
18 establish a transparent multi-step peer review process  
19 that includes biostatisticians.

20 And with that I will shut up and end my comments.

21 Thank you.

22 CHAIRMAN BAGGETT: Thank you.

23 MR. O'BRIEN: Good morning, Chairman Bagget,  
24 Board Members. Leo O'Brien with WaterKeepers of Northern  
25 California and San Francisco Baykeeper.

1           You will have to forgive me if I wander a little  
2 bit. I was up last night with my wife's statistics  
3 textbook trying to sort out what is proposed here. I'll  
4 talk a little bit about some policy problems and then  
5 focus my comments on a couple of the legal problems.

6           As has been noted, what you're -- part of this  
7 policy does is balance two types of errors. And it's  
8 clear that the policy is strongly biased in favor of what  
9 we think is the wrong direction. In fact, the Functional  
10 Equivalent Document demonstrates that the application of  
11 this policy will result in impaired water bodies going  
12 unlisted. It also demonstrates that the rate at which  
13 water bodies go unlisted, that impaired water bodies go  
14 unlisted and the rate at which water bodies that are  
15 impaired will be delisted will be higher than the rate  
16 today.

17           Now if we assume that the Regional Boards and State  
18 Board do what the law requires and implement the TMDL for  
19 every listed water body, we can assume that pollution will  
20 be reduced when impaired water bodies are listed. That  
21 sounds to me like a significant adverse environmental  
22 effect, and we will get to that a little later.

23           So I guess what I am saying is, if you adopt this  
24 policy, you will dramatically increase the probability  
25 that some environmental problems will go unaddressed. How

1 does this policy accomplish that? What is the mechanism?

2 Is because there is a series of choices embedded in  
3 the policy, in the binomial method, you know, and at every  
4 turn. Every single time there was one of these choices,  
5 the bias of the policy is picked. So in selection of the  
6 confidence interval, in the selection of so-called  
7 critical exceedance criteria, in the selection of the null  
8 hypothesis, in the selection of the binomial method and  
9 the statistical assumption, in the selection of minimum  
10 sample size, all of those decisions which had an array of  
11 choices, the policy always picks the choice that will  
12 favor not listing unimpaired water bodies over the failure  
13 to list an impaired water body.

14 So, I mean, I guess the point is that beneath the  
15 statistics, hidden under there are some really important  
16 and critical policy decisions which you will be making. I  
17 am asking you to examine those policy decisions. Do you  
18 really want to favor essentially the economic costs of  
19 falsely listing over the economic, ecological and health  
20 costs of falsely delisting and falsely not listing? And I  
21 think if you critically examine that question, you will  
22 come to the conclusion that this is the wrong way to go.

23 Those policy assumptions are inconsistent with  
24 common sense. They are inconsistent with the  
25 precautionary principle and they put an unfair burden on

1 the public.

2 So in terms of the legal problems, the policy  
3 conflicts with applicable water quality standards. Just  
4 to illustrate this, Bill mentioned this, CTR for toxics  
5 says that the numbers laid out in CTR, the standards  
6 assume that one hour for the acute criteria, one hour in  
7 three years is a problem. One sample. So that works out  
8 to be -- EPA has worked it out that that is one out of  
9 every 1,095 samples. That is .09 percent should be  
10 sufficient to list something for toxics. For chronic-type  
11 criteria it is one out of 274. So we are talking about  
12 hundreds of times less protective. They cannot be  
13 reconciled. CTR cannot be reconciled with this policy.

14 The FED violates CEQA. And the policy violates  
15 antideg for the same reason, and that reason is that these  
16 -- that we know, if we apply this policy, impaired water  
17 bodies will not be addressed. It is -- the FED says so.  
18 And at the same time the FED says there is no significant  
19 impact, and those two things cannot both be true. So we  
20 have a FED which fails to identify this significant  
21 environmental impact and importantly fails to mitigate it.

22 So I would say if you go forward with the policy,  
23 you need to do a statement of overriding considerations.  
24 In fact, that statement is designed to unbury exactly the  
25 kind of policy considerations or the policy assumptions

1       which you're making here, which is that the economic  
2       consequences over here are more important than the  
3       ecological consequences or the economic consequences on  
4       this side. So if you are going to go forward with the  
5       policy, I don't see you can avoid that.

6               I would suggest that perhaps you should revise the  
7       policy to mitigate this significant environmental impact.

8               And one final point is this policy will destroy the  
9       incentive of dischargers to cooperate in data collection,  
10       monitoring and data generation. As soon as this comes on  
11       line, their incentive will be to make sure samples aren't  
12       taken so that these thresholds are never met. And they  
13       will fight funding for SWAMP in the legislature. They  
14       will fight -- they will pull out of collaborative efforts  
15       like the Regional Monitoring Program in the Bay, and you  
16       will find it a lot harder to get the data done. Your  
17       budget doesn't allow us to collect the data, and it is  
18       certainly the case that the public is not going to be able  
19       to fund it on their own.

20               So I would ask you to send this back and have it  
21       rethought out.

22               Thank you.

23                       CHAIRMAN BAGGETT: Thank you.

24                       Alan Levine and Dave Paradies.

25                       MR. LEVINE: Good morning. My name is Alan

1 Levine, and I represent Coast Action Group, Box 215, Point  
2 Arena, California.

3 I am going to address this listing policy in  
4 reference to my favorite rivers, the North Coast rivers  
5 and what's gone down with them. So I will start with the  
6 original set of listings that occurred a while ago.  
7 Wouldn't have passed muster under this new proposed  
8 policy, and the reason why is there just -- basically  
9 there weren't enough samples at the time. Now ten years  
10 later with more samples we find more than ample  
11 justification, and the river is in worse shape.

12 I want you to know that every timber harvest plan, 9  
13 percent of all the timber harvest plans that come into  
14 Coast Cascade in the community impact section or water  
15 assessment or habitat assessment process, they say holes  
16 are filled and streams are suffering from impairment due  
17 to sediment.

18 That's plenty of evidence. They didn't know where  
19 to look at the time of the original listing. There was  
20 evidence for it in the files of THPs.

21 The current system that we are operating under now  
22 has worked pretty well. All the North Coast rivers are  
23 listed except for the Smith River, and we have 600 water  
24 bodies or more statewide listed. The big problem is we  
25 don't have implementation plans. And I just remember in

1 the waiver hearings that North Coast Region was promising  
2 that part of their WDR setup is to have Basin Planning and  
3 TMDLs. And I guess Gary is going to push them in that  
4 direction when he goes to their meetings.

5 How many water bodies have we listed  
6 inappropriately? Not very many. Then I understand the  
7 drive is towards consistent policy. Here is some of the  
8 concerns. With the biological monitoring and just term  
9 sediment, it's hard to get large enough sample sets, and  
10 the binomial method really doesn't apply very well to  
11 small sample sets. You need fairly significant sizes, and  
12 we're not getting them and we may never get them because  
13 there is not enough funding for getting such large size  
14 samples. However the binomial controversy or the  
15 model related to that controversy --

16 CHAIRMAN BAGGETT: I have a question.

17 Clearly under biological populations, if you've got  
18 less than 20 samples, that is not a lot, is it, 20  
19 samples?

20 MR. LEVINE: For sediment 20 samples on a river  
21 might be a large number or for some other problem. It  
22 just depends.

23 CHAIRMAN BAGGETT: It says if it is less than  
24 20, than five show exceedance, which isn't --

25 MR. LEVINE: No.

1                   CHAIRMAN BAGGETT: Doesn't seem like a great  
2 burden in monitoring. In terms of the volume you are  
3 talking about.

4                   MR. LEVINE: Right. But what I said was the  
5 binomial wasn't the limiting factor here. The limiting  
6 factor in assessment process is the weight of evidence  
7 issue, which you are bringing up right now. And I will  
8 get to that. Okay.

9                   I mean, the level of confidence that you are looking  
10 for is in the threshold area, not in the percentages.  
11 Like the percentage that you just gave me, I feel okay  
12 about. But you want to have a level of confidence in the  
13 criteria which comes up and that comes up in the  
14 evaluation guidelines section, in Section 623. And I  
15 guess I will jump right to that.

16                   The use of professional judgment finds the level  
17 that you just offered me, not the binomial process. And  
18 the binomial process you substantiate that or reject it.  
19 But in your case it would substantiate. I think the  
20 minimum number of cases needs to be something around ten  
21 or something like that. But, yeah, it would work.  
22 Binomial is not the limiting factor. But the use of  
23 professional judgment and making determinations of  
24 thresholds of exceedance and allowance for multiple lines  
25 of evidence or the weight of evidence and allowance of the

1 current science.

2 And what I am saying is that section, 6 2 3, 6.2.3,  
3 needs to be slightly clarified and made more flexible to  
4 accept those lines of reasoning in there and the use of  
5 the expertise of the Regional Board staff in setting those  
6 standards. I think that they can do a good job for you.  
7 I think the Regional Board staff is fairly confident or  
8 very confident and judicious in their approach to this,  
9 and I don't think they want to list rivers  
10 inappropriately. It is a whole lot of extra work for  
11 them. I think they know they need to put their assets and  
12 their energy where it counts.

13 And then I will finish with referencing Gary's need  
14 for consistency. There is many, many differences in  
15 variables in water bodies and pollutants, both, and it  
16 just leads to variation in the whole process. And all you  
17 can do is the best job that you can do in substantiating  
18 your choices in those thresholds and exceedance levels  
19 that I was talking about.

