

CITY OF LOS ANGELES

316

CALIFORNIA

DEPARTMENT OF  
PUBLIC WORKS

BOARD OF  
PUBLIC WORKS

COMMISSIONERS

VALERIE LYNNE SHAW  
PRESIDENT

ELLEN STEIN  
VICE PRESIDENT

RONALD LOW  
CYNTHIA M. RUIZ  
JANICE WOOD



JAMES K. HAHN  
MAYOR

BUREAU OF SANITATION

RITA L. ROBINSON  
DIRECTOR

JOSEPH E. MUNDINE  
ENRIQUE C. ZALDIVAR  
ASSISTANT DIRECTORS

433 SOUTH SPRING STREET  
LOS ANGELES, CA 90013  
TEL: (213) 473-7999  
FAX: (213) 473-8100

August 25, 2004

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

Dear Mr. Wilson:

**COMMENTS ON THE DRAFT FINAL WATER QUALITY CONTROL POLICY FOR  
DEVELOPING CALIFORNIA'S CLEAN WATER ACT SECTION 303(d) LIST AND  
DRAFT FINAL FUNCTIONAL EQUIVALENT DOCUMENT**

The Bureau of Sanitation, City of Los Angeles (City) appreciates the opportunity to comment on the State Water Resources Control Board's (SWRCB) draft final Water Quality Control Policy for Developing California's Clean Water Act §303(d) List of impaired waterbodies (Listing Policy) and the draft final Functional Equivalent Document (FED). The waterbodies of the region are significant resources and their protection and preservation are high priorities for the City. As such, cleanup of impaired waterbodies is an important issue and the City is committed to improving the quality of our waterways.

The City would like to acknowledge the SWRCB and local RWQCBs for their joint effort to standardize the delisting and listing process by incorporating commonly accepted and reproducible scientific methodology in their process approach. The application of the standard binomial distribution and the null hypothesis in the current draft of the Listing Policy is commendable, as part of this effort. Continued scientific rigor will allow application of the Listing Policy fairly and consistently across all regions of California. The Listing Policy is a cornerstone of the TMDL Program and an integral component. With a more transparent, accessible, and scientifically rigorous Listing Policy, public confidence in 303(d) listings will improve, helping point local TMDL programs in a less contentious and productive direction.

A pre-draft version of the Listing Policy was circulated at a July 2003 meeting of the AB 982 Public Advisory Group and an official December 2003 draft of the Listing Policy was also released. The City submitted official comments on the December 2003 draft. The City also provided feedback during Listing Policy development meetings, as well as during development of the 2002 303(d) List.

After reviewing the current draft of the Listing Policy, the City finds that many changes have occurred in the Policy. If considered separately, these changes might be considered minor; however, when considered in total, they tend to substantially reduce the scientific rigor of the Listing Policy. Unfortunately, this reduction increases the potential for inconsistent application of the Listing Policy between regions and lowers the City's confidence in the Listing Policy and impairment listings that might be generated by it. The City must rely on the correctness and importance of these listings in committing funds to remediate them. If the regulated community is left to sort through the impairments, separating subjectivity from science or "possible impairments" from "existing impairments," public resources become poorly focused, making it difficult to successfully reach the environmental goals of local TMDL programs. Therefore, the City recommends that scientific rigor be restored to the Listing Policy and respectfully submits the following comments and recommendations for consideration.

**1. Restore Scientific Provisions to Associate Pollutants to a Waterbody Prior to TMDL Development:**

The City agreed with and supported scientific provisions included the December 2003 draft Listing Policy. The provisions ensured pollutants would be identified prior to TMDL development. The City supported the fact that TMDLs cannot be completed without load or wasteload allocations, unless a pollutant is identified. The City also agreed that listings should be based on reasonable scientific measures, and subjective observations should not be the sole line of evidence. Therefore, the City would like to see the science-based approach to impairment determinations restored to the policy in the following important areas:

**a. Clarify Application of the Weight-of-Evidence Approach - (Sections 1 and 3)**

Although the current draft of the Listing Policy goes part of the way in describing the weight of evidence approach, its application is less clear when using qualitative assessments or in dealing with impairments that are not tied to a pollutant. Having a clear definition of the weight of evidence approach, in the context applied, is expected to provide less confusion in the decision-making process for listing decisions. There are four associated recommendations, as follow:

