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**B A S M A A**

Alameda Countywide  
Clean Water Program

Contra Costa  
Clean Water Program

Fairfield-Suisun  
Urban Runoff  
Management Program

Marin County  
Stormwater Pollution  
Prevention Program

San Mateo Countywide  
Stormwater Pollution  
Prevention Program

Santa Clara Valley  
Urban Runoff Pollution  
Prevention Program

Vallejo  
Sanitation and Flood  
Control District

February 18, 2004

**Craig J. Wilson  
TMDL Listing Unit  
Division of Water Quality  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100**

**Re: Comments on Draft Functional Equivalent Document (FED) and Draft  
Water Quality Control Policy for Developing California's Clean Water  
Act Section 303(d) List**

Dear Mr. Wilson:

This letter is submitted on behalf of the Bay Area Stormwater Management Agencies Association (BASMAA) in response to the invitation to submit comments on the Draft Functional Equivalent Document (FED) and Draft Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (Draft Policy), dated December 2003.

BASMAA is a consortium of eight municipal stormwater programs in the San Francisco Bay Area representing 90 agencies, including 79 cities and 6 counties. BASMAA is focused on regional challenges and opportunities to improving the quality of urban runoff that flows to our local creek, the San Francisco Bay and Delta, and the Ocean. The member agencies of BASMAA are responsible for complying with the requirements of municipal separate storm sewer system (MS4) National Pollutant Discharge Elimination System (NPDES) permits issued by the San Francisco Bay Regional Water Quality Control Board.

BASMAA member agencies would like to thank you for this opportunity to comment on the FED and the Draft Policy. BASMAA strongly supports the State Water Resources Control Board's (State Board) goal of establishing a standardized approach for assigning water bodies to the State's 303(d) list, and endorses the inclusion of requirements for data quality and quantity, requirements for consistent and statistically valid data evaluations, and implementation provisions. BASMAA agrees that the Draft Policy is a step in the right direction towards achieving these goals. However, we would like to point out a few areas of the Draft Policy where improvement is still needed. Specifically, the Draft Policy should direct Regional Water Quality Control Boards (Regional Boards) to do the following:

Bay Area  
Stormwater Management  
Agencies Association

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Oakland, CA 94612  
510 622 2306

## BASMAA Comments on Draft 303(d) Listing Policy and FED

1. Use an "integrated" format for water quality assessment reporting, comprising the 303(d) list and complementary but separate lists for *Planning/Monitoring, Standards Fully Attained, Standards Partially Attained, TMDLs Completed, and Enforceable Programs*;
2. Re-evaluate data used to list water bodies identified on previous 303(d) lists, using criteria for listing described in the Draft Policy;
3. Adopt numeric objectives when appropriate, consistent with the California Water Code (sections 13241 and 13242), rather than use "numerical evaluation guidelines" to interpret narrative objectives; and,
4. Revise the FED to bring it into compliance with State Board regulations and the California Environmental Quality Act (CEQA).

The following paragraphs briefly describe BASMAA's main concerns regarding the Draft Policy and the issues that should be resolved prior to its adoption.

### **Issue #1: Lack of an "Integrated" Water Quality Assessment Report Format**

BASMAA strongly supports the State Board embracing an "integrated water quality assessment report" (integrated report) format, including the creation and population of "lists" separate from the 303(d) list, but that are included in the integrated report. The Draft Policy would restructure the 303(d) list to consist of 3 categories:

- Water Quality Limited Segments Category - waters will be placed in this category if the water quality standard is not attained, the standards nonattainment is due to a pollutant or pollutants, and remediation of the standards attainment problem requires a Total Maximum Daily Load (TMDL).
- TMDLs Completed Category - waters will be placed in this category once a TMDL has been developed and approved by the U.S. Environmental Protection Agency (USEPA), and will stay on the list until the water quality standard is attained.
- Enforceable Programs Category - waters will be listed in this category if pollution control requirements other than TMDLs are reasonably expected to result in attainment of water quality standards.

BASMAA has two main concerns regarding the proposed structure of the 303(d) list. First, the proposed structure would include all three categories of waters on the 303(d) list itself, rather than only the *Water Quality Limited Segments Category*. The inclusion of all three categories on the 303(d) list is of major concern because: (a) the negative implications of a water segment being (or continuing to be) on the 303(d) list may be significant even though a TMDL and/or enforceable program has already been put into place to address the water in question; and (b) available resources to address the water segments on the 303(d) list are limited and an overly inclusive list may confuse priority-setting, resource allocation, and other important decisions at both the State and local level. In particular, waters placed in the *Enforceable Programs Category* should not be included on the 303(d) list. Placing such waters on the 303(d) list would also cause a misperception that water quality in California is significantly worse than it actually is.

