



California Stormwater Quality Association

"Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation"

September 7, 2004

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Executive Office
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: July 22, 2004 Draft Final Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List

Dear Chairman Baggett and Board Members:

Thank you for this opportunity to provide our comments on the July 22, 2004 *Draft Final Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List*. We provided detailed comments on the December 3, 2003 draft policy in our February 18, 2004 letter, and appreciate the opportunity to provide additional comments at this time. As we have previously stated, CASQA supports the State Water Board's goal to establish a standardized approach for developing California's Section 303(d) list. The process employed in developing the 2002 list was a vast improvement over the processes used in previous years. CASQA continues to provide general support for the development of the 303(d) Listing Policy, as represented by the July 2004 draft. In particular, the strengthened binomial distribution statistical approach is very good. However, in several important ways the July 2004 draft represents a weakening of the policy over that presented in previous versions.

Overall Concern

CASQA was generally supportive of the approach that was proposed within the July 2003 draft policy, which built on experience gained in the 2002 listing process. However, the subsequent December 3, 2003 Draft Water Quality Control Policy and the associated Functional Equivalent Document (FED) and July 22, 2004 draft represent movement away from a sound and supportable policy.

Like the Regulated Caucus of the AB 982 Public Advisory Group, CASQA would like to see the State Water Board adopt a final statewide policy as soon as reasonably possible. At the same time, we are concerned that the cumulative effect of the revisions since the July 2003 draft has been to jeopardize the prior emphasis on establishing clear, objective, technically sound criteria for listing and delisting decisions. In particular, the loosening of the policy direction to the Regional Water Boards has weakened the policy.

Several of CASQA's concerns are related to the change in structure of the draft policy from the July 2003 version through the December 2003 draft to the current draft. Instead of building on the listing process improvements that resulted in the 2002 303(d) list, the draft policy has been moving back toward the policy that produced the inclusive but flawed 1996 and 1998 303(d) lists in which many water segments were erroneously listed. We offer the following comments and recommendations to address our concerns.

General Comments

CASQA wishes to express its support for the technical comments and recommendations of the AB 982 Public Advisory Group Regulated Caucus on the following issues:

- *Description of Weight-of-Evidence Approach.* (§§1, 3)
- *Listings for Pollutants vs. Pollution.* (§2.1; §§3.1.4, 3.1.7 – 3.1.9)
- *Placement and Removal of Segment/Pollutant Combinations.* (§2.2)
- *State Water Board Certification for Addressing Impaired Waters.* (§2.2.2)
- *Natural Background Conditions and Physical Alterations.* (§3.1)
- *Visual and Semi-Qualitative Assessments.* (§3.1)
- *Use of Data Collected During Spill or Other Violation.* (§3.1)
- *Use of the binomial distribution using the null hypothesis.* (§§3.1, 3.2, 4.1 through 4.9, Tables 3.1 and 3.2 and 4.1 and 4.2)
- *Use of Guidelines v. Legally Adopted WQOs.* (§§3.1.3 – 3.1.10)
- *Conventional versus Toxic Pollutants.* (§§3.1.1 – 3.1.10)
- *Bioaccumulation.* (§3.1.5)
- *Nuisance Listings and Delisting.* (§3.1.7)
- *Adverse Biological Response Listings.* (§3.1.8)
- *Bioassessment Data for Listing Multiple Segments Under Degradation of Biological Populations and Communities.* (§3.1.9)
- *Trends in Water Quality.* (§3.1.10)
- *Situation-Specific Weight of Evidence.* (§3.1.11)
- *Water Quality Standards Being Addressed.* (§3.2)
- *TMDL Scheduling.* (§5)
- *Requirement That All Data Be Used and Modification of Quality Assurance Requirements.* (§6.1.4)
- *Removal of Data Age Restriction.* (§6.1.5)
- *Temporal Representation.* (§6.1.5.3)
- *List Approval.* (§§6.2, 6.3)
- *Public Input on State Water Board Initiated Changes to the Proposed List* (§6.3)

Specific Comments

Policy Seems to Ignore Requirements of 40 CFR 130.7(b)(4)

CASQA is concerned that the July 2004 draft policy still does not fully comply with the federal regulations for implementing section 303(d) of the federal Clean Water Act. The section 303(d) list is supposed to include: 1) water quality-limited segments, 2) associated pollutants, and 3) a priority ranking of the waters, including waters targeted for Total Maximum Daily Load (TMDL) development in the next two years.