- 1) Add the definition below to the Glossary. The definition is based on the text contained in Issue 3 of the Functional Equivalent Document (FED), describing a weight-of-evidence approach:

The weight-of-evidence approach is a process by which multiple lines of evidence are assembled and evaluated from one or more sets of data. The lines of evidence are evaluated based on the strength or persuasiveness of each

measurement endpoint and concurrence, or lack thereof, among various endpoints. Confidence in the measurement endpoints is assessed and factored into the evaluation of the available lines of evidence. Lines of evidence can be chemical measure, toxicity data, biological measurements, and concentrations of chemical in aquatic life tissue.

- 2) The following text should be added to the end of Section 1 on Page 1-2 of the Listing Policy. This will more fully reflect the discussion in Alternative 1 of the FED (FED, Issue 3, Weight of Evidence for Listing and Delisting):

In addition to other information that must be provided in Fact Sheets in accordance with Section 6.1.2, the RWQCBs must document their application of the weight-of-evidence approach where multiple lines of evidence are utilized in listing decisions by:

- i. Providing any data or information supporting the listing;
- ii. Identifying the pollutants(s) being listed;
- iii. Describing how the data or information affords a substantial basis in fact from which listing can reasonably be inferred;
- iv. Demonstrating that the weight of evidence of the data and information indicate that the water quality standard is not attained; and
- v. Demonstrating that the approach used is scientifically defensible and reproducible.

- 3) It is recommended that the weight of evidence approach consider water, tissue or sediment concentrations of pollutants as a primary line of evidence for impairment listings. An established relationship between tissue levels and water column concentrations in the respective water segment should exist for listings based on fish tissue, such as bioaccumulation. Such listings should also be based on a multiple line of evidence approach.

Secondary or ancillary supporting lines of evidence would be "conditions of pollution" such as health advisories, adverse biological response or degradation of biological populations and communities. This is recommended because a number of factors unrelated to a pollutant concentration could also cause "conditions of pollution," such as habitat modification, food chain disruption, over-fishing, etc. Sections 3.1.4, 3.1.7, 3.1.8 and 3.1.9 can be clarified to apply the weight of evidence approach in this way. In addition, it should be clarified that even though these types of "conditions of pollution" are used as ancillary support, they are not appropriate as impairment listings because, as stated previously, they are conditions and may be caused by other factors besides pollutant concentrations.

- 4) Situation specific weight of evidence, as introduced in Section 3.1.11 of the current draft of the Listing Policy is highly subjective and circumvents the scientific rigor necessary in the Listing Policy. Without further development of

definitions, as well as stakeholder review of that development, this approach should be removed from the Listing Policy.

- b. ***Clarify Use of Reference Conditions in Relation to Visual and Semi-Qualitative Assessments*** – The current draft restores the use of visual and semi-quantitative assessments to the Listing Policy. For example, in a general statement outlined on page A-5, the draft Listing Policy indicates that numeric water quality data must exceed the guideline, however, the current draft also allows comparison to a reference condition. If not clarified, this infers that conditions do not have to be numeric in nature in regard to reference conditions. At a minimum, it is recommended that visual and semi-qualitative assessments for listing factors such as nuisance, adverse biological response, degradation of biological populations and communities, and bioaccumulation only be used as ancillary lines of evidence under all conditions, even when comparing to reference conditions. ***(Section 3.1)***
- c. ***Revise Conventional versus Toxic Pollutant Definitions*** - The current Draft of the Listing Policy would identify trash and sediment as toxic, as well as other constituents. This is an extreme categorization of toxics and, therefore, not a standard scientific approach, per either the State Water Code or the Code of Federal Regulations (CFR). It is recommended that less extreme definitions be adopted, such as conventional pollutants similar to the list of pollutants in EPA's category of Group 1 pollutants in 40CFR123.45, Appendix A and, for toxic pollutants, the Group 2 pollutants should be applied, per the same CFR Appendix. ***(Sections 3.1.1-3.1.10)***
- d. ***Change Requirement That All Data Be "Used" and Require Data Quality Assessment*** - The current draft of the Listing Policy misstates the following: "Even though all data and information must be used..." Use of the word "used" implies that the Listing Policy must use all information in its final decision. Replace "used" with "evaluated," as some data may not be usable after evaluation. In addition, a data quality assessment should accompany all listing decisions to verify that data is accompanied by scientifically reliable quality assurance and should be presented in the Fact Sheets made available for public review. ***(Section 6.1.4)***
- e. ***Restore and Clarify Temporal Representation Language*** – If temporal sampling is geared towards critical conditions, as stated in the current draft of the Listing Policy, sampling will be biased. It should be clarified that scientifically-based temporal sampling and representation is for a block of time such as wet weather season, dry weather season, time of day, or day of week, and should not be geared toward a critical event or conditions. If samples are collected in a manner that is truly temporarily representative, it is reasonable to expect that critical events and conditions would be adequately captured. ***(Section 6.1.5.3)***
- f. ***Restore and Improve Nuisance Listing and Delisting Methods*** - Waters can now be placed on a list for both nutrient related and other types of nuisances when the water segment is compared to reference conditions. Significant nuisance conditions and reference conditions are highly subjective, especially absent numeric data and measurable requirements (i.e. the binomial distribution) to show there is a real problem. For delisting this is still problematic, since listing can now be based on anecdotal information. Therefore, it is recommended that