20 Thank you.

21 CHAIRMAN BAGGETT: Thank you.

22 Dave.

23 MR. PARADIES: Morning. I think we all  
24 appreciate Mr. Carlton's question that sought consistency  
25 between the Regional Boards and the various listing

1 methodologies, come whatever anomalies there were in the  
2 past. It seems, though, that we should not be looking to  
3 achieve consistency through an oversimplification and  
4 restricting the ability of people to make judgments based  
5 on sound scientific method.

6 The policy as we see it here today in attempting to  
7 select a single statistical method confuses statistical  
8 significance with ecological significance. We hit a  
9 number 10 percent being passed around. As example in  
10 trying to apply 10 percent to all the different things we  
11 might measure in water. Considering an illustration. If  
12 I put ten glasses of water over here, ten glasses of water  
13 over there, and told you that one of these glasses, 10  
14 percent, contained ten times the arsenic drinking water  
15 should. One of those glasses contains ten times the  
16 nitrate drinking water. Should --

17 If you know anything about chemistry, which set of  
18 glasses would you take your chances on? Type one and type  
19 two errors, you get it all involved in sample counts and  
20 things. The fact is you want the same confidence for  
21 dioxin as you do for suspended sediment. That's what we  
22 are faced with here.

23 Another issue with respect to the multiple lines of  
24 evidence. We talked about five samples not being very  
25 much. When you're dealing monthly samples -- the SWAMP

1 program as it sits typically does conventional water  
2 quality sampling monthly. Typically if it does toxicity,  
3 metals or synthetic organic, if it does those at all, they  
4 do them once a year or so. We look at the table over  
5 here, Table 3.1, in Appendix 8, which has all these sample  
6 counts. The level of monitoring being conducted in the  
7 state of California for screening purposes right now, you  
8 don't need this whole table, you only need the first two  
9 cells on the upper left-hand side. If a SWAMP array,  
10 based on state contract prices, were actually measured at  
11 a single site or a single water body sample with a count  
12 like this and we start talking about 500 samples, these  
13 things are in excess of \$10,000 for a full screening. We  
14 are talking \$5,000,000. The state of California only has  
15 \$4,000,000 to cover the entire state. This table only  
16 refers to a single site or a single water body. You  
17 aren't going to get any more money to the Regional Boards.  
18 So apparently, to measure this single site at levels like  
19 this, these poor dischargers are going to be 13267 to  
20 death.

21 On the other hand, if you use a reasonable strategy  
22 and allow for multiple lines of supporting evidence, in  
23 other words, we go out, we find toxicity in the stream,  
24 let's say it kills the insect, it kills a fish. Then we  
25 go out and do a rapid bioassessment.

1                   CHAIRMAN BAGGETT: Right.

2                   MR. PARADIES: We have one toxic sample in  
3 effect. We took one bottle of water, but it killed the  
4 fish; it killed the insect that lives in the water column.  
5 It kills the insect that lives in the sediment. Then we  
6 go out and we find out that the benthic invertebrate  
7 community in the stream is also hampered by the standards  
8 in the region. And then we find that we've got three or  
9 four nitrate samples that are, say, ten times the drinking  
10 water standards. No biologist in their right mind will  
11 call that water anything but impaired. And this policy  
12 would not allow it to be listed because it meets no sample  
13 counts.

14                   The policy would refer you to this alternative data  
15 evaluation. And I think by way of making some  
16 constructive resolutions and specific suggestions we would  
17 alter language here so that Regions, Boards would not --  
18 they go here, and in a case like that, and there's  
19 probably not that many sentences here that would need to  
20 change to permit the application of rational science.

21                   CHAIRMAN BAGGETT: That is exactly what I was  
22 going to go to. I think people seem to be missing it.  
23 The first cut's the binomial. This is the second cut. So  
24 that makes it easy to list. I think in ten years, you go  
25 through that approach, it is easy. You listed those.

1 Then these others were set aside. The ones --

2 MR. PARADIES: One, one --

3 CHAIRMAN BAGGETT: Which is exactly why it is  
4 put in here, which is wide open. Have you looked at the  
5 bottom yet?

6 MR. PARADIES: It is why it is in there, but  
7 again I think --

8 CHAIRMAN BAGGETT: Outstanding national  
9 resource waters. State water quality protection areas.  
10 All those are just to make it simple. Whatever  
11 establish.

12 MR. PARADIES: Right.

13 CHAIRMAN BAGGETT: Whatever establishes --

14 MR. PARADIES: There is some language here  
15 that still concerns me. For example, just one example. I  
16 think there is three or four elements here.

17 Measurements can be analyzed using scientifically  
18 defensible procedure. That is good. And provides an  
19 equivalent level of confidence as the listing factors in  
20 Section 3.1 and tests the null hypothesis that water  
21 quality standards were attained. Testing all null  
22 hypotheses is not the only method of human reasoning.  
23 It's quite questionable in many applications. The example  
24 I gave you, which, by the way, is a real one, and I've got  
25 more samples like that that was done in the Central Coast

1 reasonably.

2 CHAIRMAN BAGGETT: Number four?

3 MR. PARADIES: You can't have the hypotheses  
4 and you can't have the same level of confidence by gosh  
5 where the sample comes. I can show you a lot of sites  
6 where that is the case, where you've got one water body  
7 that is listed and here, a half mile away, you finally got  
8 around to monitoring that water body and find that it has  
9 characteristics just like the other one. Why do I have to  
10 go sample?

11 CHAIRMAN BAGGETT: Dave, go to the bottom of  
12 the page.

13 MR. PARADIES: Okay. RWQB may use alternate  
14 exceedance frequency, if justified. Justification may  
15 include -- basically you can read that and say anything  
16 you want. I can read that way as long as you would go --  
17 refer to the last sentence in 3.1.11: At a minimum the  
18 justification must demonstrate.

19 And then I've got to fulfill those bullets. I don't  
20 get to that other paragraph until I fulfill these other  
21 bullets. If we modified the language in that top  
22 paragraph, I'd completely agree with you that this  
23 provides an outlet and mechanism for making sound --

24 CHAIRMAN BAGGETT: You will be providing  
25 language?

1 MR. PARADIES: We would be happy to do that.  
2 I think that this may even be just a case of unintended  
3 consequences in the drafting of the document. There's  
4 other places where we might see this as well. There is  
5 another place that says all samples taken in one day  
6 should be averaged and represented as one sample. There  
7 is a scientific difficulty with that for certain kinds of  
8 parameters.

9 One other good example would be dissolved oxygen. A  
10 characteristical problem with dissolved oxygen due to  
11 nutrients is that the oxygen is just screaming high in the  
12 daytime and crashes and burns just before dawn. If I take  
13 a really high number here and real low number here, and I  
14 average them, I got fish dying at noon from super  
15 saturation. I have fish dying at dawn because they can't  
16 breathe at all. And the site still passes the test. So  
17 again there is some nuance of language here and some of  
18 the overly specific things, with a few minor  
19 modifications, can -- the problems can probably be  
20 remedied.

21 But the bottom line is if a stream kills a variety  
22 of organisms and so on. When you've got six or seven  
23 things that are saying there is a problem here and you  
24 don't have a convenient hypotheses to test, then all this  
25 sample count debate doesn't mean very much.

1 I thank you.

2 THE COURT REPORTER: Would you put your name on  
3 the record, please.

4 MR. PARADIES: My name is Dave Paradies. I'm  
5 with the Bay Foundation of Morro Bay.

6 MR. BECKMAN: Good morning, Chairman Baggett,  
7 Board Member Sutley and Carlton. I'm David Beckman with  
8 the Natural Resources Defense Council. I am the last of  
9 the enviro PAG speakers this morning.

10 What I wanted to do is just mention a few more  
11 points that were not touched on by the speakers before me  
12 and then make a more general point about the problems with  
13 the policy. The exchange actually between Chairman  
14 Baggett and Dave Paradies is a good example of the  
15 problems. It would be wonderful if that simple piece on  
16 that page could be addressed, and we fix the problems with  
17 the policy as a whole. But the policy in the FED together  
18 are hundreds of pages and each page has similar problems,  
19 which doesn't mean that they are not correctable problems.  
20 But it means that the challenge is much more significant  
21 than a few lines here or a few lines there.

22 Sort of the thing about the comments you heard and  
23 the few additional examples I will provide I think is --  
24 poses a question to each of you. And the question  
25 fundamentally is: Is this policy -- has it become through

1 intention or through the process result strip, and is the  
2 result that the policy leads to, in many situations, the  
3 result that's the proper one for the state and the one  
4 that you, each of you as Board Members, want to approve?

5 Let me mention a few additional examples that feed  
6 into this issue of whether multiple alternatives in a  
7 given situation. This policy almost always reaches a  
8 conclusion which reinforces either not listing a dirty  
9 water body or providing some kind of escape, some kind of  
10 exit from the TMDL approach.

11 One example is the policy maintains and really puts  
12 into practice the enforceable programs, so-called  
13 enforceable programs exemption, which we talked about many  
14 times and still has all sorts of loopholes, still provides  
15 an open exit ramp that can be used in too many  
16 circumstances. I suggest to you that it's bad policy in  
17 addition to being totally inconsistent with 303(d), which  
18 requires a TMDL when certain existing technological  
19 approaches to cleaning up water have not been effective.  
20 It's a very simple question. You read through the 303(d)  
21 and it is pretty straightforward. This policy, however,  
22 will open up the door, and you will have Regional Boards  
23 swamped, no pun intended, by dischargers who say, "Look,  
24 there is an enforceable program." And at a minimum that  
25 is going to be a huge roadblock to the real important work

1 that the Regional Board staffs have to do.

2 Notwithstanding all the comments we've made about  
3 that, that program is still there. That's professional  
4 judgment as other speakers have touched on and others to  
5 follow may also touch on, including your Regional Boards,  
6 it's being severely limited, if not ruled entirely in many  
7 circumstances.