The draft policy and the Functional Equivalent Document frequently cite portions of 40 CFR 130.7, including 40 CFR 130.7(b), which specifies criteria for "Identification and priority setting

for water quality-limited segments still requiring TMDLs.” However, the draft policy is silent on a proposed methodology for the State to comply with the following requirement – also under 40 CFR 130.7(b):

“The list required under §§ 130.7(b)(1) and 130.7(b)(2) of this section shall include a priority ranking for all listed water quality-limited segments still requiring TMDLs, taking into account the severity of the pollution and the uses to be made of such waters and shall identify the pollutants causing or expected to cause violations of the applicable water quality standards. The priority ranking shall specifically include the identification of waters targeted for TMDL development in the next two years.” [40 CFR 130.7(b)(4)]

This requirement is very clear. The listing shall:

- include a priority ranking
- identify the pollutants causing or expected to cause violations of the applicable water quality standards

Need to identify pollutants

In terms of identifying pollutants, CASQA previously reviewed the State's 2002 303(d) list and observed that hundreds of water segments are listed without specific pollutants being identified. In response to the comments in our February 18, 2004 letter, staff stated that the “Draft Policy requires the identification of the pollutant prior to listings made on the 303(d) list, with the exception of toxicity.” However, Section 3.1.7 of the July 22 draft also provides a mechanism for water segments to be “placed on the Section 303(d) list if qualitative assessments of the water segment for nuisance water odor, taste, excessive algae growth, foam, turbidity, oil, trash, and color are associated with numerical water quality data” that meet specified criteria. Of the items in the above list including toxicity, only oil and trash can be considered pollutants as defined in the Clean Water Act and Porter-Cologne. The rest are conditions or symptoms of the impacts of pollutants. The criteria specified in Section 3.1.7 do not require pollutant identification. These criteria, dubbed “acceptable evaluation guidelines” may help define whether a condition (symptom) is significant or not, but they are not designed to identify pollutants (i.e., causes).

Given the clarity of the requirement in 40 CFR 130.7(b)(4) that the list shall identify pollutants, it is clear to CASQA that the State Water Board must publish a list for the purposes of 303(d) compliance that identifies pollutants for all water quality-limited segments listed.

Need to include a priority ranking

Similarly, 40 CFR 130.7(b)(4) is clear that the list must include a priority ranking. Yet, in Issue 8 of the FED, Priority Ranking and TMDL Completion Schedule, the recommended alternative (3) blurs the distinction between these two separate actions – priority ranking and TMDL scheduling – to the point of again seeming to ignore 40 CFR 130.7(b)(4) and mischaracterizing USEPA's recent guidance (*Guidance for 2004 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act*, issued by USEPA on July 21, 2003). Citing this guidance, recommended alternative 3 states: “Thus, USEPA has indicated that listed waters do not need to be classified as high, medium, or low priority and suggested that the established TMDL schedule, in and by itself, could reflect TMDL priority ranking.” This statement in the recommended alternative appears to be wrong. USEPA's guidance does not speak to 40 CFR 130.7(b)(4) and only provides guidance for TMDL scheduling, presumably because 40 CFR 130.7(b)(4) is so clear that the list shall include a priority ranking that no further guidance is necessary on that requirement.

As a result, CASQA believes that the draft policy is missing a methodology for complying with the requirement under 40 CFR 130.7(b)(4) that the list shall include a priority ranking. To comply with this priority ranking requirement, CASQA believes that the State Water Board should seriously consider the methodology for developing a numerical "Pollutant Severity Score" proposed by Armand Ruby, alternate CASQA representative to the AB 982 PAG, in his *Proposed Approach to Section 303(d) Listing/Delisting* memorandum to Craig Wilson (August 25, 2004). This methodology is designed to be used to develop the priority ranking required by Clean Water Act section 303(d)(1)(A) as well as under 40 CFR 130.7(b)(4).

We understand that introducing a new methodology at this point in the process may seem challenging but again, we believe the draft policy is currently lacking a methodology for meeting the priority ranking requirement and we believe that the proposed methodology is compelling enough to warrant its serious consideration.

Policy Unduly Complicates Definition of 303(d) List

CASQA believes that the scope of the July 2004 draft policy is overly ambitious and attempts to be too many things to too many stakeholders, resulting in a draft that unduly complicates the definition of a 303(d) list, is inconsistent with the federal regulations implementing this portion of the Clean Water Act, and as a result produces a definition of a 303(d) list that will be virtually impossible for disparate but otherwise reasonable stakeholder groups to understand, let alone accept. The first paragraph of the Introduction to the draft policy states "The objective of this Policy is to establish a standardized approach for developing California's section 303(d) list..." And yet, the policy attempts to do much more than that.

