

STATE WATER RESOURCES CONTROL BOARD

CONSIDERATION OF A RESOLUTION TO ADOPT THE  
WATER QUALITY CONTROL POLICY FOR DEVELOPING CALIFORNIA'S  
CLEAN WATER ACT SECTION 303(d) LIST

THURSDAY, SEPTEMBER 30, 2004  
10:00 A.M.

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

ORIGINAL

REPORTED BY:

ESTHER F. SCHWARTZ  
CSR NO. 1564

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ATTENDEES

STATE WATER RESOURCES CONTROL BOARD:

- ARTHUR G. BAGGETT, JR., CHAIR
- PETER S. SILVA
- RICHARD KATZ
- GARY M. CARLTON
- NANCY H. SUTLEY

STAFF:

- CELESTE CANTU
- THOMAS HOWARD
- HARRY SCHUELLER
- CRAIG J. WILSON

COUNSEL:

- CRAIG M. WILSON
- MICHAEL LEVY

HEARING PARTICIPANTS:

- CRAIG JOHNS
- GARY LORDEN
- STEVEN ARITA
- SHARON GREEN
- CLAYTON YOSHIDA
- GERRY GREENE
- RICHARD WATSON
- DAVID BOLLAND
- BILL JENNINGS
- LESLIE MINTZ
- LINDA SHEEHAN

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1 SACRAMENTO, CALIFORNIA

2 SEPTEMBER 30, 2004, 10:30 A.M.

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4 CHAIRMAN BAGGETT: Item nine.

5 MR. CRAIG J. WILSON: Morning, Mr. Baggett and  
6 Members of the Board. My name is Craig J. Wilson. I am  
7 chief of the TMDL listing unit in the Division of Water  
8 Quality. The next item is consideration of a resolution  
9 to adopt the water quality control policy for developing  
10 California's Section 303(d) list.

11 This item was heard at your September 8th workshop,  
12 and in response to the testimony received at that workshop  
13 and the letters received, we have made several minor  
14 changes. I'll go through those very briefly.

15 The first one is the stringency or the listing for  
16 toxics. The requirement for listing has been reduced, so  
17 two hits out of two samples would be sufficient grounds  
18 for placing a water on the list.

19 The second change is to increase the amount of  
20 information that is available for delisting. Instead of  
21 20 samples or 16 or fewer, we would require for toxics 28  
22 samples before listing would be considered and 26 for  
23 conventional pollutants.

24 The third change is the application of the summer  
25 month exceedance frequency for bacteria to freshwaters.

1 There is nothing in the record that indicates that it's  
2 inappropriate use of that kind of measurements. We went  
3 forward and made that recommendation to you.

4 The fourth change is we've removed a reference to  
5 the impaired waters policy and replaced it with a simple  
6 statement that if there is a regulatory program available  
7 that is going to be completed within a specified time  
8 frame, it should be used instead of completing a TMDL.

9 Another change is on the public process. When the  
10 list finally comes back to the State Board, we've set up  
11 the requirement that any issue can be brought before the  
12 State Board and discussed at your workshop.

13 And lastly, second to last, I should say, is we  
14 have placed a statement in the resolution for a commitment  
15 for a workshop after the 2006 list is completed. There  
16 has been so much controversy over this and a lot of  
17 interest to make sure that this policy is working.

18 The last change is very minor, editing changes to  
19 the policy, changing the numbering of the sections, that  
20 type of thing.

21 We have received four letters. One from Craig  
22 Johns from the AB 982 regulating Caucus. The second's  
23 from Gary Lorden, Cal Tech statistician that came before  
24 you and discussed the binomial model at the last workshop.  
25 A letter from Larry Forester of the Coalition for

1 Practical Regulation and Eugene Mitchell from the San  
2 Diego Chamber of Commerce. I would like to talk very  
3 briefly and respond to a couple of the new substantial  
4 issues that have been raised.

5 In the letter from Craig Johns there was a long  
6 discussion how the policy allows for the appropriate use  
7 of statistics when compared to water quality standards.  
8 He asked for more explanation in the FED. I have gone  
9 over all the comments he submitted. I think it is very  
10 consistent with what's already in the FED, and it would  
11 just be a repeat, if you will, to add anything extra to  
12 that. My recommendation is to not make any change.

13 There's discussion about the unreasonableness of  
14 using the additional information for delisting. It  
15 removes some of the consistency in the policy. That  
16 consistency is still there. It's still for larger sample  
17 sizes. It really just takes a difference between, like,  
18 three or four hits to list and four hits or five hits to  
19 delist. So I think it is an appropriate use of this.

20 The reason to have 28 samples for toxics is to  
21 increase the need for monitoring and to get that  
22 monitoring information. He makes a very good point.  
23 There are listings out there. I don't have any examples  
24 at my fingertips that are based on very little  
25 information. The way the policy is written now, it would

1 increase the amount of monitoring that would be made  
2 available before delisting would occur.

3 Another comment that was raised related to the 4  
4 percent exceedance frequency for bacteria, applying that  
5 to freshwaters. The letter says that the standards were  
6 not developed using that 4 percent exceedance rate, that  
7 the EPA epidemiological study did not consider that. That  
8 4 percent value is the background density of bacteria in  
9 coastal waters. We have no reason to believe that it  
10 doesn't also apply to freshwaters. It's not really a  
11 standards issue. It is an interpretation of the standards  
12 point.

13 In Dr. Lorden's letter to you he talked  
14 specifically about changing the pegs. We changed the  
15 exceedance frequency from 5 percent to 3 percent. And in  
16 his experience that is a very low exceedance right. I  
17 agree with that point. It is very low. And for outliers  
18 you can have higher exceedance frequencies. This is a  
19 conservative approach. This is bringing more waters onto  
20 the list so we can take a closer look at those. He feels  
21 that the tables that we had at the September 8th workshop  
22 were much more reasonable than the ones that are currently  
23 in the proposal.

24 Again, he also brings up the point that symmetry of  
25 the listing and delisting is removed by requiring more

1 information. It is removed for those small sample sizes.  
2 The reason for that is to create an incentive for more  
3 monitoring. At sample sizes greater than 28, that  
4 symmetry is still present.

5 The other two letters from the Coalition for  
6 Practical Regulations and San Diego Regional Chamber of  
7 Commerce, no new substantial issues were raised. They  
8 have all been responded to in the previous documentation.

9 The staff recommendation is to approve the  
10 resolution adopting the policy and approve the FED.

11 This concludes my presentation. If you have any  
12 questions at this point, I would be happy to answer them.  
13 I will be here throughout the discussion to answer any  
14 questions that might come up.

15 CHAIRMAN BAGGETT: Not at this point. We have  
16 a number of cards.

17 MR. CRAIG J. WILSON: Thank you.

18 CHAIRMAN BAGGETT: Thank you, Craig.

19 We have the regulated community first up. Three  
20 cards: Craig Johns, Gary and Steve Arita. Are you there?  
21 Do you have an order?

22 MR. JOHNS: It makes no difference. Thank  
23 you, Mr. Chairman, Members of the Board. Craig Johns here  
24 on behalf of California Manufacturers Technology  
25 Association. And also I think it's -- I believe it is

1 fair for me to say I speak on behalf of all 24 members and  
2 alternates of the regulated caucus of the public advisory  
3 group.

4           Actually, I am not going to say very much and ask  
5 that Dr. Lorden follow me just to address a couple of the  
6 issues related to the balance issue. I would like to  
7 thank again Craig Wilson and his staff and everybody at  
8 the staff and the Board Members for their patience in this  
9 policy, in developing this over the last couple of years.  
10 Why we think that the binomial method provides a very  
11 meaningful objective, basically scientific approach to  
12 determining listings and delistings of impaired waters, we  
13 do believe that the proposed changes are moving us  
14 backwards in terms of that balance. And we urge you to  
15 reject all the changes with respect to Sections 3-1, 3-2,  
16 the tables and Section 4-1.

17           I would like to point out that if my letter said --  
18 I went back and looked at it real quickly. I wanted to  
19 say, "Craig, I'm sorry if you interpreted my letter as  
20 asking for more work on your behalf or on your staff's  
21 part to somehow explain the FED." I didn't mean to ask  
22 for that. I don't think you folks need to do any more  
23 work.

24           There was a conversation that we had, Craig and I  
25 had a couple weeks ago, where I suggested that the

1 addition to the language to Section 4.2, saying that you  
2 cannot use the binomial method for delisting purposes  
3 unless you have a minimum sample size, I think it is 28  
4 and 26, flies in the face of FED, which is set out at Page  
5 220, which says on Alternative 3, that says that a party  
6 can seek delisting or reexamination of a listing, if you  
7 will, even if there is not additional data. And the  
8 language says you have to have this additional data is in  
9 conflict with that. I suggested that the whole purpose of  
10 why Alternative 3 was a good one from our perspective and  
11 why I think that hopefully at least a majority of the  
12 Board Members agree, is that there are historical listings  
13 on the TMDL list that we need to reexamine without  
14 spending a lot of either state and federal resources or  
15 private resources that are limited and dwindling in this  
16 economy and to get more appropriately addressed real water  
17 quality impacts.

18 It could take many years and lots of money to go  
19 out and develop the kind of data sets that could then be  
20 submitted. And if it doesn't make sense from an  
21 objective, the binomial method approach, then our question  
22 is why do that. We understand the temptation to try to  
23 move those pegs as was discussed last time. But we really  
24 think that you are losing some significant and appropriate  
25 balance that your July draft had.