all nuisance-related impairments be tested against the binomial distribution method, including those instances when the nuisance is compared to background or reference conditions. Without this requirement, a water segment can be listed based on subjective data. *(Section 3.1.7)*

- g. ***Restore and Modify Natural Background/Physical Alteration Exclusion - (Section 3.1)***  
Previous drafts of the Listing Policy prohibited listing waters that were only impaired due to natural background conditions or physical alterations, such as reservoirs, that could not be controlled. The current draft of the Listing Policy is now silent on this issue and therefore would allow listings of water segments due to natural background or physical alterations that cannot be controlled. The Draft Policy is also silent on what mechanism would be used to address these types of "impairments". Until independent policy is developed for this condition, this issue should not be left to an undefined subjective procedure. Therefore, the following language is recommended for Section 3.1:

If standards exceedances are associated with physical alteration of the water body that cannot be controlled or associated with natural background conditions, the water segment shall not be placed on the section 303(d) list. Instead, the Regional Board shall conduct an expedited use attainability investigation, and make any appropriate standard changes before the next listing cycle. If it is determined that the standards are appropriate and the water segment is not attaining standards according to the listing factors, then that segment shall be listed as expeditiously as possible. When making the listing decision, allowances should be made for exceedances associated with physical alteration and natural background conditions.

- h. ***Restrict Use of Data Collected During Spill or Other Violation*** – Data and information collected during a known spill or violation cannot be considered scientifically indicative of the waterbody's current condition unless it is proven to be a chronic spill at the same location that has not been remedied. With this in mind, it is recommended that any acute spill data or remedied chronic spill data be considered ancillary, at best, in that it is not a direct measure of the water body's present condition. *(Section 3.1)*
- i. ***Clarify Bioassessment Data Necessary for Listing Multiple Segments*** – As written, the Listing Policy infers that measurements from one section of a segment could be used to list an entire segment. This would not be appropriate in regard to bioassessment data in that most segments will probably contain some variation in the physical habitat. That variation could account for differences in the biological community along a segment. *(Section 3.1.9)*
- j. ***Incorporate EPA Trend Guidance*** – EPA Guidance requires listing of waters that will exceed the associated standard before the next listing cycle. This statement should be included in the Listing Policy. *(Section 6.1.5.3)*
- k. ***Refer to Existing Policy*** – It is difficult to identify areas of scientific subjectivity when the Listing Policy refers to documents that are not official policy yet, such as "The Water Quality

Control Policy for Addressing Impaired Waters". It is recommended that the Listing Policy only refer to existing policy. (*Section 3.2*)

1. **Modify Listing Requirements for Older Data** – In the previous drafts of the Listing Policy, data older than 10 years was not going to be used to make listings, except on a case by case basis. The current draft of the Listing Policy, however, would allow new listings just based on older data (greater than 10 years old). If older data is going to be used to list an impairment, it should be accompanied by newer data (10 years or less). The newer data will help verify whether the older data is relatively reliable or not. The new data should also be more heavily weighted than the older data because it is more current and, therefore, more representative of current conditions. (*Section 6.1.5*)
2. **Promulgate Guidance Documents and References Used To Provide Listing Criteria and Increase Stakeholder Review:** (*Sections 3.1.3-3.1.10*)