The section 303(d) list is supposed to include: 1) water quality-limited segments, 2) associated pollutants, and 3) a priority ranking of the waters, including waters targeted for TMDL development in the next two years – period. As described above in our first specific comment, CASQA believes that the current draft does not provide a methodology that meets even these basic criteria and yet the policy attempts to go beyond them by creating more than one category and subcategories of lists within the 303(d) list. These categories and subcategories belong in the State's Clean Water Act section 305(b) report. In fact, they are statutorily required under section 305(b).

To avoid these regulatory mistakes and the impending confusion they will cause, CASQA recommends that the following steps be taken so that California's resulting 303(d) lists match their federal definition:

1. Make the following ~~strike through~~ revisions to the description of the list in section 2 of the draft policy "Structure of the CWA Section 303(d) List":

2.1 Water Quality Limited Segments

Waters shall be placed in this category of the section 303(d) list if it is determined, in accordance with the California Listing Factors, that the water quality standard is not attained; the standards nonattainment is due to ~~toxicity~~, a pollutant, or pollutants; and remediation of the standards attainment problem requires one or more TMDLs.

The water segment shall remain in this category of the section 303(d) list until TMDLs for all pollutants have been completed, U.S. Environmental Protection Agency (USEPA) has approved the TMDLs, and implementation plans have been adopted.

2.2 Water Quality Limited Segments Being Addressed

~~Water segments shall be placed in this category under two circumstances:~~

~~1. A TMDL has been developed and approved by USEPA and the approved implementation plan is expected to result in full attainment of the standard within an adopted time frame; or~~

~~2. If a RWQCB certifies under the provisions of the Water Quality Control Policy for Addressing Impaired Waters that pollution control requirements other than TMDLs are reasonably expected to result in the attainment of the water quality standard within an adopted time frame.~~

~~Waters shall only be removed from this category if it is demonstrated in accordance with section 4 that water quality standards are attained.~~

2. Make all necessary revisions to the rest of the draft policy so that all sections are consistent with this definition of the 303(d) list.
3. Develop a 305(b) reporting policy that dovetails with the "front-end" of the 303(d) listing policy and provides an appropriate regulatory home for many of the categories and subcategories of water segments that, under the current draft 303(d) listing policy, would be inappropriately lumped in the 303(d) lists.
4. Adopt a version of the draft Water Quality Control Policy for Addressing Impaired Waters that dovetails with the "back-end" of the 303(d) listing policy. Again, this policy would provide a home for some of the categories and subcategories of water segments.

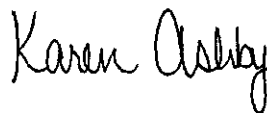
Steps 3 and 4 have the added benefit of providing places for retaining the base of information on water segments established during the 2002 listing process.

CASQA believes that taking these steps will effectively implement the concept of an Integrated Water Quality Report, which CASQA supports. The combination of a comprehensive 305(b) reporting policy, clear 303(d) listing policy, and adaptive Water Quality Control Policy for Addressing Impaired Waters would give the State Water Board, the environmental community, and the regulated community a legally structured and clear set of lists to help guide water quality management in California. In addition, the three policies would provide the State Water Board with the categorical components for a California Integrated Water Quality Report.

Again, thank you for the opportunity to submit our comments on the *Draft Final Water Quality Control Policy for Developing California's 303(d) List*. We welcome the opportunity to work further with you to improve the listing/delisting policy and California's 303(d) program.

Please contact me at (530) 753-6400, x 232 if you have any questions regarding our comments.

Sincerely,



Karen Ashby - Chair
California Stormwater Quality Association

cc: Craig J. Wilson

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Testimony

Draft Final Water Quality Control Policy for Developing California's
Clean Water Act Section 303(d) List (July 22, 2004)

September 8, 2004

Comments of the California Stormwater Quality Association

Good Morning

My name is Bill Busath and I am here today in my capacity as Vice Chair of the California Stormwater Quality Association.

My address is 1309 35th Ave., Sacramento, CA 95821.

The California Stormwater Quality Association (CASQA) is composed of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout the state, and was formed in 1989 to recommend approaches to the State Water Board for stormwater quality management in California. In this capacity, we have assisted and continue to assist the State Water Board with the development and implementation of stormwater permitting processes.