8 Why do you employ a thousand people or more at  
9 Regional Boards if you don't want their professional  
10 judgment? If, in fact, you don't want their professional  
11 judgment, then perhaps there is a much more thorough and  
12 effective kind of change you could make to listing water  
13 bodies. But there are certainly many circumstances that  
14 everybody could agree where best professional judgment is  
15 very important, whether it be permitting, whether it be  
16 identifying impaired water bodies. This policy seems to  
17 move far to the other extreme.

18 Bases of species is another example. That problem  
19 will not be addressed by the 303(d) list. Many  
20 alternatives that were proposed, but the one that was  
21 selected is not to deal with the issue.

22 Threatened water bodies. Perhaps this is another  
23 one of the more astounding examples clearly required by  
24 303(d) in the regulations. Right there, the plan text.

25 CHAIRMAN BAGGETT: It is not -- I guess I am

1 missing it. Right there on 3.1.1.

2 MR. BECKMAN: No, there are no --

3 CHAIRMAN BAGGETT: It is clear, there are  
4 significant water bodies. If the Regional Board says it  
5 is in an ASBS area, that automatically puts it into the  
6 whole --

7 MR. BECKMAN: Speaking of ASBSs, I am talking  
8 about the fact that 303(d) lists are supposed to include  
9 both impaired water bodies and those that are considered  
10 not to meet standards or may not meet standards in the  
11 future. In other words, those that may be cleaned out but  
12 degrading, those that may be approaching the quote-unquote  
13 impaired level. The whole theory that is so self-evident  
14 that you want to intervene if you can as a regulatory  
15 agency before the problem becomes bad, because it is  
16 easier to deal with.

17 CHAIRMAN BAGGETT: That is why we had a  
18 monitoring list once upon a time.

19 MR. BECKMAN: Right. That is true.

20 CHAIRMAN BAGGETT: You didn't want us to have  
21 a watch list. That was the original, the previous draft  
22 had a watch list which was exactly to address that  
23 concern.

24 MR. BECKMAN: The problem that we had with the  
25 watch list was not that we didn't -- I hope you didn't

1 believe that the environmental community wasn't interested  
2 in identifying waters that were degrading but not yet  
3 impaired. The problem there had to do with the fact that  
4 the 303(d) list is supposed to be a coherent list; it is  
5 not supposed to be a set of sublists.

6 The point I am trying to make, however, is simply  
7 that this policy does not require the listing. In fact,  
8 it provides for a series of hurdles for Regional Board to  
9 list a water body that it believes is threatened. This is  
10 not an area, I believe, that the Board has any discretion  
11 here. Threatened water bodies are supposed to be part of  
12 the 303(d) list.

13 Now sort of to have a broad or concluding point for  
14 our comments this morning.

15 The whole setup of this approach, including maybe  
16 probably, the null hypothesis that you're assuming the  
17 water bodies are clean and you want evidence that they are  
18 dirty, conflicts, I would argue, with the very premise of  
19 303(d), and the very situation that Congress dealt with in  
20 1972 and throughout the '70s and '80s in the Clean Water  
21 Act; and that it is that in 303(d) Congress assumed that  
22 notwithstanding efforts to clean up the nation's water  
23 bodies, there would nevertheless be circumstances in which  
24 those efforts were unsuccessful.

25 They assumed, I would contend, that water bodies

1 will be or could be dirty, to put it plainly.  
2 notwithstanding the efforts of Boards like yours. But  
3 what you are doing is flipping that assumption on its head  
4 in this policy. You are making the assumption that all of  
5 your efforts have been successful and, therefore, you only  
6 want to list when you have evidence to the contrary. But  
7 as I emphasized, that is exactly opposite of the way this  
8 regulatory approach works and the safety net role that the  
9 303(d) in particular plays.

10 So with putting aside the binomial issues and the  
11 statistical issues, all of which are very important, I am  
12 not suggesting you not pay attention to them, but just at  
13 a very basic level, I think its incumbent upon each of you  
14 to ask why are you making that kind of assumption in this  
15 program. This is a safety net program. This is not your  
16 first effort out of the box with multiple other approaches  
17 available to you if you are unsuccessful. It is the last.  
18 As we pointed out, you're adopting or could adopt, if you  
19 adopt this staff proposal, an approach which is 300 more  
20 times more likely or up to 300 more times more likely to  
21 result in not listing than in listing.

22 I have asked you if you were a board sitting in  
23 another endeavor of society, would that make sense? For  
24 example, if you were a board that was faced with approving  
25 or disapproving a medical device that was shown to be 300

1 more times likely to kill the patient than to save his or  
2 her life, would you approve that device? If you were  
3 regulating air transportation and there was a mechanical  
4 rule that was 300 times more likely to cause an airplane  
5 to crash than to land safely, would you approve that  
6 policy?

7           You can pose hypotheticals all day long along those  
8 lines, but I would argue that they are very germane to the  
9 question. Because your point of emphasis in terms of your  
10 regulatory jurisdiction is protecting clean water. That  
11 is sort of self-evident. Nevertheless, there's evidence  
12 that we are going to give to you in detail that this  
13 proposal, if you adopt it, really is far more likely to  
14 result in the failure of the programs you are  
15 administering than in its success. And for that reason  
16 alone it deserves to be rethought.

17           So by way of conclusion, I think that we would like  
18 -- we would hope that both the Board and staff,  
19 notwithstanding the effort that staff has put into this  
20 plan, would read the comments that we are going to provide  
21 and those that we've articulated today with an open mind.  
22 It is a very important endeavor, 303(d) list and the TMDL  
23 program, and there is a certain sense that we are  
24 beginning to get over the years when we culminate where we  
25 are today that perhaps, whether it is intended or not, the

1 institutional hurdles and the institutional requirements  
2 of dealing with this 303(d) list are seeping into judgment  
3 in a way that is causing a proposal to be floated which  
4 has the effect of reducing the 303(d) list and thereby  
5 making the bureaucratic effort necessary, less  
6 significant. It is really not the Board's role or the  
7 staff's role to worry about those things, although it may  
8 be human nature to have them affect one's work. But it is  
9 really at this point most important that the policy that  
10 is adopted work for California today and work for  
11 California in the future. And the implications of the  
12 policy should not be -- should not reverse engineer it to  
13 get to a point where you think you can manage a smaller  
14 number of water bodies on the list.

15 CHAIRMAN BAGGETT: I guess I fail to see how  
16 it does that.

17 MR. BECKMAN: The policy itself admits that it  
18 will actually reduce the number. I can point to the  
19 number of places in the FED. I can give you the citation.

20 CHAIRMAN BAGGETT: If you do the binomial  
21 approach, you may get through that. You've got the sample  
22 sizes. It is listed automatically if it meets the stats.  
23 If it doesn't meet the stats, it is not listed, then you  
24 still go to the whole alternative data evaluation. And  
25 the Regional Board who has the expertise in those

1 watersheds will be looking in setting the criteria. What  
2 kind of water body? Where does it flow into? If they see  
3 the sample size is like Dave or Alan mentioned, if you've  
4 got five samples of sediment, maybe it should be less than  
5 200 meters. I don't know. Spaced apart. You've got five  
6 samples, the NTUs, it's off the scale. Then they list it  
7 is. There is a lot of flexibility here, it seems to me.  
8 This is the first cut. Binomial, just to make it clean  
9 off the bat. Regardless of what happens next. Then you  
10 would go into the next -- you have all these alternatives.  
11 I guess that is what I'm really frustrated, where the lack  
12 of Regional Boards and I guess you-all feel there is a  
13 lack of alternatives.

14 MR. BECKMAN: Let me see if I can respond to  
15 that with two points.

16 CHAIRMAN BAGGETT: Maybe you need to change  
17 some language in there. I don't know. That is the way I  
18 read it.

19 MR. BECKMAN: We don't read it that way. Maybe  
20 it is a question of changing, but I think the way we read  
21 it is currently accurate. The alternative as you are  
22 referring to it is not unguided. It is not that if you  
23 think there is a problem, Regional Board, you're invested  
24 with the power to do something about it.

25 What it actually says is that you can put together,

1 you, Regional Board staff person, can, overburdened as he  
2 or she may be with work, can put together a significantly  
3 defensible alternative which has a procedure that provides  
4 an equivalent level of confidence as the listing factors  
5 in Section 4.2.

6 So what you are really saying is that the Regional  
7 Board cannot depart from the levels of confidence in other  
8 statistical measures and that they have to put together  
9 something that looks and feels and perhaps is an equally  
10 scientific and statistically valid approach. That's the  
11 problem. So the alternative that you're surmising is not  
12 correct --

13 CHAIRMAN BAGGETT: You have three toxicity  
14 hits on a mile of river in the matter of a one-month  
15 period, don't you think that that would qualify as a  
16 problem?

17 MR. PARADIES: It won't pass the hypotheses  
18 test.

19 MR. BECKMAN: It depends on the -- I think what  
20 you're saying, Chairman Baggett, is you agree it is a  
21 problem, and we do, too. But what we're saying is that  
22 the language that would have to be implemented doesn't  
23 provide the same flexibility as you're saying you want in  
24 the --

25 CHAIRMAN BAGGETT: I assume we'll get some

1 written comments on the language.

2 MR. BECKMAN: Right.

3 Let me make one other very brief point. I still  
4 don't think that you should accept a binomial approach  
5 that is riddled with errors simply because you have --  
6 even if you do fix and provide sort of a second approach,  
7 it would seem to me that the whole point of this effort is  
8 to have a more implementable, more consistent and  
9 efficient way to deal with the water bodies.