In past listing cycles, RWQCBs throughout the State made listing decisions based on numeric values from peer-reviewed guidance, research papers, and technical reports in lieu of standards or water quality objectives. This has been done in other States, as well. After reviewing the July 2003 pre-draft and December 2003 Listing Policy draft, the City commented that the RWQCBs' use of guidelines in this manner (i.e., without review by affected stakeholders and the general public), raises questions about the applicability of such standards to specific regions and special conditions or characteristics of local waterbodies. The current draft of the Listing Policy incorporates requirements that limit the type of guidelines to be used and indicates requirements for Fact Sheets to include a "reference" to any RWQCB justification for local application of a guideline. This is an improvement; however, the City has further serious concerns with this approach.

Past experience indicates that guidelines sometimes are applied inappropriately to local conditions, with justification rationale such as, "this is the most protective or stringent guideline" or "this is the best available reference water body." Comments have been provided on the variation of circulation patterns, as well as tidal activity, water body structure, water use, climate, etc., but the guidelines or references are applied locally with no adjustment. Therefore, the City recommends that not only the justification rationale be referenced in the Fact Sheet, but also that it be included for stakeholder review along with the Fact Sheet. In addition, "best available" or "most stringent" should not be considered an acceptable justification rationale for local application.

The response to comment on Page B-111 of the FED indicates that Basin Plan review of guidelines used for the listing process is outside the scope of the Listing Policy. However, guidelines used in the Listing Policy have been transferred to associated TMDLs. The regulated community must then comply with these guidelines and, only at specified re-consideration dates, sometimes 4 to 5 years down the road, may they be reconsidered again. It seems as if these guidelines are being used as standards and should be formally addressed as such. Ideally, guidance and references applied to our local water bodies for a number of years should be

subject to a full public review and comment process at some point, ensuring that they are applicable to those waterbodies. This type of review does take time, but it also allows the regulated community adequate time to plan for studies that may take several years to budget and complete, as well time to plan and budget for future water body cleanup. In addition, this type of review allows the City's wastewater treatment plants and industrial dischargers enough time to comply with the guidelines, or unofficial standards, if they are transferred to an associated TMDL, as some have been.

Typically, treatment plants and industrial dischargers are under a completely different set of standards and, in the past, have had to adjust ongoing studies and operations to address new guidelines or existing guidelines, applied differently. This has proven to be very expensive, especially when a RWQCB has approved a work plan and a study is in progress, as a new guideline is issued that requires a different approach and or interpretation.

Another key part of the problem with this approach is that guidelines are not legally adopted water quality objectives and therefore have not undergone the public review and comment to determine if they are appropriate based on Water Code §13241 and 13242, factors which balance the proposed standards with other factors such as economics and the need for recycled water. The City is often blindsided by new studies referenced at each listing cycle, disrupting approved work plans and projects. Therefore, the City recommends increased stakeholder review and comment of those guidelines when applied locally, including promulgation and documentation of numeric guidelines in Basin Plans. This will ensure transparency in the listing process, resulting in the fair and cost-effective application of numeric guidelines and references.

### **3. Clarify Review of Prior Listings and Restore Time Frame: *(Sections 3 and 4)***

In comments made on the December 2003 draft, the City expressed concern as to whether older impairment listings would be re-evaluated within a reasonable timeframe. Often, the older listings were not transparent and were based on subjective information, without support from numerical, statistically significant amounts of data. Old listings often did not have a written rationale, and essential reports have been found to be missing, with only photocopies of spreadsheets and no quality assurance documentation on file. In the associated July 2004 response to comment, the SWRCB indicated that applications for re-evaluation of an existing impairment listing is possible during each listing cycle, whether new data is available or not (page B-103). It is assumed that this re-evaluation, therefore, could include re-evaluation of older listings. Upon closer examination of the Final Draft document; however, the exact process and timeframe for re-evaluation of older listings becomes unclear. As written, unless a case for faulty data, or improper quality assurance/quality control, or limitations related to analytical methods could be made, or if associated standards have changed, one might have to perform the reassessment using delisting factors of the Listing Policy and the burden of the analysis would be placed on the applicant.