We appreciate the opportunity to provide comments on the proposed 303(d) listing policy. CASQA has actively participated in the public review process for the proposed policy through our representation of stormwater interests on the AB 982 Public Advisory Group and through our review and comments on the July 2003 and December 2003 versions of the draft policy. In the interest of time, I will summarize our testimony and submit our more detailed testimony in writing.

As we have previously stated, CASQA supports the State Water Board's goal to establish a standardized approach for developing California's Section 303(d) list. The process employed in developing the 2002 list was a vast improvement over the processes used in previous years. Like the Regulated Caucus of the AB 982 Public Advisory Group, CASQA would like to see the State Water Board adopt a final statewide policy as soon as reasonably possible. At the same time, we do have several major concerns.

First, CASQA is concerned that the July 2004 draft policy seems to ignore the requirements of 40 CFR 130.7(b)(4) and therefore does not fully comply with the federal regulations for implementing section 303(d) of the federal Clean Water Act. This requirement is very clear. The listing shall:

- include a priority ranking
- identify the pollutants causing or expected to cause violations of the applicable water quality standards

In terms of identifying pollutants, two things are clear to CASQA:

- 1) that conditions or symptoms like nuisance water odor, taste, excessive algae growth, foam, turbidity, and color, which could be used to list water segments under the draft policy, are not pollutants as defined in the Clean Water Act and Porter-Cologne
- 2) that the State Water Board must publish a list for the purposes of 303(d) compliance that identifies pollutants for all water quality-limited segments listed

Secondly, 40 CFR 130.7(b)(4) is clear that the list must include a priority ranking. Yet, in Issue 8 of the FED, Priority Ranking and TMDL Completion Schedule, the recommended alternative (3) blurs the distinction between these two separate actions – priority ranking and TMDL scheduling – to the point of again seeming to ignore this federal regulation and mischaracterizing USEPA guidance. USEPA's guidance does not speak to 40 CFR 130.7(b)(4) and only provides guidance for TMDL scheduling, presumably because the regulation is so clear that the list shall include a priority ranking that no further guidance is necessary on that requirement.

As a result, CASQA believes that the draft policy is missing a methodology for complying with the requirement under 40 CFR 130.7(b)(4) that the list shall include a priority ranking. To comply with this priority ranking requirement, CASQA believes that the State Water Board should seriously consider the methodology for developing a numerical "Pollutant Severity Score" proposed by Armand Ruby, alternate CASQA representative to the AB 982 PAG. We understand

that introducing a new methodology at this point in the process may seem challenging but again, we believe the draft policy is currently lacking a methodology for meeting the priority ranking requirement and we believe that the proposed methodology is compelling enough to warrant its serious consideration.

Finally, CASQA believes that the scope of the July 2004 draft policy is overly ambitious and attempts to be too many things to too many stakeholders, resulting in a draft that unduly complicates the definition of a 303(d) list, is inconsistent with the federal regulations implementing this portion of the Clean Water Act, and as a result produces a definition of a 303(d) list that will be virtually impossible for disparate but otherwise reasonable stakeholder groups to understand, let alone accept.

The section 303(d) list is supposed to include: 1) water quality-limited segments, 2) associated pollutants, and 3) a priority ranking of the waters, including waters targeted for TMDL development in the next two years – period.

CASQA believes that the current draft does not provide a methodology that meets even these basic criteria and yet the policy attempts to go beyond them by creating more than one category and subcategories of lists within the 303(d) list. These categories and subcategories belong in the State's Clean Water Act section 305(b) report. In fact, they are statutorily required under section 305(b).

To avoid these regulatory mistakes and the impending confusion they will cause, CASQA recommends three steps:

1. Make all necessary revisions to the draft policy so that all sections are consistent with the federal definition of the 303(d) list.
2. Develop a 305(b) reporting policy that dovetails with the “front-end” of the 303(d) listing policy and provides an appropriate regulatory home for many of the categories and subcategories of water segments that, under the current draft 303(d) listing policy, would be inappropriately lumped in the 303(d) lists.

3. Adopt a version of the draft Water Quality Control Policy for Addressing Impaired Waters that dovetails with the "back-end" of the 303(d) listing policy. Again, this policy would provide a home for some of the categories and subcategories of water segments.

The combination of a comprehensive 305(b) reporting policy, clear 303(d) listing policy, and adaptive Water Quality Control Policy for Addressing Impaired Waters would give the State Water Board, the environmental community, and the regulated community a legally structured and clear set of lists to help guide water quality management in California.

Thank you for the opportunity to present our comments.