10 So if we don't fix that problem, we're not really  
11 going to be successful with this policy, because you are  
12 just going to be putting people always into that default  
13 position, which is going to be challenged and be subject  
14 to all sorts of review. And in the end you will end up  
15 maybe where we are now, where Regional Boards basically  
16 use their own judgment to do what is best. That judgment  
17 needs to be preserved. Certainly we are not opposed to  
18 making it more regularized and consistent.

19 CHAIRMAN BAGGETT: One last question. The  
20 last listing cycle, and I had four full days in this room.  
21 We added, what, 200 water bodies, us and USEPA, was about  
22 200, we went from 16 to 18, roughly, something like that.

23 MR. LEVY: That is correct.

24 CHAIRMAN BAGGETT: It seems like that wasn't  
25 -- everybody -- we didn't seem to get a lot of argument.

1 We certainly didn't get any litigation or EPA didn't cover  
2 that. So I guess you don't see -- so you are actually --  
3 where the state listed so many of the major impairments.  
4 All the North Coast streams are listed already for  
5 sediment and temperature. We can't -- I guess the Smith,  
6 have one exception. It seems to me you are going to have  
7 a diminishing number anyway.

8 MR. BECKMAN: Hopefully. And that is --

9 CHAIRMAN BAGGETT: Hopefully. We've already  
10 identified the really bad actors. We are down to where we  
11 are making these fine cuts.

12 MR. BECKMAN: There is two things to say about  
13 that. First, it is not -- I don't think it is clear that  
14 we've identified the bad actors. The whole SWAMP process  
15 which has buy-in from all stakeholders around the table  
16 shows that the state monitors only a small portion of its  
17 water bodies. That is number one.

18 Number two, by your own decision or by the urging of  
19 other parties, there could be some pressure brought to  
20 reevaluate the entire list, including the bad actors that  
21 you have identified under an approach that, which we've  
22 just -- we will show in our comments we've articulated  
23 today, will remove a lot of the water bodies. That is the  
24 problem.

25 Notwithstanding the list as it exists today, this is

1 still significant.

2 MEMBER SUTLEY: I think a comment and a  
3 question. I think I agree with you that if there is a  
4 problem with the binomial method, it's just the fact that  
5 there is at least an attempt to put an off-ramp shouldn't  
6 overcome -- shouldn't be enough to overcome the problem  
7 with the binomial method. I will be very interested to  
8 see not only your comments on the statistical method, but  
9 the staff response to that. If we have a problem with it  
10 with respect to even the hypothesis and the measurement,  
11 and I will -- this is all reminding me of my graduate  
12 school statistics classes which were not my favorite,  
13 anyway.

14 But it seems to me that based on my experience  
15 in the environmental agencies and, in fact, with setting  
16 standards that the way that you measure standards -- the  
17 way that you measure is a part of the standard as much as  
18 the actual data. So it is important that we get this  
19 right. But I guess my question for you is: It seems to  
20 me that, and this is the first time I'm going through this  
21 process, through the listing process at all, that a lot of  
22 concern, instead of being generated by the consequence of  
23 being listed and then what happens after that, and I  
24 thought I heard you say that that wasn't the purpose of  
25 the 303(d) list. In a sense we can't correct those

1 problems or those issues in this policy.

2 Did I understand --

3 MR. BECKMAN: Not exactly. I guess my point  
4 may have been not well articulated. I was trying to  
5 indicate that the policy should be analyzed by whether it  
6 identifies impaired water bodies, not by whether there are  
7 so many of those that the state and the folks who work for  
8 the state are going to have a difficult time in dealing  
9 with that large number, and that I was afraid that  
10 intentionally or unintentionally that the concern over  
11 workload, that is significant, was infiltrating into how  
12 to do this testing is put together.

13 But to address your concern, and certainly we are  
14 aware having sat through the PAG meetings, we started out,  
15 actually, with perhaps that being one of the most  
16 significant issues that the regulated community was  
17 raising, although they will speak for themselves I am  
18 sure. But we heard a lot of concerns about, well, we are  
19 going to be on the list, this is going to mean that we are  
20 not going to be able to expand, and it could be erroneous,  
21 and we think the Regional Boards picked our impairment out  
22 of a hat one day in 1972, and it is no longer valid.

23 The truth of the matter is, though, that those  
24 apocryphal stories have not been demonstrated over the  
25 last three years to be true, number one. Number two,

1 since the '98-99 period of time when the large list that  
2 you just added to was put in place, a number of legal  
3 decisions, including ones by this Board, Tosco and others,  
4 that have minimized the immediate impacts of listing.  
5 There is no -- frankly, we don't agree with it, but  
6 practically speaking being on the list does not mean that  
7 your permit gets altered or that you are required not to  
8 discharge immediately. So I think, practically speaking,  
9 that being on the list is not -- it has far less  
10 consequences to the regulated entity on the list than not  
11 being on the list has to the environment, the broader  
12 economy and the interest the public has in those water  
13 bodies.

14 In our comments, if you're interested, we can  
15 provide some of those citations about how this Board has  
16 dealt with that issue.

17 Thank you.

18 CHAIRMAN BAGGETT: Thank you.

19 Peter Kozelka.

20 MR. KOZELKA: Peter Kozelka, EPA Region 9. I  
21 work in the water division, in the TMDL monitoring  
22 assessment unit. Speaking on behalf of Dave Smith and  
23 Alexa Strauss who are unable to be here.

24 As you know, EPA reviewed the policy several times,  
25 and we will be providing written comments before the close

1 of the comment period. And as you also know, EPA actually  
2 doesn't, according to federal regulations, approve each  
3 state's assessment methodology, rather we review and  
4 approve or disapprove a state's decisions, i.e., the  
5 303(d) list that is submitted.

6 As you all are aware, in the past EPA has partially  
7 disapproved the 303(d) list submitted by California and  
8 added impaired waters. Direct words from Alexa Strauss,  
9 we would like to minimize that effort as much as possible.  
10 I think it is in the interest of the state as well as EPA.

11 Based on our interpretation of the policy, we find  
12 serious inconsistencies with the existing state standards  
13 as well as federal regulations. I will get into those in  
14 a minute. I don't want to belabor some of them that have  
15 already been pretty well laid out. But as you also heard,  
16 there is some parts of this policy that are relatively  
17 clear and there are some parts that are not so clear. So  
18 it is hard for us to make definitive stance to say that a  
19 state lists submitted based on this policy would  
20 dramatically conflict with one that we would review. In  
21 some ways we think the alternative data evaluation, which  
22 is probably more appropriately called the weight of  
23 evidence approach, could save the day, and there are  
24 states that have that in there, and it does make a  
25 dramatic difference.

1           There are some good aspects of the policy. Let me  
2 get to those. We appreciate the fact that the state has  
3 gotten into the idea of interpreting unconventional data,  
4 biological information, sediment tissue, et cetera. And  
5 it supports the translation of narrative objectives into  
6 numerical criteria or guidelines for assessments. It does  
7 provide some or attempts to provide some clear assessment  
8 criteria. And we believe that should be the goal of the  
9 policy to streamline assessments as well as to provide  
10 greater consistency across the Board.

11           Regarding the major inconsistencies with existing  
12 state standards and federal regulations, toxics is  
13 certainly number one. The California Toxics Rule has  
14 clearly explained that it is part of the Basin Plan  
15 objectives. It is a federal regulation, and currently the  
16 policy allows too many exceedances as explained in the  
17 policy.

18           Conventional and other parameters. It seems to  
19 imply that a 10 percent exceedance is where you are going  
20 to go with this. And in my review of Basin Plans, only  
21 Regional Board 9 actually allows that for certain  
22 conventionals: nitrates, TDS and a variety of other  
23 things. The only other area that seems to imply that a 10  
24 percent is allowed in the existing standards is in the  
25 bacterial monthly mean standard. But both of those, the

1       conventionals as well as the bacterial, often have single  
2       sample maximum criteria, and those would not be addressed  
3       according to this particular binomial approach. So there  
4       is an inconsistency there with the existing state  
5       standards.

6                Toxicity. Most Basin Plans actually state no toxics  
7       in toxic amounts or no toxicity whatsoever. We find there  
8       is an inconsistency there. There is a provision which  
9       hasn't been talked about yet called natural source  
10      exclusions, and those are not provided in any of the state  
11      standards. So regarding natural source exclusions, which  
12      we think we could go with you on that one, as long as it  
13      is clearly documented that it is all related to natural  
14      source, this is actually considered to be a water quality  
15      revision and you'd actually have to provide it, and review  
16      it under 303(c), not as part of the existing policy. That  
17      is -- I think we can work with you, but it may have to go  
18      through a different route, a different revision, to tell  
19      you the truth.

20               Minimum sample sizes. EPA does not advocate use of  
21      the use of minimum sample sizes. We believe there is no  
22      basis for high sample sizes or excursion frequencies if  
23      any sample sizes are not met.

24               Data quality requirements. The policy seems to say  
25      that you need to have a quality assurance project plan or

1 equivalent. We would like a definition on equivalent.  
2 And federal regulations say that essentially all data  
3 information shall be considered. We would offer the fact  
4 that if you feel that you have more confidence, that you  
5 could provide more weight to that which you consider to be  
6 better data than other data, but you can't absolutely  
7 exclude data whatsoever.

8           Some other key concerns of this whole weighted  
9 evidence approach. I think that that is not meant to be  
10 the solution to be it here. The FED has laid out  
11 essentially some options with the weight of evidence  
12 approach, but I think there should be some more clear  
13 protocols, essentially sort of a decision tree that could  
14 be laid. There are plenty of examples that exist in other  
15 states' assessment methodologies that this state can start  
16 off with, and we would be happy to provide you with.