1           I will just conclude by saying we urge you to  
2 reject these changes regarding the toxics and the  
3 conventional number of data points and the number of  
4 exceedances that are allowed. If you have any questions,  
5 I will try to answer them.

6           MEMBER SUTLEY: I have a question. I've been  
7 listening to this same argument for more than a year, I  
8 think, on the issue of delisting, and I have yet to see in  
9 anybody's material an example of anything that anybody  
10 believes was listed in error and this statistical method  
11 if we were to go back to the September 8th draft would  
12 have caught that this new approach wouldn't have. I  
13 haven't heard it.

14           So if you've got one, now would be the time to  
15 provide us with a single example of something that  
16 somebody believes was listed in error.

17           MR. JOHNS: Well, I wished that I would have  
18 known that you were interested in that question from the  
19 last hearing, Ms. Sutley. We would have been happy to  
20 bring it. There was a study that was done by, I believe,  
21 Larry Walker & Associates examining some of the historical  
22 listings in the Central Valley where they have gone into  
23 Regional Board offices and found no data in the file that  
24 purportedly supported the listings. I can't give exact  
25 water segment name and pollutant. I understand that Craig

1 Wilson doesn't have that information handy either. It  
2 would have been nice to know that you wanted that. We  
3 certainly would have been willing to provide it. I think  
4 that during many of the PAG -- the conversations that we  
5 had over the last several years there were folks from the  
6 State Water Board who stood up and acknowledged that in  
7 the past.

8 Prior to the litigation that started several years  
9 ago this whole emphasis on the TMDL program, there was  
10 really no negative consequences to listing and, in fact,  
11 listings were made because it came with benefits. It came  
12 with Federal EPA grants to the State Board, and there  
13 weren't the negative consequences that are perceived now.  
14 There was acknowledgement that in many cases those  
15 listings were perhaps not appropriate from the data, the  
16 quality or the volume.

17 CHAIRMAN BAGGETT: How do you respond to, I  
18 guess, the environmental community's argument that if the  
19 listing and delisting are almost identical processes you  
20 will just have a Ping-Pong effect. One year will be  
21 listed. Next year it will be delisted. Next year it will  
22 be listed. It will be just because it is so close.

23 MR. JOHNS: Well, I can give you my opinion  
24 that would probably be 180 degrees opposite of what the  
25 enviros' opinion would be. I'm going to ask Dr. Lorden to

1 expand on his letter, because his letter touched on that  
2 very issue of the Ping-Pong effect. He could do that, I  
3 think, more effectively than I. I don't think that it is  
4 a real threat. And if, in fact, that kind of Ping-Pong --  
5 it is going to happen no matter where you set the pegs.  
6 The issue is whether or not the statistical approach that  
7 you as a Board wants to adopt is balanced.

8 I am not saying that you don't have a legal  
9 authority as was mentioned last hearing by the  
10 environmental community to do whatever you want. This a  
11 policy call. It is in your hands. We all recognize this.  
12 I'm just suggesting that our views is that it is a bad  
13 policy call on your point, would put us backward, not  
14 moving forwards on this issue.

15 MEMBER KATZ: Let me ask you an easier  
16 question since you didn't have the information Ms. Sutley  
17 asked you at your fingertips. I am sure if this had been  
18 the problem you make it out to be, there would be examples  
19 that come to mind almost immediately.

20 What have you petitioned the Board to delist? Or  
21 your organization. If this listing process is so screwed  
22 up, what in the past period of time have you come before  
23 us and asked us to delist?

24 MR. JOHNS: Well, the organization that I am  
25 here today on behalf of, CMTA, has not, to my knowledge,

1 petitioned any.

2 MEMBER KATZ: No.

3 MR. JOHNS: It is in a little different  
4 situation than many of the Central Valley listings and  
5 some in Southern California. And the reps from Southern  
6 California want to talk about that, I'll be happy to let  
7 them do it. From the industrial dischargers' standpoint,  
8 who are most of my clients, we don't have this issue, per  
9 se, because we have a lot of data, historical data, coming  
10 from the San Francisco Bay region. We all agree that more  
11 data is better than less data.

12 I can't answer your question as easy as you might  
13 suggest that it is. It is not that easy because I don't  
14 deal with those specific issues. And the fact, Mr. Katz,  
15 that there haven't been a spade of petitions to delist, I  
16 don't think is dispositive of the breakdown. The fact is  
17 that you have a system throughout the state that is not  
18 consistent. That is why we are here. That is why the  
19 Legislature asked your Board to develop this policy. And  
20 the fact that we don't have a spade of delisting petitions  
21 is not dispositive that the problem is broken systemwide.  
22 And that this policy as you have it today before you in  
23 the September draft is not going to move it forward. It's  
24 becoming less balanced, and that is all we  
25 are suggesting.

1 CHAIRMAN BAGGETT: Any questions?

2 MR. JOHNS: Thank you very much.

3 CHAIRMAN BAGGETT: Dr. Lorden and Steven  
4 Arita.

5 DR. LORDEN: Good morning. I wanted to fly  
6 back up to Sacramento and have an opportunity to explain a  
7 little further my letter that Craig Wilson has already  
8 pretty well summarized. I think we are talking this time  
9 about a relatively narrower range of considerations than  
10 we were at the workshop on September 8th. And I am  
11 pleased and I want to say again to see that the basic good  
12 ideas that Mr. Wilson and his staff have brought forward  
13 to deal with the question of having a good sound  
14 statistical scientific basis is a background for listing  
15 and delisting decisions. All of that still here.

16 We are now talking about some relatively  
17 smaller changes. And the reason that I feel and expressed  
18 in my letter earlier this month that it is important to  
19 consider those changes carefully, from the July tables to  
20 the September tables, is because fundamentally I think a  
21 good approach that was taken and is being taken is good  
22 precisely because it's based on some simple principles.  
23 And carrying out those principles and deriving from those  
24 principles what is the way to set the standards.

25 As I explained back earlier in September, as far as

1 the statistician is concerned, I can't tell you how to set  
2 the pegs. But I think it is a good idea to consider when  
3 setting them not just that one wants to have some  
4 particular outcome, like two should be sufficient, but to  
5 consider what all the implications of the pegs are. And  
6 the whole point of this alpha-beta balanced approach is to  
7 determine what would be meaningful and useful choices of a  
8 true exceedance percentage on the low side and true  
9 exceedance percentage on the high side, which, if they  
10 were true, would want to imply control chances of error.  
11 That is the whole statistical argument behind the tables  
12 that were derived in July or even earlier and certainly  
13 the tables that are now before you in the September draft.

14 So whereas for toxics it was 5 percent was  
15 considered to be the level at which you would want to have  
16 a controlled, not very large probability of having  
17 something listed. If the true exceedances were to be 5  
18 percent over some hypothetical long period of sampling.  
19 And on the other hand, the 20 percent at the high end.  
20 And those values seem to me to be quite reasonable. I am  
21 concerned that in shifting those downward to produce the  
22 effect of two should be sufficient for listing for toxics,  
23 we are now talking about a 3 percent value on the low end.  
24 In my experience over a broad range of statistical data,  
25 physical, real world data, 3 percent is a very low

1 frequency, if one wants to be fairly sure that we are  
2 looking at real information rather than outliers. Just to  
3 give a rough description, an outlier results when, for  
4 example, some event occurs that produces unusually high  
5 readings, like a very large storm or lab measurements  
6 which, it is my understanding in environmental water  
7 quality data are subject to somewhat substantial errors,  
8 sometimes one gets outliers just in the measurements, in  
9 the calibrations that are performed in the laboratory.

10 So I am concerned that 3 percent may be pushing it  
11 quite far, and it isn't only that it produces the level of  
12 two as the minimum rather than a level of three, but it  
13 has an impact throughout the tables. In other words, even  
14 when the desirable circumstance occurs, that we get up to  
15 sample sizes of 25 or 30 or 35 or 40 or beyond, it's still  
16 true that the tables are being calibrated on the  
17 assumption that we want to protect against falsely keeping  
18 on the list or falsely listing when the true percentage of  
19 exceedances is 3 percent. I am saying that is a very low  
20 number, because one can get up to that number or very  
21 close to it just on the basis of essentially bad data or  
22 outliers.

23 The other main question that I think Craig Wilson  
24 did a job of summarizing my letter. The points he  
25 mentioned are exactly the points that I want to discuss.

1 We're talking about listing versus delisting, and I didn't  
2 touch on this point for lack of time in the workshop in  
3 early September. But it is my feeling that there is a  
4 very elegant and scientifically reasonable symmetry in the  
5 original July draft that said that if you look at a given  
6 amount of data over some period of time for a water body,  
7 then you look at that data in terms of what evidence it  
8 conveys, what statistical evidence, without regard to the  
9 past history at some intermediate point in the data stream  
10 whether or not something met the criterion to be listed or  
11 not.

12 So in the example I gave in my letter what I was  
13 saying is with the removal of the symmetry between listing  
14 and delisting and having a higher sample size standard and  
15 even more important the 10 percent requirement on the  
16 error probabilities for delisting, essentially what is  
17 being said is that it isn't enough to simply look at the  
18 body of evidence that exists at any point in time and  
19 decide whether the body should be on the list or not on  
20 the list, one was to consider whether it was previously on  
21 the list. I really don't see logic for that.