BASMAA's second concern is that the Draft Policy abandons the "integrated" format for water quality assessment reporting that was proposed in the July 2003 Draft Policy for Guidance on Assessing California Surface Waters (July 2003 Draft Policy). The new Draft Policy would eliminate several important lists from the reporting format proposed in the July 2003 Draft Policy: *Planning/Monitoring*, *Standards Fully Attained*, and *Standards Partially Attained*.

In particular, the use of a planning list has been strongly recommended by the National Academy of Sciences (NAS) in its report to Congress and would avoid inappropriate listings, unnecessary TMDLs, and the unwise use of resources. Water bodies on the *Planning/Monitoring* list would be further studied before being placed on the 303(d) list if impaired or de-listed if not impaired. The *Planning/Monitoring* list is especially important for cases where:

- the impairments are undetermined (e.g., unknown toxicity);
- data are insufficient to determine if impairment exists; or
- water quality standards may be inappropriate.

In sum, to resolve these two main issues, BASMAA suggests that the State Board adopt an integrated format for water quality assessment reporting, which would entail the following:

- Include only waters listed in the *Water Quality Limited Segments Category* on the 303(d) list; and
- Adopt an integrated reporting format as was proposed in the July 2003 Draft Policy, including separate lists for *Planning/Monitoring*, *Standards Fully Attained*, *Standards Partially Attained*, *TMDLs Completed*, and *Enforceable Programs*.

**Issue #2: Restrictive Guidelines for the Re-evaluation of Waters on Existing 303(d) Lists**

The Draft Policy should be revised to require, upon request, the re-evaluation of existing 303(d) listings to bring the list into compliance with the criteria established in the Draft Policy. Under the Draft Policy, existing 303(d) listings would only be re-evaluated if new data and information become available. However, the Draft Policy would fail to address the many listings in the 1998 and 2002 303(d) lists that may be inappropriate because of:

- inadequate data quantity or quality;
- evidence that natural sources have caused or contributed to the impairment; and
- inappropriate water quality standards upon which listings are based.

The Draft Policy would restrict the re-evaluation of existing listings to instances where new data become available, despite the fact that existing listings may already be known to have been based on *inadequate data, inappropriate standards, or faulty premises*.

In addition, the Draft Policy places the burden of correcting the faulty existing listings on the local agency or other interested party requesting the re-evaluation. A local agency requesting a re-evaluation of an existing listing would have to provide to the Regional Board and the State Board the reason the existing listing is inappropriate, the reason the Draft Policy would result in a different outcome than the existing listing, and the data and information necessary to conduct the review. This approach is fiscally untenable for local governments and results in placing the

burden of inaccurate listings on others rather than the party charged with responsibility for maintaining an accurate list.

In sum, to ensure that TMDLs are conducted only where appropriate, meaningful, and necessary, BASMAA requests that the State Board accept requests for the re-evaluation of water bodies identified on the 2002 303(d) list based on existing (rather than only new) information and that the burden of justification for correcting listings not be shifted to affected local governments.

**Issue #3: The Use of "Numerical Evaluation Guidelines" to Interpret Narrative Objectives**

Under the Draft Policy, the State Board and Regional Boards will be able to use "numerical evaluation guidelines" such as sediment quality guidelines or Office of Environmental Health Hazard Assessment (OEHHA) or USEPA fish tissue levels, to evaluate narrative water quality objectives or beneficial use protection. While the Draft Policy specifies that "the guidelines are not water quality objectives and should only be used for the purpose of developing the section 303(d) list," this disclaimer does not negate the fact that the "numerical evaluation guidelines" will apparently be used in a manner that essentially constitutes them as a regulation. This "underground rulemaking" approach to regulating the State's waters based on new criteria is subject to arbitrary application, of questionable legality, and of concern to BASMAA.

As you know from prior litigation, State water quality objectives and plans must be adopted in compliance with, among other things, the California Administrative Procedure Act (APA) and CEQA. While "numerical evaluation guidelines" are not nominally formally adopted water quality objectives, in practice, if used to determine if a water body exceeds a narrative objective, they will have an equivalent effect and therefore may not be applied in the contemplated manner unless first properly promulgated as regulations in compliance with California Water Code Sections 13241 and 13242, the APA and CEQA.