17           There is some vague assessment methods related to  
18 nuisance and nutrients. And the nuisance essentially  
19 refers to trash and algae and odors and that sort of  
20 stuff. We would appreciate dramatically more clear  
21 information there. As you know, trash are not small TMDL  
22 issues in any state. There are no clear sediment  
23 guideline or metrics numeric values. There is discussion  
24 of them, but there is not, like, well, if we have this  
25 value, we consider an exceedance. Do the best you can and

1 go after it. People have been doing Oregon and Washington  
2 already.

3 The issue of priority setting and scheduling is  
4 simply something that could be resolved with a few  
5 clarifying information. Let me provide a little bit of  
6 perspective here.

7 Arizona came forward with a proposed policy. It  
8 looks somewhat like this. We made some comments, and they  
9 made some revisions. They made some revisions that  
10 essentially excluded some -- that provided for exclusions  
11 related to toxics. It simply says, regardless of sample  
12 size, if there is more than one exceedance in a three  
13 consecutive year period, we will list. It also does the  
14 same thing for nitrate and also does the same thing for  
15 bacteria. And those are to be consistent with their  
16 standards. So that is the sort of change that I think  
17 that could be made, and I'm not saying that that is the  
18 easiest language to put in there and is not meant to take  
19 anything away from the consistency approach that we are  
20 trying to advocate to you. But we are promoting the idea  
21 of getting things to be close to the standards. Otherwise  
22 it becomes this revision change.

23 So, in conclusion, the proposed policy, as far as we  
24 can tell, would likely yield state listing decisions that  
25 are inconsistent with standards and federal listing

1 requirements and that would trigger disapprovals by us and  
2 could, yet to be determined, result in significant  
3 additions by EPA.

4 As far as recommendations, I think there are some  
5 fixes regarding those five or six elements mentioned  
6 above. We strongly suggest the idea of improving the  
7 weight of evidence approach. We believe there is some  
8 clarifying procedures for the nutrient, sediment,  
9 nuisance, et cetera.

10 And then, finally, we ask that the revised policy,  
11 once approved by you-all, should start to be addressed to  
12 waters that are currently on the list as well as to ensure  
13 the list to be accurate.

14 I guess that's it.

15 MEMBER SUTLEY: Just a question. In your  
16 recommendations you talk about improving the weight of  
17 evidence. But if I understood your comments with respect  
18 to the inconsistency with state standards, that is a  
19 different problem that you wouldn't necessarily solve by  
20 changing -- making changes to the weight of evidence?

21 MR. KOZELKA: Correct.

22 MEMBER SUTLEY: Your recommendation is to take  
23 a look at actual statistical models and ensure that it  
24 doesn't yield results that are inconsistent with water  
25 quality standards.

1 Am I understanding you correctly?

2 MR. KOZELKA: If the statistical model happens  
3 to coincide with state standards, then you can go forward.  
4 There are clear examples where it doesn't, and that is  
5 where we think we can offer some.

6 MEMBER SUTLEY: That is the toxics --

7 MR. KOZELKA: Bacteria.

8 MEMBER SUTLEY: And others. And your written  
9 comments will go into that in more detail?

10 MR. KOZELKA: Sure, sure. The weight of  
11 evidence is another item. It is not meant to address  
12 those issues, but it is still important.

13 CHAIRMAN BAGGETT: Thank you.

14 I think we will take a five-minute break. We have  
15 about nine more cards. We will go straight through and  
16 not break for lunch, then.

17 Take five.

18 (Break taken.)

19 CHAIRMAN BAGGETT: Resume. We will start back  
20 out with Tom Herman, and then Valerie. Heads up so we can  
21 be ready.

22 MR. HERMAN: Good morning, Members of the  
23 Board. My name is Tom Herman. I am an attorney from  
24 Eureka, California. I am here today representing one of  
25 my clients, the Soper Wheeler Company that is a

1 nonindustrial California timber landowner.

2 They've long been interested in the 303(d) list and  
3 the TMDL process. And I have just given the clerk my  
4 written comments, so I won't belabor you with all those  
5 details and just try to give you some general summary.

6 Certainly, we are happy to see efforts towards a  
7 listing policy. We, too, support statewide consistency.  
8 We think it is necessary for effective and appropriate  
9 protection of our state's waters. I think when we look at  
10 the listing process, I think it is important for you folks  
11 to keep in mind the cost associated with a listing. Not  
12 only does it require a substantial expenditure of public  
13 funds, but listing in either directly or indirectly  
14 results in significant reductions in land management  
15 productivity and reductions in land value of watersheds of  
16 these listed water bodies.

17 I think it is also important for you to keep in mind  
18 the insurmountable number of water bodies currently listed  
19 in the state of California and scheduled for expenditure  
20 of these funds and impacts on lands, and tie that together  
21 with the budget shortages that we have in California. I  
22 think these factors together dictate to you policy makers  
23 to make reasonable decisions on behalf of our citizens.  
24 And we think that those all contribute to you supporting a  
25 policy that assures that no water body is listed

1 unnecessarily. We support a policy that puts the  
2 discretion -- really, the question here is: Who is going  
3 to be judge of whether these bodies should be listed or  
4 not? We would like that discretion closer to the top.  
5 Closer to the top where policy makers are subject to  
6 scrutiny by the public, closer to the -- or affected by  
7 the will of the public when they exercise their votes. We  
8 would support a policy that would result in the listing of  
9 only those water bodies where there is credible scientific  
10 evidence that water quality is impaired by humans, and  
11 where implementation of control measures is feasible to  
12 achieve actual remedial results.

13 To that end we urge you to consider the weight of  
14 evidence standard that is discussed in your policy, and we  
15 would hope that the weight of that evidence would or the  
16 evidence standard you would apply would be more like a  
17 clear and convincing level of evidence before a water body  
18 would be listed. We just can't support scheduling 30 or  
19 40 years of bureaucratic efforts to fix water bodies when  
20 in five or six years the policies will probably change and  
21 we will have our priorities in another area. Let's focus  
22 our attention on where we can get the most bang for our  
23 dollar.

24 We are particularly concerned about the  
25 interpretation of narrative standards and the adoption of

1 thresholds of concern without a notice and opportunity to  
2 be heard by the public. We would support numerical  
3 criteria wherever it is possible, and we'd rather see  
4 discretion exercised by the Board and not the staff.

5 An example of thresholds adopted that I think is  
6 particularly egregious and it is even mentioned in your  
7 policy document was in the area of sediment. Some of the  
8 Boards adopted a percentage for a V star metric, and they  
9 cite right in the literature that is available for this  
10 hearing that they had two studies they used to establish  
11 their threshold. One study found in 60 watersheds  
12 calculated that a V star less than 21 percent represented  
13 good stream condition. Sixty, a population of 60 resulted  
14 in a mean of 21 percent. Another study several years  
15 later sampled one water body and found a V star value of 9  
16 percent. So staff decided, well, we've got 21 and nine  
17 The average of that is 15. We will use 15.

18 Well, I think even a sixth grader would see the  
19 mathematical error in that kind of calculation, and if the  
20 public has an opportunity to participate in the  
21 establishment of these thresholds, I think these kind of  
22 silly errors would not emerge. We certainly support the  
23 policy that listings not be based on natural conditions.  
24 We have long urged that, and we certainly urge you to  
25 recognize the natural range of watershed dynamics and not

1 list watersheds where the evidence shows that we are  
2 within that range particularly with respect to pollutants  
3 such as sediment and temperature that are really a part of  
4 the ecosystem and far beyond any reasonable human control.

5 I think that with those comments, I provided  
6 specific comments on the text of the policy and my written  
7 document, and with that I would just say thank you.

8 CHAIRMAN BAGGETT: Thank you.

9 Craig Johns and then Valerie.

10 MR. JOHNS: Thank you, Mr. Chair and Members of  
11 the Board. My name is Craig Johns. For the record, I am  
12 here on behalf of California Manufacturers and Technology  
13 Association, 980 Ninth Street, Suite 2200, in Sacramento.

14 I would like to say, first of all, that I am  
15 surprised actually not to hear from my colleagues and  
16 friends on the environmental side, recognizing even though  
17 they may disagree with some of the results of the policy,  
18 some of the very hard work by Craig Wilson and his staff  
19 along with the many others at the State Board and Tom  
20 Howard and Celeste Cantu, Stan Martinson and Mike Levy, of  
21 course. This has been a three-year process, as you all  
22 know, having sat through many of our PAG meetings. It's  
23 been an interesting process along the way, and I've  
24 enjoyed getting to know and working with David Beckman and  
25 Linda Sheehan, David Paradies and others on the

1 environmental caucus. And even though we don't agree on  
2 everything, I think one thing that we do agree on is we  
3 need a policy that somehow makes more consistent the  
4 approach that we are going about listing waters in the  
5 state.

6 One of the things that this policy does that we  
7 support very strongly is begrudging at an attempt, anyway,  
8 of providing reasonable and objective approach to doing  
9 that. Clearly I don't need to remind you that the choices  
10 that you will be facing in the next several months are  
11 very difficult policy choices, some of which David and  
12 Linda mentioned. But clearly, I think and the regulated  
13 caucus presented a letter on this back in September. All  
14 of the aspects and elements of the current draft, even  
15 though we disagree with some of the elements, and I am  
16 talking about just a couple of those, are clearly  
17 supported by the law, and we can provide many citations to  
18 that. I want to touch on one of the questions that Ms.  
19 Sutley asked a moment ago regarding the binomial method  
20 and the impact of whether that was a water quality  
21 standard change.