22 For example, delisting is harder in an appropriate  
23 sense. Because once placed on the list, there is some  
24 evidence that's showing exceedances, and one has to  
25 accumulate some nonexceedances to overbalance that and to

1 produce the result that when you do the statistics you are  
2 not unlisting. The other way, when you have relatively  
3 less negative data and, let's say, you then recently  
4 acquire some more data that's suggestive of impossible  
5 impairment, you are going to get with the current approach  
6 situations where in effect you are penalizing one body of  
7 water over another because it's same number of failures,  
8 it's same number of exceedances, occurred earlier rather  
9 than later, when I think the opposite would be true.

10 The rational approach would be to say if we are  
11 going to consider the exceedances being more in an earlier  
12 period or more in a later period, it would be less  
13 worrisome if the exceedances were in an earlier period.  
14 My logic there, I thought, was a reasonable one from a  
15 scientific point of view. So it really bears in favor of  
16 what I had earlier indicated in letters to Mr. Wilson,  
17 which was that I thought it was really a nice kind of  
18 scientific and statistical logic to have the criteria for  
19 listing and delisting match, so that if you look at a data  
20 set you don't have to know whether at some prior point it  
21 was listed or not. You make the same conclusion on the  
22 basis of current good evidence.

23 CHAIRMAN BAGGETT: I can appreciate that. But  
24 how do you rebut the contention this would cause Ping-Pong  
25 effect? If you've got something that is so close, it

1 could literally unlist, delist, that would be an  
2 incredible amount of time and money.

3 DR. LORDEN: That is an interesting question,  
4 and I will respond to it. But let me first point out that  
5 it has nothing to do with the point I was making.

6 CHAIRMAN BAGGETT: I understand that.

7 DR. LORDEN: Whichever version one uses, July  
8 or September, as long as there is no middle decision, as  
9 long as there is no planning list or increased monitoring  
10 requirement imposed or some real-time decision to require  
11 more monitoring, a middle ground that says we need more  
12 data, as long as that doesn't exist, this possibility that  
13 you are referring to is always there. It is a  
14 possibility. I think it is an unlikely occurrence. It's  
15 sort of like a surfer skimming along across the top of the  
16 wave for a long distance. It's certainly possible that  
17 whenever you always make a decision one way or the other,  
18 listing or delisting, that you are going to have the  
19 phenomenon that you could be very close on the low side  
20 and not be listed, and at the next checkpoint you could be  
21 above it.

22 My understanding, I'm not expert in these matters,  
23 that routinely Regional Boards review every two years.  
24 And so I don't think it is likely that one would be  
25 flip-flopping every month. I don't think it is

1 necessarily likely that the data would be occurring every  
2 month. I think that is a technical possibility, but I  
3 think it is unlikely to really be a factor in practice.

4         The other thing I want to comment about is just on  
5 the, and I realize I said it, that you could move the  
6 pegs. It is important for a statistician to say that  
7 because we don't -- we are not business -- I do all kinds  
8 of consulting and appearances as a statistical expert  
9 witness, and I never say you have to choose an arbitrary  
10 value like exactly certain confidence level or margin of  
11 error or something like that. It doesn't make sense.

12         But having said that, I do feel when I look at this  
13 result of 3 percent that that is seeming to push it well  
14 into the area where outliers would be a serious concern.  
15 But it is possible to still have some statistically  
16 reasonable way of determining that two toxics in  
17 exceedance would be sufficient for listing. If one  
18 redefined the standards to consider that in a small sample  
19 size, like ten or twelve, if you have two exceedances,  
20 that would be a highly statistically significant result  
21 from the point of the earlier pegs of 5 percent or 20  
22 percent. In the sense if it were really only 5 percent  
23 exceedances, then the chances of getting two out of ten  
24 would be very small.

25         It's certainly possible that other statistic

1 methods could be used to consider that. It is also true  
2 that a Board could use its discretion. If someone came in  
3 with nine data points and three of them -- well, three  
4 would be sufficient under even the old guidelines. Let's  
5 say two exceedances, it is certainly possible to do some  
6 statistical analysis and get a statistician to do it and  
7 say that is highly statistically significant from the  
8 point of view of rejecting a hypothesis that the true  
9 percentage of exceedances is low.

10 I think that is, unless there are other questions,  
11 sufficient to cover the points I had in my letter?

12 CHAIRMAN BAGGETT: Questions?

13 DR. LORDEN: Thank you.

14 CHAIRMAN BAGGETT: Steve Arita, and then  
15 Sharon Green.

16 MR. ARITA: Morning, Mr. Chairman, Members of  
17 the Board. For the record, my name is Steven Arita. I am  
18 with the Western States Petroleum Association. I'm not  
19 going to rehash or recomment on the previous presenters.  
20 I will be just fairly brief.

21 On behalf of WSPA we do support the comments and  
22 issue that have been raised by Craig Johns and the PAG  
23 letter. We certainly do urge the Board to address the  
24 concerns that have been raised, and we would hope that the  
25 Board incorporate the suggested changes before adopting

1 the policy.

2 Secondly, Mr. Chairman, we strongly urge you to  
3 incorporate the recommendations that Mr. Lorden had made  
4 in his written letter. The proposed changes to Tables 3-1  
5 and 4-1 we believe effectively destroys the statistically  
6 sound objective and balance process for listing and  
7 delisting water bodies that previously existed in the July  
8 draft. We would urge you to take Dr. Lorden's comments  
9 and considerations and incorporate them into the policy.

10 Lastly, while we understand the decision to move  
11 the pegs for listing purposes is a Board decision, we do  
12 believe that policy decisions must be guided and based on  
13 sound science and technically defensible methodologies.  
14 We would hope that the information that we provided and  
15 the expert witness and the technical information provided  
16 to you today provides you with that technical information  
17 that you need to make hopefully a sound policy decision.  
18 And regarding --

19 Again, in closing, I would urge you to incorporate  
20 the suggestions and recommendations that you have heard  
21 from Mr. Craig Jones and Mr. Lorden.

22 Thank you.

23 CHAIRMAN BAGGETT: Thank you.

24 Questions?

25 Sharon Green and then Clayton Yoshida, City of Los

1 Angeles.

2 MS. GREEN: Good morning, Mr. Chairman and  
3 Members of the Board. I am Sharon Green. I am here today  
4 on behalf of Tri-TAC and the California Association of  
5 Sanitation Agencies. My colleague Bobbi Larson somehow  
6 must have known six months ago you were going to schedule  
7 today, and she is leaving for Italy on a nice vacation.  
8 So, lucky her. I think we'd all rather be on our ways to  
9 vacation.

10 I will also be fairly brief today and hopefully not  
11 repeating the testimony of my colleagues. I guess I would  
12 like to start actually by trying to make a couple points  
13 and response to some of the questions I have heard  
14 already. I guess from my perspective and as I think you  
15 all know I work for the sanitation district of Los Angeles  
16 County, so that is kind of my frame of reference. And my  
17 agency has spent a lot of time and effort on monitoring  
18 over the years and also in -- well, basically, over the  
19 last ten years we have reviewed and commented on proposals  
20 for 303(d) lists dating all the way back to 1994 and even  
21 before that, the predecessor lists that were done by our  
22 Regional Board.

23 And I think that the kind of things that we are  
24 concerned about with respect to the existing list and how  
25 the delisting part of the policy relates to that are

1 things like where a sample of one fish was used to create  
2 listings and now TMDLs are being done based on that. That  
3 is being done right now for Ballona Creek Estuary, and a  
4 TMDL I understand is scheduled to come out next week.  
5 They've released a preliminary draft to some of the  
6 stakeholders, so we have seen that. And in the past there  
7 were no defined criteria for delisting so people didn't  
8 necessarily know what they needed to do in terms of  
9 resampling/retesting, to figure out how something could  
10 get off the list.

11 Another example like that that affects my agency  
12 more directly than the Ballona Creek example is on the San  
13 Gabriel River. There is a listing for abnormal fish  
14 histology, and I believe that is the only of its type in  
15 the whole country. We view that as a condition, not a  
16 pollutant specific type of listing. And the results were  
17 not linked to specific pollutants in terms of what the  
18 cause is. And fish histologists we've consulted have told  
19 us that it is not even possible to link it to specific  
20 pollutants. So we have no idea what kind of TMDL could  
21 ever be done for that. You might ask why we haven't gone  
22 out and collected more data to try to get it delisted.

23 MEMBER SUTLEY: I was just about to ask that.

24 MS. GREEN: I thought you might be. The reason  
25 is because we don't know how to even assess that as a sort

1 of listing parameter. We don't know -- the line between  
2 what is normal and abnormal in fish histology is fuzzy.  
3 There is no clear bright line. Even, I think,  
4 quote-unquote, what is in the range of normal there may be  
5 histological effects on fish that may be seen. So  
6 different experts can have different calls on how to  
7 evaluate the data. And so we really didn't feel like we  
8 knew what to do, to do something meaningful.

9 MEMBER SUTLEY: In that case you are not  
10 arguing that it's not possible that the water body is  
11 impaired for this fish histology?

12 MS. GREEN: We would argue, first of all, that  
13 it is not a valid type of impairment warranting a 303(d)  
14 listing. We would argue that you really need to know what  
15 pollutant is causing it in order to be able to --

16 MEMBER SUTLEY: Have you ever made that  
17 argument to the Regional Board?

18 MS. GREEN: Yes, we have made the argument to  
19 the Regional Board.

20 MEMBER SUTLEY: What was their response?

21 MS. GREEN: Well, we made that argument also  
22 to the State Board. Their argument was it is an existing  
23 listing and, you know, basically it is going to stay on  
24 the list.