Because it ultimately will be necessary to comply with the legal requirements governing the promulgation of water quality objectives and plans in order to legally use "numerical evaluation guidelines" to interpret existing narrative objectives, the State should abandon this concept and instead directly promulgate, after full public review and comment and an evaluation of potentially significant impacts, numeric water quality objectives to replace narrative objectives in those instances where there is a need to interpret them based on quantitative criteria.

**Issue #4: Compliance with CEQA and Functional Equivalency Document Requirements**

The State Board should more meaningfully address CEQA. CEQA provides an exemption for plans, policies, or guidelines adopted under the State Board's Water Quality Control (Basin)/208 Planning Program, so long as a written report is prepared and submitted in compliance with sections 3777-3781 of the State Board's regulations. (Public Resources Code § 21080.5; 23 C.C.R. § 3782.) The written report should include reasonable alternatives to the proposed plan, policies, or guidelines and mitigation measures to minimize any significant adverse environmental impacts.

The FED does not appear to comply with CEQA or the State Board's regulations, because it does not analyze or mitigate the potentially significant adverse environmental impacts of the Draft Policy or identify the impacts of potential alternative approaches. The FED asserts, without explanation or substantial evidence, that the Draft Policy would have no significant

BASMAA Comments on Draft 303(d) Listing Policy and FED

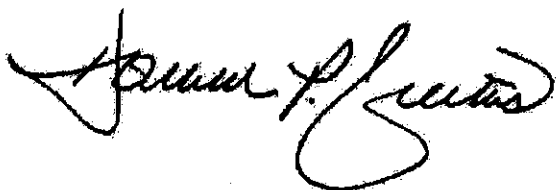
adverse impact on the environment. However, the Draft Policy could potentially have a significant adverse impact on land uses, affordable housing, transportation systems, air quality, and flood control and drainage systems, by including a water body on the 303(d) list, leading to the imposition of additional or modified discharge requirements, via TMDL implementation.

Furthermore, there is a question whether the Draft Policy even falls within the scope of the State Board's certified exemption from CEQA. The State Board's exemption from CEQA applies only to plans, policies, or guidelines prepared under the State Board's Water Quality Control (Basin)/208 Planning Program. (Public Resources Code § 21080.5; 23 C.C.R. § 3782.) The Draft Policy was prepared under section 13191.3(a) of the Water Code, separate from the State Board's regular activities under the Water Quality Control (Basin)/208 Planning Program. It appears the State Board has not analyzed the Draft Policy in the context of the factors listed in section 13241 of the Water Code, as it ordinarily would analyze basin plan amendments under the Water Quality Control (Basin)/208 Planning Program. If the Draft Policy falls outside the scope of the exemption, the State Board likely needs to analyze and prepare a report on the Draft Policy in compliance with CEQA.

In summary, BASMAA believes that prior to the adoption of the *Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List*, the Draft Policy and the FED should be revised to address the above issues. We thank you for the opportunity to provide preliminary comments. We look forward to receiving and discussing your responses and to working with your staff.

Please contact Chris Sommers (BASMAA representative to the Clean Estuary Partnership) at (510) 832-2852 or Geoff Brosseau (BASMAA Executive Director) at (510) 622-2326 if you have any questions regarding the comments or suggested revisions.

Very Truly Yours,



Donald P. Freitas  
Chair - BASMAA Executive Board

cc: BASMAA Executive Board

Jim Scanlin, Alameda Countywide Clean Water Program  
Kevin Cullen/Larry Bahr, Fairfield-Suisun Urban Runoff Management Program  
Liz Lewis, Marin County Stormwater Pollution Prevention Program  
Bob Davidson, San Mateo Countywide Stormwater Pollution Prevention Program  
Bob Oller, Sonoma County Water Agency  
Jack Betourne, Vallejo Sanitation & Flood Control District  
Adam Olivieri, Santa Clara Valley Urban Runoff Pollution Prevention Program

**BASMAA Comments on Draft 303(d) Listing Policy and FED**

**Arleen Feng, BASMAA Monitoring Committee Chair**  
**Jon Konnan, Clean Estuary Partnership PCBs Work Group**  
**Tom Mumley, San Francisco Bay Regional Water Quality Control Board**  
**Steve Moore, San Francisco Bay Regional Water Quality Control Board**  
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