22 The positive aspects of this policy that we strongly  
23 support include the requirements for specific data quality  
24 and quantity. And on that point I noted that Mr. Kozelka  
25 from EPA stated in his comments, and I was confused by

1 this, frankly, that the EPA has never supported or  
2 advocated minimum data requirements. The reason I am  
3 confused is because the 200-, I believe 2002 CALM guidance  
4 says EPA encourages states, territories and interstate  
5 commissions, et cetera, to use data quality objectives,  
6 processes to define minimum quality data requirements,  
7 including information on appropriate sample size and  
8 monitoring design.

9 So clearly EPA headquarters recognizes the need for  
10 this, and we would support the staff's move in this  
11 direction. We also support strongly the requirements for  
12 consistent and valid data evaluations and the strong move  
13 towards more elaborate, public and stakeholder  
14 involvement.

15 A couple items I want to bring to your attention. I  
16 will be leaving them with staff, a copy of a letter  
17 detailing these in a little bit more from Jack Stewart at  
18 CMTA. Just three minor points. That we still have some  
19 concerns about policy with an overarching concept behind  
20 these comments, that's something that the Chairman  
21 mentioned at the 2002 hearings on the 2002 revisions. And  
22 that is that we are faced with a critical situation of  
23 having way more work. We meaning collectively the Boards,  
24 the Regional Boards, the State Board and the interested  
25 stakeholders that deal with the watersheds, way more work

1 on water quality issues with dwindling resources,  
2 particularly at the state side, as you well know. And we  
3 need to find a better way to triage the important water  
4 quality challenges that are facing all of us.

5 We think that much of the policy that is presented  
6 goes that way. We have a couple of suggestions for  
7 improving it still a little bit more. The first one is  
8 the review criteria for existing 303(d) listings in  
9 Section 6.1. The July administrative draft, for lack of a  
10 better way to refer to it, set forth a specified process  
11 for reviewing the historical listings, and this December  
12 draft took that out of the current criteria for review of  
13 only new data or information, which to us makes no logical  
14 sense given that we all know and heard at many of the PAG  
15 meetings that many historical listings are based on little  
16 or no data that we can find or that have some credibility  
17 questions, often for convenience and even to secure EPA  
18 grant money.

19 We would urge the State Board to put something back  
20 into the policy, I believe EPA supports this concept, that  
21 would allow for a review of these historical listings,  
22 using the final policy that you will finally adopt. And  
23 ultimately this is the only way we can go back and confirm  
24 that those historical listings are legitimate. One middle  
25 ground, if I might, might be that if an individual or an

1 entity wishes to require or request a review, the burden  
2 will be on them to request it in writing and maybe showing  
3 that the burden that they have to show that under the new  
4 policy the listing might change to diminish the staff  
5 resource allocation.

6 CHAIRMAN BAGGETT: That is obviously one of  
7 the big challenges.

8 MR. JOHNS: We would agree. And that is why  
9 we think that to the extent that the party believes that  
10 there might be a questionable listing, the burden should  
11 fall on them to bring forth adequate information for the  
12 Regional Board to consider.

13 MEMBER SUTLEY: Craig, can I just ask on that  
14 issue?

15 MR. JOHNS: Please.

16 MEMBER SUTLEY: You said you thought that  
17 there were a lot of historical listings that were based on  
18 less than evidence. Do you or does anybody who has been a  
19 part of some of these discussions have a sense of -- maybe  
20 have some data or some way of quantifying exactly how many  
21 of those that are problematic?

22 MR. JOHNS: I don't know if we have  
23 quantifiable -- if we can quantify the exact number. I  
24 know in the PAG discussions we were presented with  
25 information from folk members of the PAG, and I believe

1 Ms. Dunham is here today. She might be able to speak to  
2 that, about efforts to go into Regional Board offices to  
3 find the files that substantiated or justified the basis  
4 for some of the historical listings and found very little  
5 or nothing in those files. I don't believe that those are  
6 significant or substantial, and I don't think that this  
7 would be an inordinate burden.

8 The other point, perhaps, you also are referring to  
9 is we also heard from staff at the State Board during PAG  
10 meetings that before there was any real consequence, if  
11 you will, to adding waters to the list, there was actually  
12 a benefit, if you will, because adding more waters carried  
13 with it additional grant money from EPA. So that is  
14 something I think that is justified in at least looking  
15 at.

16 Continuing on, then, with just two more minor  
17 points. The consolidation of lists. In the July draft  
18 there were several lists, as was pointed out earlier by  
19 Chairman Baggett, which drew varied objections from the  
20 environmental and regulated caucuses. I think there were  
21 eight in total. Our view is that by maintaining a single  
22 list there will be many listings that will continue to be  
23 made with limited or questionable data or information,  
24 particularly with some of the sort of fallback provisions  
25 that has gotten some attention here. We think that there

1 is a very good reason to have a planning or monitoring or  
2 watch list, whatever is the appropriate term for it that  
3 you would like to come up with. So if there is some  
4 evidence that there may be an impairment but not enough to  
5 get past the binomial approach or get past the alternative  
6 data evaluation section, at least we all know that we are  
7 watching that. We can spend some additional resources to  
8 find out if the problem truly exists.

9 I wanted to point out also that the NASA report  
10 strongly supports this approach as a means by which to  
11 better triage and make good decisions on listing and  
12 expenditure of money.

13 One of the points that Ms. Sutley brought up through  
14 a question I believe, and I can't remember to whom, but  
15 the issue was your concern, Ms. Sutley, with regard to  
16 binomial approach, as to whether or not it might actually  
17 be a revision of water quality standards. I think it  
18 should be pointed out, and I know Mr. Levy from the Office  
19 of Chief Counsel, has read the decision that came out last  
20 May and the challenge of environmental groups to the  
21 Florida rule where the District Court ruled that, in fact,  
22 that policy which I think that the State Board staff would  
23 agree this one is based on, started on, the binomial  
24 approach, the statistical method, is not a revision of  
25 water quality standards. It is just an approach to try to

1 determine whether or not there is a minimum data set that  
2 has been reached to actually render a listing. I would  
3 encourage perhaps Mr. Levy to provide that information if  
4 you are interested, and we can certainly do that as well.

5 With that, I will conclude and just say thank you  
6 for the opportunity to comment. Be happy to answer any  
7 more questions. I will leave with staff a copy of  
8 Mr. Stewart's letter.

9 CHAIRMAN BAGGETT: Thank you.

10 Valerie and then Tess.

11 MS. NERA: Good morning. Valerie Nera for the  
12 California Chamber of Commerce. We are at 2715 K Street  
13 here in Sacramento.

14 In general we support the comments made by Mr. Johns  
15 on behalf of CMTA. And we definitely support the State  
16 Board's goal in establishing a standardized approach for  
17 assigning water bodies to the state's 303(d) list. We  
18 have a particular concern with previous 303(d) listings.  
19 We find that there are companies working in an area where  
20 the water bodies have been listed can be severely  
21 restricted in what they may discharge. So for us going  
22 back and looking at those lists again and being really  
23 sure that these water bodies are, indeed, impaired is of  
24 great importance.

25 We find that once a body is listed, even though it

1 may come of a list at some point, there is a public  
2 perception that this water in this area is impaired and is  
3 not a good place to do business.

4 So that is our particular concern with this, and  
5 those are my brief comments.

6 CHAIRMAN BAGGETT: Thank you.

7 Tess and then Sharon Green.

8 MS. DUNHAM: Thank you. Tess Dunham here today  
9 on behalf of the California Coalition for Clean Water.

10 The California Coalition is a newly formed informal  
11 association, and it was formed to start addressing some  
12 issues related to the state's water quality program and  
13 particular the state's implementation of water quality  
14 standards. And to that end I want to focus a little bit  
15 on the standards issue in relation to the TMDL list.

16 And I think what we'd first like to point out  
17 is the listing process and the policy itself. What it  
18 really fails to do, of course, is address the fundamental  
19 issue we have with water quality standards in the state of  
20 California and the fact that many of the standards that  
21 currently the listings are being based upon are  
22 inappropriate. They have been adopted 30 years ago  
23 without going through the proper process. They are being  
24 interpreted far beyond to the level that they were ever  
25 intended to be interpreted. And, of course, a lot of this

1 has been documented in two recent reviews of Basin Plans,  
2 one for the Los Angeles region and one for the Central  
3 Valley Basin.

4 Second, we'd also like to point out that again to  
5 that end the policy does allow what we would consider the  
6 inappropriate interpretation of narrative standards  
7 through the health advisory and some of the  
8 bioaccumulation. And again, these are unadapted water  
9 quality criteria. They should not be the basis for  
10 listings under any 303(d) listing policy.

11 We would also like to point out that through the  
12 reevaluation process, because of the inadequacy of many of  
13 the standards that are currently in place in California,  
14 there must be provisions within the reevaluation that does  
15 allow a revision of a listing based upon whether the  
16 standard is appropriate or not. Of course, the person  
17 requesting that needs to make some type of a good faith  
18 performance to put forward that it is an inappropriate  
19 standard.

20 And I am the Ms. Dunham that Craig mentioned just a  
21 few minutes ago with regards to the adequacy of data  
22 within the listing process. And what we found back in  
23 1998 in my previous life at the California Farm Bureau, we  
24 had some of our members go through and request the files  
25 related to specific TMDL listings throughout the state.