25 I think that certainly in the last listing cycle,

1 everybody is waiting for this listing policy to come out  
2 and provide clarity. I still think for things like that  
3 where there have been existing listings based on  
4 conditions or pollution-related conditions, it is still  
5 not clear how you get off the list. Arguing about the  
6 number of samples is irrelevant when it is not something  
7 that that applies to. So, I still think there is going to  
8 be some situations where there is a lack of clarity. That  
9 is just another point.

10 And then the other, I guess, issue to us that again  
11 it is getting away from this argument about how many exact  
12 samples you should have to have for delisting or listing.  
13 To me the real issue by the changes that have been made in  
14 the various drafts, you're going to end up with a more  
15 expansive list. You're making it easier to list, so you  
16 are going to have a bigger list presumably as a result of  
17 that, unless everybody's efforts are really taking hold.  
18 I know we are going to get cleaner water bodies and  
19 nothing will be going on the list. Presumably you are  
20 still going to get random hits of certain constituents and  
21 you are going to get some listings, some exceedances of  
22 water quality standards and data sets, and you are going  
23 to get a more expansive list.

24 And the concern I have is that, not so much that I  
25 can't go out and take more data and make an argument for

1 delisting, is that the TMDLs are coming. That we have not  
2 seen a willingness to reexamine the listings before the  
3 TMDLs are done in many cases. A recent example -- maybe  
4 there is going to be a change; it is still pending. The  
5 L.A. River metals TMDLs, there is some clear cases, some  
6 nonimpairment for which the TMDL is now proposed to be  
7 adopted, and waste load allocations assigned to different  
8 types of sources. And we don't think there is any  
9 impairment for some of those pollutants. And so I think  
10 that we need some real -- something more than just a  
11 statement in the response to comments that common sense  
12 will prevail, that some assurance that reexamination of  
13 listings really can occur in the process once things are  
14 on the list. That is really one of our big concerns.

15 So I guess just to close, I guess the feeling that  
16 I have was that there were three goals that we were trying  
17 to achieve with the listing policy, and I have to say that  
18 I thought these were widely shared goals. Maybe not.  
19 Maybe it was just my wastewater community that shared  
20 them. But that we are trying to achieve consistency in  
21 decision making, technical rigor in the decision making,  
22 and to ensure that we are focusing on resources where  
23 there really are true water quality problems and that  
24 there is transparency in the process.

25 Unfortunately, I think with this latest version I

1 think we are still achieving transparency. I am not sure  
2 we are going to achieve consistency or the degree of  
3 technical rigor that we think is necessary. So I am  
4 disappointed to say I cannot support adoption of the  
5 policy in its current form.

6 That's all I have.

7 MEMBER SUTLEY: I have one more question.

8 I'm failing to understand how requiring more  
9 sampling in a sense by eliminating the use of the  
10 statistical method for sample sizes, under 25 for  
11 delisting, wouldn't create more technical rigor. It would  
12 seem to me that that requirement by itself solves the  
13 problem of arguing about delisting, if you have sufficient  
14 data. Now the question of conditions, I think we have all  
15 -- I think I won't get into that. But it just seems to me  
16 by your own listing of principles, that it seems to me to  
17 reject the idea of requiring more samples before something  
18 can be delisted does actually provide technical rigor that  
19 you all have been asking for.

20 I recall the Clean Water Act says we have to list  
21 impaired water bodies. So we need to be sure that we are  
22 getting the impaired water bodies on the list. So it  
23 seems to me that as a policy matter and as a matter of  
24 sufficient data to make a decision to take something off  
25 the list, that requiring more samples only makes common

1 sense.

2 MS. GREEN: I guess I have a few points to  
3 make in response. One is that I don't disagree with that.  
4 I don't think that getting more data, per se, is at least  
5 from my perspective the objection. I think one objection  
6 is sort of equity or having balance in the approach, and I  
7 think that the current version has changed the balance.  
8 And so people view it as not a level playing field for  
9 decision-making, so to speak, for listing and delisting,  
10 which Dr. Lorden talked about. That is one answer.

11 Like I said, I don't think it's the actually going  
12 out and having to take more samples and monitoring, per  
13 se, that's something that we object to, at least, again,  
14 from the wastewater community perspective. I can't speak  
15 for others. But I think it is also really the need to  
16 feel that there is an assurance that there is going to be  
17 that opportunity to take another look before a TMDL is  
18 done. In other words, that there will be enough time to  
19 get the data. So that --

20 MEMBER SUTLEY: That seems to me to be a  
21 different issue. And it may or may not be worth  
22 addressing that particular issue in this policy. But the  
23 question of whether we should have more data before we  
24 delist seems to me to be consistent with your argument  
25 about technical rigor. So let's keep those issues

1 separate.

2 MS. GREEN: Thank you very much.

3 CHAIRMAN BAGGETT: Yes.

4 Thank you. Then Dr. Gerry Greene.

5 MR. YOSHIDA: Good morning. My name is  
6 Clayton Yoshida, representing the City of Los Angeles. I  
7 am going to keep my comments brief also. We agreed pretty  
8 much with most of the comments that have been said about  
9 the statistical aspect of the policy. And in general --  
10 first of all, thank you for very much for allowing us to  
11 submit several written comments in the past and  
12 participating in the development of this policy.

13 I am going to be brief about the binomial  
14 distribution table. I think in general we support the  
15 binomial distribution method in determining the number of  
16 exceedances based on the number of samples collected. The  
17 latest policy, though, is modified in that it uses the  
18 balanced error approach with confidence level and power of  
19 80 percent, which we support. But we would also like to  
20 have in balance so that the delisting also has a  
21 confidence level and power of 80 percent. And we believe  
22 that the required number of samples for an 80 percent  
23 confidence and power are sufficient to convince decision  
24 makers that a water body may be delisted.

25 And also adding -- there was also an additional

1 provision for fewer required samples to make a listing  
2 decision, and that puts the procedure more in line with  
3 the CTR standards for toxicants and human health, and yet  
4 it is more protective during the delisting process.

5 On another subject of bacterial listings, there was  
6 a mention of substantial human contact. We believe that  
7 is too vague for a policy. We would like to have that  
8 modified so that there is more detail in that term, such  
9 as using the AB 411 description of beach attendance and  
10 location near to a storm drain.

11 Also, we are concerned with evaluation of nuisance  
12 as compared with reference systems. We don't agree that  
13 nuisance should be used as evidence for listing unless a  
14 second -- unless a nonsubjective method of evaluation is  
15 developed.

16 And lastly, concerning the denial of delisting  
17 requests. If a delisting has been applied for but denied,  
18 the Regional Board should be required to provide data and  
19 information to support that position.

20 And I think that is it.

21 Thank you very much.

22 CHAIRMAN BAGGETT: Any questions?

23 Thank you.

24 Dr. Gerry Greene and Richard Watson, twice.

25 DR. GREENE: Hello. My name is Dr. Gerry

1 Greene, and I am here to speak today as a member or  
2 representing the executive advisory committee of the Los  
3 Angeles County MS4 permittees. You have a short letter.  
4 I will try to follow that, but I would like to divert just  
5 to address a couple of the issues that have been mentioned  
6 already.

7 In particular, the issue of Ping-Ponging and  
8 flopping. Very clearly, I would like to say as a city  
9 staff member, we are making many, many changes. We have  
10 MS4 permits that are getting harder every time, go-around.  
11 There are general industrial, general construction permits  
12 issued by the State Board. We are making improvements. I  
13 think water quality does show that. It does not happen  
14 overnight. It takes a lot of effort. It takes a lot of  
15 money. But I think the flip-flopping will be less an  
16 issue as we find things that have been perhaps listed  
17 based on old data and delisting them or perhaps not even  
18 having to deal with it in the first problem.

19 The second question that was brought up was talking  
20 about monitoring. We actually have not argued against  
21 monitoring. We do a lot of monitoring, not in Downey per  
22 se, but the representatives in our area, usually through  
23 our county or our san district or in association with  
24 agencies like SCORP. We have proposed talking about watch  
25 lists and supported the idea of watch lists to try to get

1 additional monitoring data before we are actually looking  
2 into a TMDL, which is long-term implications for our  
3 permits, for our planning process, for the dollar or the  
4 bottom line for bond orders and everything else.

5         Although we don't have an unlimited monitoring  
6 budget any more than you do, there is a lot of money going  
7 towards monitoring. We pay for monitoring as part of our  
8 city fees to the State Board. So there is -- it is an  
9 issue, but we understand. We don't think that the TMDL  
10 needs to come before the monitoring. I feel that's the  
11 situation we are in.

12         Having said that, back more on to the list or the  
13 short letter I gave that is hopefully up on your desks.  
14 This criteria review prior to TMDL development, we feel  
15 that there are TMDLs that have been inappropriately  
16 listed.

17         Ms. Sutley asked for an example. One of our  
18 permittees, I believe it is Burbank, in reference to the  
19 Burbank Wash, has spoken repeatedly that they had one hit  
20 out of 198 or 200 samples for, I believe it is, cadmium  
21 and lead. I could be wrong on that second one. I'm  
22 pretty sure the cadmium. But essentially one hit out of  
23 200 samples. That's presumably why they were listed under  
24 the L.A. rivers TMDL. Another speaker spoke to the issue  
25 of one fish. One striped mullet collected in 1993 is what

1 we heard last week was the basis for that toxicity TMDL.