Very real resource limitations exist for the SWRCB, RWQCBs, and the regulated community. The City believes that a timeframe, acceptable to the SWRCB and RWQCBs, should be restored

to the Listing Policy for the re-evaluations of older listings, e.g., possibly three listing cycles, as presented in the pre-draft of the Listing Policy. Agencies and the concerned public can help provide assistance by submitting thorough applications for re-evaluation and re-assessment, as appropriate. In further support of a timeframe for re-evaluation of older listings, recent contact with the SWRCB indicates the following listing priorities: 1) analysis of new data received in support of the 2004 303(d) listing cycle; 2) the 300 or so new listings made in the 2002 303(d) List, 3) applications for re-evaluation or re-assessment; and 4) the re-evaluation of older listings. Therefore, the City recommends that a reasonable timeframe be included in the Policy to ensure that older listings are re-evaluated so that unnecessary TMDLs do not have to be generated. The City also recommends that re-evaluations of older listings be performed based on "listing" factors, not "delisting" factors, since the re-evaluation is to determine whether the historical listing was appropriate in the first place.

**4. Acknowledge the Alternative Enforceable Program and Separate from 303(d) List:  
(Section 3.2)**

In the December 2003 draft and the current draft of the Listing Policy, the SWRCB proposes to make the Alternative Enforceable Programs List a subset of the §303(d) list under the "TMDLs being addressed" category. In earlier drafts of the Listing Policy, the Alternative Enforceable Programs List was to be separate, acknowledging the enforcement program as an alternative to the TMDL program, when appropriate and when approved by the SWRCB. In addition, the current draft of the Listing Policy indicates that impairments designated under an Alternative Enforceable Program would have to undergo the impairment delisting procedure. The City believes that the requirement for dual monitoring and reporting, under both an enforcement program and the delisting procedure is excessive. The City recommends that the alternative enforceable program be duly acknowledged as an alternative, the requirement for formal delisting be removed, and that the two lists be separated, provided that the local RWQCB agrees that: 1) in their professional judgment, the alternative enforceable program has shown evidence of success; and, 2) cleanup using a given enforcement program is expected to result in achieving standards by the next listing cycle, as required by federal regulations.

**5. Note on FED: (Figure 4)**

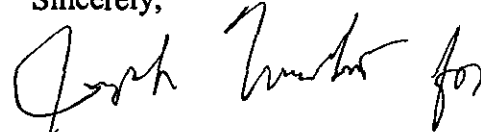
The Tujunga Wash is incorrectly pictured as the Los Angeles River in Figure 4 of the Functional Equivalent Document. The Tujunga Wash is a tributary to the L.A. River. The upper portion of the L.A. River is located southwest of the Tujunga Wash and is not pictured.



Mr. Craig J. Wilson  
August 25, 2004  
Page 9 of 9

The City appreciates and thanks the SWRCB and its staff for the effort they have put forth in drafting the 303(d) Listing Policy and addressing previous issues that have been raised. Thank you for the opportunity to submit comments. If there are any questions, please call Ms. Donna Toy-Chen, TMDL Section Manager, at (213) 473-8567, or her staff lead for 303(d) Listing Policy, Mr. Clayton Yoshida, Senior Chemist, at (213) 473-8569.

Sincerely,



Rita L. Robinson, Director  
Bureau of Sanitation

RLR:TJM:DC:hpf

cc: Jonathan Bishop, Regional Water Quality Control Board  
John Sheppard, Mayor's Office  
Rafael Prieto, Chief Legislative Analyst Office  
Jeff Catalano, CD 9  
Valerie Shaw, President, Board of Public Works  
Cynthia Ruiz, Board of Public Works  
Joe Mundine, Bureau of Sanitation/EXEC  
Traci Minamide, Bureau of Sanitation/RAD  
Donna Toy-Chen, Bureau of Sanitation/RAD  
Clayton Yoshida, Bureau of Sanitation/RAD  
RAD Central File/TMDL Section

Printed: 8/23/2004

R:\Main Files\TMDL Issues\303(d) listing\Listing Policy 2004\Listing Policy comments 08-25-2004.doc

"Page intentionally left blank"