1 And a number of our members, after making these requests,  
2 went into the Regional Boards, and as the Regional Boards  
3 pulled out the file for that listing, the file was either  
4 empty, nothing in there or there was one page of  
5 handwritten notes. This obviously was not the case for  
6 all TMDL listings, and, in fact, I would say the 2002  
7 listing process was greatly improved in trying to cert  
8 documents, some of that. It does go to show that there  
9 has been in some cases no data or at least within the  
10 Regional Boards' files to substantiate listing, and  
11 because the standards in many cases have been adopted  
12 improperly and are not appropriate, that is what calls  
13 into the need for strict data provisions within this  
14 listing policy. If we were all confident that the  
15 standards in place were appropriate, had been done  
16 correctly, had been done pursuant to Porter-Cologne, we  
17 probably would not need to go to the level of data  
18 requirements that we are looking for in this policy.

19 Thank you.

20 CHAIRMAN BAGGETT: Thank you, Tess.

21 Sharon Green and Steve Arita.

22 MS. GREEN: Well, I guess I can still say, good  
23 morning, Mr. Chairman and Members of the Board and staff.  
24 I am Sharon Green. I am here today on behalf of the  
25 California Association of Sanitation Agencies and Tri-TAC,

1 a statewide advisory group for publicly owned treatment  
2 works. The address for CASA is 915 L Street, Suite 1400,  
3 Sacramento.

4 I will endorse the comment of Mr. Johns and Ms.  
5 Dunham and several other people. I'll just be brief and  
6 summarize our points. We will be submitting comments in  
7 writing by the deadline. I would also just like to  
8 mention I'm here basically on behalf of Bobbi Larson. She  
9 is out sick today, unfortunately. I don't pretend to fill  
10 her shoes.

11 But in any case, we strongly support the goal of  
12 establishing a standardized approach for assigning water  
13 bodies to the state's 303(d) list, and we endorse the  
14 inclusion of the requirements for data quantity and  
15 quality, the requirements for a consistent and  
16 statistically valid data evaluation methodology and some  
17 of the implementation provisions.

18 I guess if I could summarize, one thing I would say  
19 to you is don't back away from this just because it's too  
20 hard. I think it underlies some of the comments you have  
21 heard today, is that this may be too hard to do. And I  
22 just encourage you to do what we think is the right thing.  
23 I think we see a need for more rigor in the process. I  
24 think some other speakers have mentioned the fact. Tess  
25 certainly mentioned that there have been listings in the

1 past that haven't had rigor applied to them, a rigorous  
2 approach applied in terms of what data were used or what  
3 the decision criteria really were. And I think that that  
4 is necessary to account for the variability in water  
5 quality, and basically to capture the real world  
6 complexities when you start going out and monitoring it.

7 One other thing that I wanted to point out that not  
8 many other speakers have touched upon is that we strongly  
9 support the transparent process that I think is being set  
10 forth in the document and that, through the fact sheets  
11 and documentation being required for listings in the  
12 future, and we support public access to the supporting  
13 data. And I think that is something that just about  
14 everybody should be in agreement on.

15 Just to touch on a couple of brief points. That I  
16 agree with Mr. Johns that the -- in this version of the  
17 policy you seem to be moving away from the more integrated  
18 water quality assessment report and from the multiple  
19 lists. We didn't think that the July draft was  
20 necessarily perfect, but we did think it was a good  
21 approach. It allows people to figure out what categories  
22 of waters we have and where they really belong, get a  
23 better picture of what's really happening, where you  
24 already have a TMDL, calling that out, and where you have  
25 an enforceable program in place, you would be calling that

1 out and not including it on the 303(d) list and requiring  
2 a TMDL for those.

3 As part of that, we also strongly support what you  
4 did in 2002 in establishing a planning or monitoring list,  
5 and I think that is a good way to address those water  
6 bodies where we need more information and need to be able  
7 to keep track of them and move forward on them, and not  
8 just ignore them. And by dropping them out of this sort  
9 of official process it is, I think, more likely that they  
10 may not get the attention that they need and deserve.

11 And finally, I would commend the Board for providing  
12 a mechanism for reevaluating water bodies that were on  
13 previous lists through the new policy criteria. But I  
14 would echo Mr. Johns' request that you broadened it just a  
15 little bit and allow interested parties to request a  
16 reevaluation even if new data and information aren't  
17 necessarily available. I think that would just highlight  
18 this point that there may be some existing listings. I  
19 don't know -- Ms. Sutley asked how many of these do we  
20 think there are. I don't know if anybody had a  
21 comprehensive notion of that. If anybody does, I would  
22 suppose it would be your staff. But Craig is shaking his  
23 head. But I do think that there are some that would merit  
24 a reevaluation, and putting that criteria on it will  
25 possibly preclude a more consistent approach to listing

1 and TMDL development.

2 Thank you very much.

3 CHAIRMAN BAGGETT: Thank you, Sharon.

4 Steven, and then Karen Ashby.

5 MR. ARITA: Chairman Baggett, Members of the  
6 Board. For the record, my name is Steven Arita, Western  
7 States Petroleum Association, 1415 L Street, Suite 600,  
8 Sacramento 95814.

9 On behalf of WSPA we too would like to express our  
10 appreciation for the Board's commitment to developing a  
11 standardized process for assigning water bodies to the  
12 303(d) list. Clearly this draft policy is very important  
13 towards ensuring that the State Board is able to do, based  
14 on their limited resources, identify those water bodies  
15 that clearly need to be of highest priority and need to be  
16 addressed and rectified immediately.

17 As we stated in the past, we can't stress enough the  
18 importance of data quality analysis. In that regard we do  
19 support staff's recommendation for their weight of  
20 evidence approach. And further to that earlier you heard  
21 comments from Mr. Mumley. We also do support his  
22 suggestions for additional information, weight of evidence  
23 process if that could be included as well into the draft  
24 policy.

25 We do have some issues of concern with the draft

1 policy, but I will just focus on two, two of them, and we  
2 will be submitting written comments.

3 As you heard from other speakers, we do not support  
4 the removal of the planning lists from the draft policy.  
5 Clearly, there currently exists several hundred water  
6 bodies out there that are listed based on questionable  
7 data, lack of data or no data. And certainly a planning  
8 list will provide the opportunity to look at those water  
9 bodies, questionable water bodies, and provide additional  
10 information, monitoring data, that is necessary to  
11 determine, in fact, whether they should be listed on the  
12 303(d) list.

13 If I may, you've heard comments from other speakers,  
14 concerns about water bodies that are threatened or water  
15 bodies that are being degraded, but yet might not be quite  
16 in terms of being listed. We certainly share those same  
17 concerns. And certainly you have had some discussions  
18 with some of the speakers about those issues. It only  
19 illustrates the point that and supports the point quite  
20 frankly that a planning list should be reinstated back  
21 into the policy. Clearly we understand and are very  
22 sensitive to the fact that resources and budgetary  
23 constraints that Water Board faces today are very  
24 important and that those create a stress in terms of  
25 addressing these water bodies. However, I would suggest

1 that from a long-term perspective I don't think we can  
2 afford not to look at having water bodies through a  
3 categorized process. So again we would urge that a  
4 planning list be reincorporated back into the draft  
5 policy.

6 Secondly, we urge the Board to allocate what  
7 available resources they have to reassess the water bodies  
8 in the previous 303(d) listings. Again, we do understand  
9 that there are limited resources and budgetary challenges.  
10 However, such a reassessment will again in the long term  
11 help the Water Board to better prioritize, manage and  
12 allocate their limited resources to those water bodies in  
13 need of immediate actions.

14 Again, we will be providing additional comments and  
15 appreciate the opportunity to provide these comments.

16 Thank you.

17 CHAIRMAN BAGGETT: Thank you.

18 Karen Ashby, and then Bob Lucas.

19 MS. ASHBY: I think I can officially say good  
20 afternoon; it's ten past noon. My name is Karen Ashby. I  
21 am here today in my capacity as chair of the California  
22 Storm Water Quality Association. My address is 707 Fourth  
23 Street, Suite 200, in Davis 95616.

24 The association would first of all like to thank the  
25 State Board for all of its efforts to put forward a sound

1 listing process, and overall we support the goal of the  
2 draft policy to establish a standardized approach for  
3 developing the 303(d) list. However, we do have some  
4 general concerns with the December draft policy.

5 First, we are concerned that the revised draft  
6 policy departs from the July draft by deleting the  
7 multilist structure for classifying California waters.  
8 The use of the multiple assessment categories in the July  
9 draft water control policy was consistent with EPA  
10 guidance and the National Academy of Science's report on  
11 TMDLs to Congress. The multilist approach would help to  
12 focus limited staff and fiscal resources on identified and  
13 verified water quality impairments while ensuring that  
14 other waterways are appropriately monitored to determine  
15 if impairments exist. We respectfully request that the  
16 process used in the July draft be reconsidered.

17 Second, the association is concerned that the  
18 December draft combines two other separate lists into the  
19 303(d) list. The TMDLs completed list and the alternative  
20 enforceable program list are not required by either the  
21 state or federal regulations to be included in the actual  
22 303(d) list which is intended to include waters that are  
23 impaired or no program has been identified to address the  
24 impairment and where a TMDL has not yet been prepared.

25 To that end the association requests that the TMDLs

1 completed category and enforceable program category be  
2 removed from the 303(d) list.

3 Third, the draft policy does not correct a  
4 significant flaw in the 2002 303(d) list. The 2002 list  
5 contains listings for which specific pollutants have not  
6 been identified. There are hundreds of listings on the  
7 2002 303(d) list for which no specific pollutant has been  
8 identified and some of these listings are for conditions,  
9 some are for groups of pollutants and others are for  
10 indicators. These listings should be removed from the  
11 303(d) list and placed on a separate list until specific  
12 pollutants can be identified. In our September 12 letter  
13 the association suggested a pollution list as a way of  
14 solving this problem.