2 From my own situation, when we were looking at the  
3 2002 listing, and I first started with the City of Downey,  
4 I pointed out in the report to our Regional Water Quality  
5 Control Board as they were assembling the list that the  
6 data included a zero hardness point and, of course,  
7 hardness is related to metal concentrations. If they had  
8 excluded that zero hardness, which is pretty rare, you  
9 don't see zero hardness except coming out of an RO unit,  
10 it would have changed whether this met this listing  
11 criteria. It continued to move down through the listing  
12 process, and today it's on the 303(d) list.

13 So we do believe that these things should be  
14 reviewed, that there is additional data and in a lot of  
15 cases the data is at the margin and perhaps a watch list,  
16 a sampling program, something other than a TMDL would be  
17 the most appropriate response.

18 Impaired reach designation. Somebody alluded to  
19 that just a moment ago, and I will try to say very  
20 quickly, again, with the L.A. rivers metal TMDLs, we had  
21 many reaches of the L.A. River, the Rio Hondo, identified  
22 as being impaired or being listed in the TMDL as  
23 contributing to the loadings that we will have to monitor  
24 and yet there was no impairment. They are not on the  
25 303(d) list. If the load coming from that canyon is

1 coming down into that lower sampling point that affects  
2 the rest of the system, we are impacted. We have to deal  
3 with what is happening in that canyon. There was no  
4 proposal in the TMDL to assess how much was coming out, no  
5 removal for what came out of that water, that reach.

6 Reconstitution of the July draft, unbiased binomial  
7 distribution. I am a member of the American Chemical  
8 Society. I did that for my Doctoral dissertation. I did  
9 a lot of chemical analysis. I've done tens of thousands  
10 of them. There are instruments I wouldn't trust to give  
11 me the same answer twice. It's just the facts of  
12 analytical chemistry. Many of the samples we are talking,  
13 many CTR criteria that are being used in our TMDLs are at  
14 or below the detection of some of these instruments.

15 I can appreciate that a sample that might be ten  
16 times the detection limit is a hit. But things that are  
17 real close to the detection limit, two or three, three is  
18 close, but two is just unbelievable for me. I'm going to  
19 have errors above that. Think of a good QA program. It  
20 has laboratory controls. It has sampling controls. It  
21 has transport controls. I've had errors show up in every  
22 one of those situations. I've had benzene picked up --  
23 not benzene. It was benzene from a leaking exhaust system  
24 that was picked up in a trunk system, and we eventually  
25 found only one car was giving us -- that was transporting

1 samples was the source of our problem.

2 Bacteria. Oh, my goodness. The stories I can tell  
3 you about bacteria. They just -- the samples are -- the  
4 analytical methods are not that clean. Two samples does  
5 not give us any comfort room. It's just not within the  
6 analytical method. Analysis is not a perfect science.

7 Finally, listings must connect additions to a  
8 specific pollutant source. I think people also spoke to  
9 that. The issues of toxicity, of fish histology. I'm  
10 working for a city. I'm trying to get people to stop the  
11 problem. We can go after copper, and we're trying to. I  
12 can't go after toxicity. I don't know what that is. I  
13 can't go up to the toxicity plant and say you're the  
14 source. I can go to the copper facility, and maybe they  
15 were part of that problem that gave me toxicity. And  
16 probably in a lot of situations where we have copper or we  
17 have a pesticide in addition to a toxicity listing, that  
18 toxicity listing perhaps should be -- I don't want to  
19 phrase it this way -- back burned. Let's give those other  
20 TMDLs a chance to move forward and make headway. Because  
21 we may find that knocking out the copper does take care of  
22 the toxicity. We are looking for the same endpoint.

23 So thank you very much. Again, I would like to  
24 compliment the staff. I do feel that the listing and  
25 delisting process, and we have said this before, is a good

1 thing. It helps us to better know. We spoke about trying  
2 to delist. Hopefully, soon I will have something where I  
3 can write a proposal and say to somebody go do this. I  
4 don't have that right now. What I have right now is a  
5 process that says thank you very much, we appreciate your  
6 comments. We are going to move on to the next step now.  
7 This does help.

8 Thank you.

9 CHAIRMAN BAGGETT: Thank you.

10 Richard Watson and then David Bolland, if  
11 necessary.

12 UNIDENTIFIED AUDIENCE MEMBER: It is  
13 necessary.

14 CHAIRMAN BAGGETT: Figured it had to be.

15 MR. WATSON: Good morning, Mr. Chairman,  
16 Members of the Board. I am representing two entities  
17 today. First the Coalition for Practical Regulation. I  
18 think you have the comments in front of you. We, too,  
19 would like to commend you for the work that has been going  
20 on to develop this consistent statewide policy for listing  
21 and delisting. We've had a lot of problems among Regional  
22 Boards, and we all want to have some consistency  
23 statewide.

24 Our major concern is that the September draft just  
25 kind of continues the retreat towards the pre-2002

1 procedures. Staff did excellent work when they prepared  
2 that so-called administrative draft that went to the PAG  
3 in July of 2003. Followed the federal suggestions,  
4 guidelines, was consistent. The statistical method maybe  
5 needed a little improvement, but it was really a pretty  
6 good draft. We seemed to have been going downhill ever  
7 since then.

8 We do support this revised binomial distribution  
9 approach in the July 2004 draft, not the changes now.  
10 Because we think what happened, if you go back to the  
11 hearing we had or the workshop in Torrance, the  
12 environmental community was very concerned that the type  
13 one errors and the type two errors were not in balance.  
14 That was the big criticism at that point. Then when staff  
15 really worked hard to resolve that issue to balance the  
16 process, then they went a little further and they wanted  
17 to have a little more assurances to get it to be easier to  
18 list and harder to delist.

19 We think what was in the July 2004 draft was okay  
20 and didn't need any further revision. We also strongly  
21 support the statements made by the public advisory group,  
22 the regulated caucus, in their letter of September 24. We  
23 think that this draft version before you today is no  
24 longer balanced and it really does appear to reflect a  
25 bias towards listings of waters.

1           A few specific comments that we wanted to  
2 reiterate. We think that the proposed final policy  
3 documents still fails to fulfill requirements 40 CFR  
4 130.7(a) to provide a list of pollutants to be regulated.  
5 That has been mentioned a couple times here. The  
6 September draft continues to allow you to list segments  
7 for toxicity or a whole group of nuisance characteristics  
8 or conditions, and we have been arguing for some time that  
9 that should not be the case. We think that quantifiable  
10 pollutants have to be identified. It is not really valid  
11 to list waters for toxicity or these other conditions as  
12 you've heard.

13           The Clean Water Act basically says when something  
14 is listed you've got to do a TMDL for it. Doesn't say  
15 maybe. It says you need to do a TMDL once on that list.  
16 And as other people have said, unless you know what the  
17 pollutants are, you really can't do a TMDL. So we think  
18 that is the basic underlying problem, and we would request  
19 that you delete Sections 3.6, 3.7, 3.8 and 3.9. Those are  
20 all sections that allow listings without the pollutants to  
21 be identified.

22           Another thing that's been mentioned here, and I  
23 want to reiterate our support for it, was some sort of  
24 pollutant identification list or watch list, something  
25 like that. You have that in the July 2003 draft. I think

1 the environmental community didn't like it. You took it  
2 out to give them a little more leverage. Once something  
3 is on the list, they've got more leverage, and so that's  
4 kind of been the way we have been going here. So we would  
5 ask you at some point to relook at that. We know there  
6 are a lot of listings for which there are problems. We  
7 also request that you reject the proposed changes in the  
8 September draft that relate to sampling, the application  
9 of the binomial method and the standards for bacteria for  
10 recreational uses apply. That is going to have some  
11 unintended consequences in the inland surface waters when  
12 you start applying coastal bacteria standards.  
13 Finally, we would ask that you ask staff to prepare a list  
14 of all previous and existing listings for which no  
15 pollutants have been identified. I submitted such a list  
16 to staff many months ago. And we would ask you during  
17 this next cycle to reconsider that and to consider  
18 delisting those that have not had pollutants identified.

19 If you have any questions on that, I would be happy  
20 to take questions, otherwise I will put on my other hat.

21 CHAIRMAN BAGGETT: Okay.

22 MR. WATSON: I have been asked today to  
23 represent the California Stormwater Quality Association.  
24 Neither are present, nor chair or vice chair could be  
25 here. I am here as the chair of the Watershed Management

1 Impaired Water Subcommittee. CASQA, like many others,  
2 wants to reiterate our support for the goal establishing a  
3 standardized approach. The process that your staff  
4 developed for the 2002 listing was, I will say, superb.  
5 It was really good. Because when we commented on the '96  
6 list, the '98 list and before that, most people didn't pay  
7 attention, as others have mentioned. Until we had some  
8 lawsuits, people were not paying attention to 303(d)  
9 listings. In fact, a lot of them were not approved by the  
10 Regional Boards. The Regional Board staffs made up a list  
11 and sent it up here, and it got rubber stamped. So we are  
12 dealing with a lot of things that are on there from the  
13 past. So except for carrying forward the old listings,  
14 the 2002 process was good.

15 CASQA has a concern with another portion of the  
16 federal regulations, and it seems that this policy ignores  
17 40 CFR 130.7(b)(4), and, therefore, doesn't really fully  
18 comply with federal regs. That particular requirement is  
19 clear: It says a listing needs a priority ranking and to  
20 identify pollutants causing or expected to cause  
21 violations of the applicable water quality standards. And  
22 we think those things about identifying pollutants are  
23 very clear. Conditions are symptoms like nuisance, color,  
24 all these things. They are not pollutants as defined by  
25 the Clean Water Act. And we have gone through this many

1 times. What you have to do is propose a list and adopt  
2 one that is in compliance by identifying the pollutants  
3 for the water quality limited segments. I disagree with  
4 Commissioner Sutley, Member Sutley, in terms of listing  
5 impaired waters.