15 Fourth, and I'm echoing some of our previous  
16 commenters, the association is also concerned about the  
17 elimination of the Board's commitment to the reevaluation  
18 of each water body pollutant combination on the current  
19 list. While the reevaluation specified in the July draft  
20 might have taken several listing cycles, it at least  
21 created a mechanism to review and reevaluate all  
22 questionable listings based on the newly proposed listing  
23 standards. Without such a reevaluation many of the legacy  
24 listings will become even more questionable.

25 Finally, the association is concerned with the data

1 aggregate provisions that would allow listings based on  
2 data from adjoining water segments. This provision is  
3 inconsistent with other requirements for minimum number of  
4 samples and creates a loophole within the listing process  
5 itself. We request that this concept be rethought and  
6 that limits should be placed on the aggregation of data in  
7 order to prevent erroneous listings.

8 Thank you again for the opportunity to comment on  
9 the policy, and we will be following up with written  
10 comment letter.

11 CHAIRMAN BAGGETT: Thank you.

12 Bob and then Armand Ruby, County of Sacramento.

13 MR. LUCAS: Thank you. My name is Bob Lucas,  
14 representing the California Council for Environmental  
15 Economic Balance. For the record I'm at 1121 L Street,  
16 Suite 407, and that is Sacramento 95814.

17 Our primary concern was process from the beginning  
18 has been the accuracy of the list, and we view this  
19 document as actually a very thoughtful document, and it  
20 does reflect well on the three years of effort that have  
21 gone into putting it together. And for the most part we  
22 think that it will represent an improvement to the listing  
23 process, leading to reasonable and objective  
24 determinations.

25 We do have one concern, though, having to do with

1 the structure of the list. And it's been alluded to by  
2 other speakers before me. And briefly stated I think we  
3 would agree with the comments of the NAS that is included  
4 in the text of the report on Page 36, that the use of such  
5 a list, this is the monitoring list, improves the accuracy  
6 of the listing process for a number of reasons.

7 One, that it provides a setup for the parties to  
8 contribute to the monitoring program, and that then leads  
9 to an assessment of new data and a better understanding of  
10 the impacts on beneficial uses. For that reason we would  
11 urge you to reconsider this particular recommendation,  
12 whether you move from four lists to one list with three  
13 categories or that you restructure the list entirely and  
14 go back to what you had been using in the past. We urge  
15 that you at least include a planning list or monitoring  
16 list.

17 Thank you.

18 CHAIRMAN BAGGETT: Thank you.

19 Armand and then Sterling McWhorter.

20 MR. RUBY: My name is Armand Ruby. I am an  
21 alternate member of the AB 982 PAG representing municipal  
22 storm water agencies. I am providing comments today on  
23 behalf of the Sacramento County Storm Water Program.

24 We want to express our support for the Board's  
25 efforts to establish standard protocols for the 303(d)

1 listing process. A standardized approach will help the  
2 state meet its obligations to protect and improve impaired  
3 waters in reasonable and cost-effective way. We also  
4 support the efforts by the State Board staff to establish  
5 a technically sound set of criteria as a foundation of  
6 those standard protocols. This is essential in deriving a  
7 listing policy that will result in scientifically  
8 supportable listings of impaired waters.

9 We do have a few concerns that we wish to express as  
10 well as follows: Firstly, I would like to support the  
11 previous speakers who have advocated inclusion of a  
12 planning or monitoring or watch list. And we do believe  
13 that there is a clear need for some version of a  
14 monitoring or planning list that accounts for those waters  
15 for which data are incomplete or inconclusive. But I  
16 would like to take a slightly different take in  
17 approaching this issue.

18 First, Sections 3.1.6, 3.1.8 and 3.1.9 of the  
19 revised draft policy, it appears that a water body can be  
20 listed due to toxicity, adverse biological response or  
21 degradation of biological populations even in the absence  
22 of identification of a pollutant causing such effects.  
23 And all three of these sections appear to acknowledge that  
24 such an association is necessary, at least before  
25 proceeding with the TMDL. But the language is not there

1 to require such an association prior to listing. We feel  
2 that is inappropriate. The situation cries out for a  
3 version of the old monitoring or planning or watch lists.  
4 One suggestion would be renaming it on the pollutant  
5 identification list to account for those surface waters  
6 where biological testing indicates impairment but the  
7 cause of the pollutant or pollutants have not been  
8 identified.

9 A second significant concern lies in the aggregation  
10 of data by reach or area. The last part of this section  
11 states data related to the same pollutant from two or more  
12 adjoining segments shall be combined provided that there  
13 is at least one measurement above applicable water quality  
14 objective in each segment of the water body. The pooled  
15 data shall be analyzed together.

16 This appears to me that if Reach A has the minimum  
17 number of required samples and meets the criterion for  
18 listing, and Reaches B, C, et cetera, could all be listed  
19 if this just one sample meets the criteria through pooling  
20 with the data. This is in conflict with the letter and  
21 spirit of the carefully crafted technical bases for which  
22 listing that is laid out in the policy.

23 As I lose my voice, I would like to say that there  
24 are several other concerns that we have that will be  
25 expressed in written comments.

1 Thank you.

2 CHAIRMAN BAGGETT: Thank you.

3 Sterling and then on deck is Bill Busath, City of  
4 Sacramento.

5 MR. MCWHORTER: Thank you, Chairman. Sterling  
6 McWhorter with the Humboldt County Cattlemens Association  
7 and the Buckeye Conservancy.

8 I appreciate the staff and the Board trying to come  
9 up with a policy to list and delist impaired water bodies.  
10 When the North Coast rivers were put on the list, there  
11 was no policy. It was basically testimony from one or two  
12 individuals saying that, for instance, the Mattole River  
13 was impaired, that it was put on the list. And so I think  
14 we definitely need a policy to assure that the data is  
15 gathered and accurate.

16 Kind of take offense to being called a bad actor up  
17 on the North Coast. The North Coast rivers are not bad  
18 actors. Our members own 300,000 acres of open space  
19 habitat. We provide food and fiber, timber for building  
20 homes, for the world economy. There's runs that -- very  
21 good salmon runs in the rivers right now. There have been  
22 for a few years. So there is things changing. Things  
23 look good out there. The Mattole River runs by my front  
24 door, and it is not a muddy mess every day of the year. I  
25 can guarantee you that.

1           There is no legal challenges coming before you right  
2 now because we have not been harmed. We are on a 303(d)  
3 list. Big deal. It is the implementation plans that are  
4 going to cause the legal challenges on the 303(d) list.  
5 Sediment is natural. They're drilling for oil wells --  
6 not oil wells, but natural gas wells in the Old River  
7 Valley. They were down 6,000 feet and they hit a redwood  
8 log. It's natural. You can't put a number on it. You  
9 can't -- you know, it's very frustrating being up here,  
10 coming to these meetings, listening to the environmental  
11 community or the world fishing fleet whine about that  
12 there is no fish. Well, they caught up all the fish. And  
13 I am doing research on that to prove that. They've caught  
14 billions and billions of pounds of salmon. And that is  
15 where the fishery has gone to. And now that those  
16 regulations have been put in place the fish are coming  
17 back.

18           We will be here to participate in these boards. I  
19 appreciate you guys are having a hard time dealing with  
20 this because it is a big subject. It is a huge hit on the  
21 taxpayers, and it is going to be a huge hit on the  
22 landowners if it does get implemented.

23           I appreciate your time and thank you.

24                   CHAIRMAN BAGGETT: Thanks for making the trip  
25 down. You are making progress up there.

1 Bill and then Tim, if necessary.

2 MR. BUSATH: My name is Bill Busath. I am  
3 storm water manager for the City of Sacramento.

4 I just quickly want to go on record in support of  
5 the comments of both Armand Ruby and Karen Ashby with  
6 CAQA. We also support the Board's effort and goal in  
7 establishing a standardized approach to the 303(d)  
8 delisting process. Especially, and we especially would  
9 like to endorse the comments that have been made  
10 concerning the planning and monitoring list. And also the  
11 reevaluation of the bodies that are on the list now. We  
12 will also be submitting some written comments. That is  
13 all I have to say.

14 CHAIRMAN BAGGETT: Thank you.

15 That is all the cards I have.

16 MR. PIASKY: Chairman Baggett, Members of the  
17 Board. Real brief. I am Tim Piasky, representing the  
18 construction industry coalition of water quality. I do  
19 want to commend the Board and staff for all the hard work  
20 that went into developing this policy. I think it is an  
21 important policy. Obviously, there are some things that  
22 still need to be worked out. You've heard a lot of  
23 comments today. There is no new comments that I would  
24 bring, so I just wanted to come up and express my support  
25 for the Board's effort and the fact that we will be

1 submitting written comments that will detail a lot of the  
2 same things you heard today.

3 Thank you.

4 CHAIRMAN BAGGETT: Thank you.

5 Anyone else?

6 With that, if you want more, February 5th, Member  
7 Sutley and Silva will be down in Torrance on the South  
8 Coast. So you go down to that hearing or send us your  
9 written comments. We take this very seriously and we will  
10 read them all. I know my colleagues and I realize what a  
11 big issue this is.

12 Thanks for coming.

13 (Public hearing concluded at 12:20 p.m.)

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REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA                    )  
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I, ESTHER F. SCHWARTZ, certify that I was the official Court Reporter for the proceedings named herein, and that as such reporter, I reported in verbatim shorthand writing those proceedings;

That I thereafter caused my shorthand writing to be reduced to printed format, and the pages numbered 3 through 95 herein constitute a complete, true and correct record of the proceedings.

IN WITNESS WHEREOF, I have subscribed this certificate at Sacramento, California, on this 13th day of February, 2004.

  
\_\_\_\_\_  
ESTHER F. SCHWARTZ  
CSR NO. 1564

1/28/04

Public Hearing Transcripts

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