6 You're required to list impaired waters for which  
7 pollutants have been identified. And it causes no end of  
8 problems for your people, for the Regional Boards, for the  
9 regulated community when you list things for which  
10 pollutants aren't identified. Particularly when someone  
11 says you have to do a TMDL. And this started in San  
12 Diego. They started a toxicity TMDL in Cholla Creek. At  
13 the time, I don't know when this was, four years ago or  
14 so, I bet them it is going to be organo pesticides, and it  
15 was. But they were trying to do something with toxicity.  
16 So you waste a lot of effort trying to do that through the  
17 TMDL process.

18 CASQA's members who were here last time, including  
19 me, were impressed with comments by Dr. Lorden.

20 CHAIRMAN BAGGETT: I've got to go back to that  
21 last. I can't let this one go. So you're arguing that we  
22 know there is a toxicity problem, so we should just ignore  
23 that because maybe you identify a pesticide later on?

24 MR. WATSON: I am not arguing that.

25 CHAIRMAN BAGGETT: How would you ever have

1 identified that pesticide if you didn't have it listed for  
2 something to begin with?

3 MR. WATSON: This is where the idea of the  
4 watch list or the pollutant identification list comes in.  
5 We all agree that we need to do that. And we've been  
6 hoping for some time that the logic of having that, I  
7 think it was middle ground that Dr. Lorden mentioned,  
8 where you don't know what it is, then maybe there become  
9 conditions in municipal permits for doing some monitoring.  
10 Our permits keep changing, and so there can be 13225  
11 letters or different ways, so you can do that without it  
12 being listed. That is the problem.

13 CHAIRMAN BAGGETT: You just made a great  
14 argument for toxicity.

15 MR. WATSON: Not for listing.

16 CHAIRMAN BAGGETT: Continue.

17 MR. WATSON: Because you have ways of doing the  
18 monitoring. We are not opposed to monitoring to find out  
19 what the problems are. We just don't want to start a  
20 shotgun approach doing TMDLs for conditions. And what you  
21 need to do -- I've written some proposals. One, stuff in  
22 Upper Newport Bay where we did some forensic monitoring to  
23 find out what the problems were. I actually put those  
24 things together. There are ways of doing this, but you  
25 don't have a TMDL first. That is our big issue.

1           And I would also like to -- so we support the  
2 binomial method as a good choice and hope you will adopt  
3 the one that is in 2004, July 2004 draft. And we agree  
4 with the PAG that the problem of applying bacteria  
5 criteria to inland waters, and they mentioned that before.  
6 It is a particular problem because of the Tributary Rule.  
7 When you start doing that, it goes upstream to everything.  
8 And so we are really concerned about that.

9           Lastly, we would like to suggest at some point, I  
10 don't know when you do it, that you look at tying these  
11 things together. And we talked about 305(b), a policy for  
12 how you do that, tie that into the front end of this thing  
13 and the implementation policy that was developed before,  
14 tying that into the back end. We've really focused a lot  
15 on the middle of this process. And once we went away from  
16 that multi list approach, it's been the focus -- the  
17 environmental groups have been trying to put everything on  
18 the list and other people are really afraid of that.

19           We'd ask you at some point hopefully before 2006  
20 that you would reconsider how in a logical way to put  
21 together a total program.

22           Thank you.

23           CHAIRMAN BAGGETT: Thank you.

24           MR. CRAIG M. WILSON: Mr. Chairman, for the  
25 record, Craig Wilson, State Board Chief Counsel. The last

1 couple of speakers have raised a couple of legal issues  
2 that I think staff disagrees with. If you would like to,  
3 staff counsel Michael Levy could respond to some of  
4 that.

5 CHAIRMAN BAGGETT: Let's wait until we are  
6 through.

7 MR. CRAIG M. WILSON: Very good.

8 CHAIRMAN BAGGETT: Last two for discharger's  
9 side and we've three more cards, and I think we will have  
10 some lengthy discussion here.

11 MR. BOLLAND: Mr. Chairman, Board Members.  
12 David Bolland, the Association of California Water  
13 Agencies. I've served on the PAG since it was formed, and  
14 I am representing the water industry in general, both the  
15 drinking water side as well as the irrigation water side.  
16 Many of our agencies have storm water responsibilities as  
17 well as flood control and other kinds of discharge of  
18 waters. And so we do end up on the discharger side  
19 generally, although many of our agencies in the drinking  
20 water part of our constituency are very concerned about  
21 source water protection.

22 CHAIRMAN BAGGETT: We have heard from them  
23 already today.

24 MR. BOLLAND: Yes, and I saw them out front.  
25 And rather than beat that particular dead horse --

1                   CHAIRMAN BAGGETT: I thought I would ask for  
2 ACWA's position.

3                   MR. BOLLAND: I will say that I have been very  
4 impressed by working in the PAG process, and particularly  
5 the work that staff has done over the five years in  
6 maturing the TMDL program in California, helping frame the  
7 issues of integrity of a program that has credibility with  
8 the public and particularly the regulated community. And  
9 I think this 303(d) listing process, this policy is a real  
10 good step in the right direction. And ACWA supports the  
11 listing policy unequivocally.

12                   However, the issues that are being discussed now,  
13 particularly about the binomial approach, the symmetry, I  
14 think just honing in on that issue. We agree with the  
15 regulated community as a whole that there needs to be a  
16 symmetry in that process. We saw it in the previous  
17 draft. We saw retreat from it for policy reasons in the  
18 current draft, and we think it needs to be fixed. I do  
19 want to underscore the fact that we believe there is  
20 already provisions again that have been built into this  
21 latest draft that provide tremendous discretion to the  
22 Regional Boards to use their authority and their  
23 discretion and basically a subjective level of judgment to  
24 list with a weight of evidence approach and trying to make  
25 a rational case through the listing process, which, again,

1 we appreciate the discipline that is being imposed on that  
2 process in requiring the fact sheets to be developed by  
3 Regional Board members or Regional Board staff to support  
4 those produced listings.

5 But we think that if listing/delisting decision has  
6 to be made and there is a symmetrical binomial approach,  
7 it provides a good baseline from which to work. Then with  
8 the weight of evidence approach additional facts could be  
9 brought to bear that can support basically disapproval of  
10 a delisting proposal. We believe that restoring those  
11 tables to a symmetrical approach, and allowing that  
12 discretion with the weight of evidence approach is the key  
13 to making a good decision on this. And we support that,  
14 we appreciate your willingness to consider these difficult  
15 questions. And we ask you to go ahead and do those  
16 things. We urge you to approve the listing policy as it  
17 pretty much stands, with those changes. There are some  
18 things in that policy that have been brought up that are  
19 problematic. We think that those will become more obvious  
20 as it's implemented. But we think a policy is better than  
21 no policy, and the technical rigor and the science-based  
22 approach is the way to go.

23 We really appreciate the efforts that the state has  
24 made, the Regional Board staffers as well as the State  
25 Board staffers to try to put together a package here that

1 provides a lot more credibility and a lot more rigor and a  
2 lot more consistency and transparency, and we are looking  
3 forward to seeing it implemented properly.

4 CHAIRMAN BAGGETT: Thanks, David.

5 Questions?

6 We have three cards remaining: Linda Sheehan, Bill  
7 Jennings and Leslie Mintz. Do you have an order?

8 MR. JENNINGS: Morning, Chairman Baggett,  
9 Board Members. Mr. Carlton, that is certainly an elegant  
10 shadow growing on your chin. I guess it was mandatory  
11 that all male members of the Board have facial hair. I  
12 was going to do a slide presentation on two items.

13 Bill Jennings representing DeltaKeeper,  
14 WaterKeepers of Northern California, San Joaquin Audubon  
15 and California Sportfishing Protection Alliance.

16 I would like to -- I would like to reiterate, as we  
17 previously observed, the staff continues to ignore the  
18 explicit statutory requirements of 303(d). The 303(d)  
19 list is not a list of impaired water bodies. It is a list  
20 of waters where best practicable control technologies and  
21 secondary treatment are by themselves not adequate to  
22 implement applicable standards. Once listed there is no  
23 statutory authority to remove a water body from the list.  
24 And I want to encourage you to review for yourself the  
25 explicit requirements in those first few paragraphs of

1 303(d). But we've said that frequently.

2 I want to talk -- a brief review of the history of  
3 this kind of discombobulated process. Staff initially  
4 proposed a binomial approach based upon a null hypothesis  
5 that assumed that water bodies are clean. Contrary to  
6 virtually the entire history of monitoring programs in  
7 California. The blatant inequities of that approach led  
8 them to subsequently propose a statistical balancing,  
9 predicated on a 5/20 critical exceedance level. That is a  
10 5 percent error rate for listing a clean water body and a  
11 20 percent error rate for failing to list a dirty water  
12 body.

13 To this inequity the staff added a rule of five  
14 minimum exceedances that had absolutely no statistical  
15 validity. Faced with the appalling error rates of small  
16 sample sets of this approach as we demonstrated at the  
17 last workshop, staff now proposes a 3/18 percent critical  
18 exceedance rate, plus another nonstatistical aberration,  
19 the rule of two. For toxics I think the error rate  
20 remains -- the previous error rate remains for  
21 conventional pollutants. There is no justification for  
22 assuming that waterways are clean. The evidence is quite  
23 to the contrary. There is no statistical justification  
24 for using rules of two or three or five.

25 MEMBER SUTLEY: Bill, could I stop you there

1 because I am confused about something? On the issue of  
2 the rule of two which is a policy decision that I think,  
3 based on my understanding of the CTR, which is that it is  
4 the second exceedance that causes there to be a violation,  
5 and that is where the rule of two, so to speak, comes  
6 from. So I am not really sure why there is a concern  
7 about applying that as a policy matter rather than -- I  
8 don't think it was intended to be -- well, why that's a  
9 problem. Why are you concerned about that? Because I'm  
10 stumped, help me out here.

11 MR. JENNINGS: Yes, I will. Over the next  
12 several slides I think I will try to explain that, address  
13 that.

14 I am missing a slide which basically was showing  
15 the error rates of the 3/18 plus the rule of two, which  
16 shows that the error rates are virtually the same.  
17 Actually, we can -- this next -- this shows a comparison  
18 between the proposed straight balanced binomial and then  
19 the binomial plus the rule of two.

20 As the chart demonstrates, a true binomial approach  
21 with an exceedance of three and 18 would require that a  
22 single exceedance in up to 12 samples would trigger a  
23 listing. Understand, statistically, a single exceedance  
24 would trigger a listing. Statistics cut both ways.  
25 Frankly, if you have an exceedance of a pollutant that

1 does not naturally occur in a state of nature, the  
2 statistical odds are that you will get additional hits if  
3 you sample all 1,095 days in a three-year period. Or for  
4 that matter, 26,280 hours in a three-year period because  
5 these are one-hour standards. Statistics are both ways,  
6 cut both ways. Listing based on a single exceedance is  
7 statistically valid, but it is politically unacceptable.

8         So staff has cast statistical integrity aside, and  
9 they imposed this arbitrary rule of two. And let's look  
10 at this rule of two. If we examine the results for a  
11 sample set of ten and if you look at the horizontal red  
12 there, you see that there is only a 3 percent chance of  
13 improperly listing a clean water body, but there is a 44  
14 percent chance of failing to list a dirty water body.

15         The present scheme is heavy skewed in favor of  
16 polluters. These are the alpha and beta tables up through  
17 30 samples. And if you look at the horizontal red lines  
18 across there, that is ten samples and it is 3 percent and  
19 the beta is 44 percent. I don't see the balancing here.  
20 Of course, the rule of two is abandoned at larger sample  
21 sizes. While the law only allows a fish to be killed  
22 twice in three years, staff proposes to allow it to be  
23 killed up to 11 times if you collect more samples.

24         You know, the rule of two, if we have no more than  
25 one exceedance in a three-year period, than why should --

1 if we collect 30 samples, why should that have a  
2 difference. You've affected the ecosystem.

3 This is because the binomial approach is  
4 fundamentally incompatible with water quality standards.  
5 If an ecosystem is irreparably damaged when there is just  
6 one exceedance in a three-year period, there can be no  
7 justification for requiring six or ten or 14 exceedances  
8 at larger sample sets. The approach simply violates the  
9 law. The binomial approach ignores spacial and temporal  
10 concerns, ignores magnitude, and these are crucial  
11 components of water quality standards. Employing a  
12 binomial method for conventional pollutants based upon a  
13 critical exceedance rate of 5/20 and the rule of 5, which  
14 is still in the system, is scientifically and legally  
15 unjustified.

16 And the proposed delisting policy, as we have  
17 discussed before, which almost certainly leads to a  
18 Ping-Pong effect as you list the same water bodies for the  
19 same pollutants and delist and list.

20 In conclusion, I think prudence would suggest that  
21 there are more appropriate statistical methods if you want  
22 to pursue that. Certainly, a reverse null hypothesis  
23 would be more protective and more in line with the  
24 realities of our waterways. What we do find is that our  
25 waterways are more likely to be polluted in California

1 than they are clean. And the policy contemplates a  
2 somewhat vague multiple lines of evidence approach as an  
3 alternative. A better path would be to regard statistics  
4 as a supporting tool to assist a multiple lines of  
5 evidence approach. It should not be the equivalent or the  
6 primary methodology.

7 In any case, we would urge the board to agree to  
8 conduct, following EPA approval in the next listing cycle,  
9 a review of the effectiveness of the policy, followed by  
10 public workshop and a hearing to consider any necessary or  
11 prudent revisions.

12 I think that does it. Thank you very, very much  
13 for your patience. Any questions? Did I answer your  
14 question on the rule of two?

15 MEMBER SUTLEY: I guess you did. I think we  
16 may have disagreement, but I personally don't think the  
17 rule of two is arbitrary. There is a rationale for it.  
18 It is a policy rationale.

19 MR. JENNINGS: It is a policy. It is not a  
20 statistics. You have abandon statistics and you've  
21 superimposed a policy. If you accepted statistics, you  
22 would be listing at one. Because it is statistically  
23 likely to hit on one. So in this way, the rule of two is  
24 less protective than the binomial.

25 MEMBER SUTLEY: But it is not arbitrary.

1 MR. JENNINGS: Thank you.

2 CHAIRMAN BAGGETT: Questions.

3 MS. MINTZ: Good morning, Board Members. My  
4 name is Leslie Mintz. I am here on behalf of the  
5 Environmental Caucus of the PAG. We want to say, first of  
6 all, that we appreciate your listening to us. We know  
7 this has been an arduous process, and we are pleased with  
8 some of the changes you have made to the policy. We still  
9 have some concerns. And in the interest of clarity and  
10 time we have culled them down to three specific things  
11 that we wish -- Linda and I wish to address today.

12 Our first main concern is continuing problems with  
13 the boomerang effect with regard to conventional  
14 pollutants. Our second concern is the continued  
15 inconsistency between the language on toxics and CTR. And  
16 the last main point, we would like to ask for mandatory  
17 use of the weight of evidence approach.

18 For points one and two, based on previous workshops  
19 and hearings, this Board specifically, it was our  
20 understanding, that this Board specifically directed staff  
21 to address these issues. And it is our belief that staff  
22 has failed to do that. Ms. Sheehan will discuss  
23 specifically, Ms. Sutley, questions regarding the rule of  
24 two and the rule of three for toxics which changed this  
25 rule of two. A lot of rules floating around.

1           We believe it is still inconsistent with CTR. We  
2 do not think that staff fixed the boomerang issue for  
3 conventional pollutants, and Ms. Sheehan will discuss that  
4 as well as the practical concern for this Board, why we  
5 think it means a lot of work if staff leaves it the way it  
6 is now. I wanted to just briefly address the weight of  
7 evidence issue, and note that it was our understanding  
8 that you, Chairman Baggett, and this Board supports a  
9 weight of evidence approach to listing where other factors  
10 have indicated nonattainment. But such an approach will  
11 be meaningless unless the State Board requires the  
12 Regional Board to use this approach. Currently, as  
13 written, it is not clear that the policy makes it  
14 voluntary, in our opinion, and accordingly we ask that the  
15 first paragraph of Section 3.11 be revised.

16           I have actually a sentence that I can read. Would  
17 you like me to read it into the record? Or I can hand it  
18 to someone. I can read it.

19           When all other listing factors do not result in a  
20 listing of a water segment, but information indicts  
21 nonattainment of standards, a water segment shall be  
22 evaluated to determine whether the weight of evidence  
23 demonstrates that the water quality standard is not  
24 attained. If the weight of evidence indicates  
25 nonattainment, the water segment shall be placed on the

1 303(d) list.

2 If you read what is currently written, this is not  
3 much different, it is just clearer.

4 CHAIRMAN BAGGETT: I understand.

5 MS. MINTZ: Pardon?

6 CHAIRMAN BAGGETT: It makes sense to me.

7 MS. MINTZ: We also think that as EPA said in  
8 their August 26th, 2004 letter, they thought the current  
9 discretionary approach was ambiguous. I think they would  
10 support this change. I can't speak for them, but I think  
11 they would.

12 Lastly, I do want to make a comment on the record.  
13 I'm not going to belabor it here today. I do think that  
14 much of what is in this policy on beaches is incorrect as  
15 per Heal the Bay's specific comments. And we would hope  
16 that if there is a future revisitation of the policy that  
17 we can take those technical issues up more specifically at  
18 that time.

19 Now I would like to turn it over to Linda.

20 Thank you.

21 MS. SHEEHAN: Good morning. Linda Sheehan  
22 with the Ocean Conservancy. I want to thank you for being  
23 so patient through years and years and years of this  
24 process, and our 150-page comment letter, which I am sure  
25 you all enjoyed. I think it is going to be on amazon.com

1 soon. And I hope you appreciate the specific line edits  
2 the environmental community submitted. Because trying to  
3 get us all to agree on specific actions was something I  
4 didn't think that we could possibly pull off, but we did.

5 Another thing that I didn't think that we could  
6 possibly pull off was focusing on just a couple of  
7 specific issues to address today and not address some of  
8 the other issues that were dealt with in some of our  
9 comments, like pollution, scheduling, and I am not going  
10 to start that.

11 But what I want to really focus on was the issues  
12 that Leslie brought up. You've heard from us and you've  
13 heard our comments, so I just wanted to highlight, if you  
14 will indulge me quickly, what EPA said in their letter of  
15 August 26th with regard to the issues that Leslie brought  
16 up. And I will just read from their letter.

17 California approved water quality standards do not  
18 provide for the use of the binomial approach or the  
19 policy's tolerance for violation of water quality  
20 standards 5 percent of the time or more for toxics or 10  
21 percent of the time for more conventional pollutants.

22 And EPA found that as a result of these  
23 deficiencies basically we are going to see a lot more  
24 waters not making it on the list that should be. The  
25 whole idea of this policy is to try to make it easier for

1 us to list the waters that are impaired and not list the  
2 waters that aren't impaired, and EPA will be happy.  
3 Everybody will be relatively happy and we will clean up  
4 the waters, and that will be good.

5 Now we realize that the 5 percent in EPA's letter  
6 has been changed to 3 percent. We still think that that  
7 misses the point with respect to toxics. We can't use  
8 statistics to change CTR, and CTR has this rule of two,  
9 that no more than one exceedance every three years. The  
10 change in the policy from the rule of three to the rule of  
11 two sort of gets it for small sample sizes. But when you  
12 get bigger, it is not two anymore, it goes up. So the  
13 solution would be just to cross out everything on the  
14 right-hand side of Table 4.1, I think, or 3.1. On Page 8,  
15 3.1 or Page A9, just write two all the way down. That is  
16 the rule of two. I don't know if that answers it, but if  
17 it is a big sample size, it is still no more than one  
18 exceedance every three years.

19 CHAIRMAN BAGGETT: Would this be so important  
20 to you and the language which you proposed, the water  
21 segment shall be placed if the weight of evidence  
22 indicates nonattainment after reasonable balancing with  
23 other factors, does not pick up those kinds of situations  
24 you are talking about?

25 MS. SHEEHAN: That is the point, and you're

1 giving away the ending. The conventional pollutant issue  
2 -- the issue with respect to conventional pollutants  
3 haven't been really addressed at all, actually been  
4 addressed at all either. This rule of five is still  
5 there. We provided tables what we think our numbers  
6 should be, dot, dot, dot. If the weight of evidence  
7 approach was changed to something that was mandatory and  
8 clear, yeah, the Regional Boards could take a look at the  
9 data, if information was still available to show that it  
10 was impaired. Then they could do that. Then, hopefully,  
11 those waters would be captured or would need to be  
12 mandatory.

13 The issue is that you hope that Regional Boards  
14 don't have to go and do all this individual work again,  
15 because that is sort of what we are trying to avoid with a  
16 more streamlined process. If that gets us there, it gets  
17 us there.

18 Of course, with respect to the delisting and  
19 toxics, I don't know that the weight of evidence approach  
20 -- it would need to be clear here, too, that, again, it is  
21 no more than one exceedance every three years. And the  
22 delisting for toxics allows more exceedances than that.  
23 And in addition the whole boomerang issue as brought up  
24 earlier with respect to conventionals was not addressed  
25 either. Again, we provided some numbers, and we'd like to

1 see the boomerang issue fixed. There has been some talk  
2 about it, that the environmental groups wanted more  
3 balancing of the errors. And it is true. The original  
4 version, which was much worse than this version -- it was  
5 very, very bad as opposed to this version, and we  
6 appreciate the changes that have been made to improve it,  
7 but that first version would really miss a lot of waters,  
8 and this one just misses a lot of waters. So, you know,  
9 we would like to see changes -- well, the first version  
10 was not as good as this. Because some of the changes with  
11 respect to the weight of evidence approach have improved  
12 it. But the boomerang, the boomerang is still there.

13 We have to really see how this plays out in  
14 practice at the bottom line. You just got to give it a  
15 try and see what happens. If this weight of evidence  
16 approach is mandatory, that will help.

17 So, in summary, we would prefer to see, obviously,  
18 the values used in the tables with respect to sort of this  
19 statistical process reflect what we have proposed, reflect  
20 what EPA would like to see. The weight of evidence  
21 approach has got to be mandatory just to make sure that we  
22 are not missing anything.

23 Finally, with respect to the Board order, we would  
24 like to see a reopener earlier than 2006. I would suggest  
25 a reopener in 2004 to bring this back to workshop.

1 CHAIRMAN BAGGETT: 2004?

2 MS. SHEEHAN: I meant 2005. A 2004 listing  
3 process. Yes, I want a reopener tomorrow, please.

4 CHAIRMAN BAGGETT: You are looking for a  
5 reason to have a meeting in December.

6 MS. SHEEHAN: No, no, no. I meant the 2004  
7 listing process. Calm down. It's okay.

8 So after this 2004 listing process is complete, it  
9 would be nice right away while everybody is fresh to look  
10 at this and also to incorporate, while the staff report is  
11 being prepared, to make sure that it is clear that EPA and  
12 stakeholders and regions are involved in the preparation  
13 and commenting on the staff report before it is reduced  
14 for the workshop. So we just don't get the three-minute  
15 comments at a workshop, and we get a really thoughtful  
16 process because this is a big deal for the state to be  
17 moving in this direction.

18 CHAIRMAN BAGGETT: I don't know that I've ever  
19 been accused of holding someone to three minutes.

20 MEMBER KATZ: Much to our chagrin.

21 CHAIRMAN BAGGETT: Much to their chagrin.

22 MS. SHEEHAN: You know what I mean. I don't  
23 know if that was helpful. I would like to see some of the  
24 changes made with respect to the toxics and conventionals.  
25 But at a minimum, the weight of evidence approach needs to

1 be mandatory, just to make sure that we are not addressing  
2 -- missing those waters.

3 MEMBER KATZ: The weight of evidence approach.  
4 We've been talking among ourselves about the weight of  
5 evidence approach.

6 MEMBER SILVA: I am comfortable as long as  
7 some equal statement is made for delisting, that Regional  
8 Boards also use some kind of weight of evidence, allow  
9 people to present their case for delisting. As long as  
10 equivalent language on both sides.

11 MEMBER SUTLEY: I am not sure I have a problem  
12 with that. As long as -- I would have a problem if you  
13 were applying the statistical method to delisting where we  
14 didn't have very much data, but if there is a weight of  
15 evidence I don't see that there is a problem in being  
16 symmetrical.

17 MEMBER SILVA: If you have no problem in being  
18 symmetrical, I guess -- I'm uncomfortable with having  
19 different standards for listing or delisting. I'm still  
20 uncomfortable with that.

21 CHAIRMAN BAGGETT: What is your response to  
22 that?

23 MS. SHEEHAN: Well, my response to that was it  
24 was my impression, based on prior statements by the Board,  
25 that the Board agreed that it should be more difficult to

1 list than it is -- it should be more difficult to delist  
2 than to list, that you should be more protective.

3 MEMBER SILVA: The Board never came out with  
4 that policy.

5 CHAIRMAN BAGGETT: There was a workshop, as I  
6 recall --

7 MS. SHEEHAN: Our opinion would be that it  
8 should be tougher to delist than it is to list, and this  
9 is something that we've said repeatedly in prior comments.  
10 Because as one of the experts earlier said, once it's on  
11 the list, you have information already showing you that  
12 the water body is dirty, and you have to go beyond that to  
13 show that it's actually clean. When you're starting off  
14 putting it on the list, it's a different situation. So we  
15 should be very careful in evaluating the information,  
16 making sure if we are going to delist we are really sure  
17 that that water is clean.

18 CHAIRMAN BAGGETT: I am guessing what Pete --  
19 a follow-up on your suggestion where maybe one would apply  
20 this reasonableness test to delist would be -- maybe the  
21 example that was given on toxicity where they finally,  
22 four years later, discovered, in fact, there was a  
23 pesticide causing the toxicity impairment. So it would be  
24 hard to do that with the statistical method because  
25 toxicity is hard to do statistically. When you found the

1 chemical that actually was toxic, then you could use that  
2 weight of evidence to delist that water body for toxicity.

3 MEMBER SILVA: Transfer that TMDL to the  
4 constituent that you are aware of.

5 CHAIRMAN BAGGETT: To the constituent that you  
6 are aware of if it is still listed, if they haven't  
7 cleaned it up.

8 MS. SHEEHAN: It would still be listed.

9 CHAIRMAN BAGGETT: Not necessarily for  
10 toxicity because you found --

11 MS. SHEEHAN: It is always good to be clear as  
12 to what you are listing for.

13 MEMBER SILVA: At that point I am basing it on  
14 numbers.

15 CHAIRMAN BAGGETT: It would be hard to do a  
16 statistics in that case. You would have other evidence.

17 MS. SHEEHAN: The CTR doesn't really let you do  
18 statistics all that easily.

19 CHAIRMAN BAGGETT: Pete, I guess your point is  
20 you would reapply the same reasonableness to delisting.

21 MEMBER SILVA: I want it for both sides.

22 MEMBER CARLTON: I would like to take this  
23 discussion a step further as far as weight of evidence  
24 discussion and reasonableness from the earlier comments  
25 and testimony we had by Mr. Johns and Ms. Green. I

1 understood their concern that if a discharger presents a  
2 petition for delisting, that there is no requirement for  
3 the Regional Boards to make a weight of evidence response.  
4 They can reject that. To the extent that we want to rely  
5 on weight of evidence, I think that Regional Boards should  
6 be required to apply that test to delisting and make a  
7 substantial showing of proof that they have rejected a  
8 delisting petition.

9 MS. SHEEHAN: Well, I think that if we were  
10 going to do that, then we might want to think about how  
11 would you phrase the weight of evidence approach with  
12 respect to delisting and if you want to make the same  
13 standard for delisting as you would for listing. And I  
14 would argue that you would want to use a different  
15 standard for listing because of the reasons that we have  
16 discussed, that you already have this information that the  
17 water body is dirty. So if you are thinking about looking  
18 at data in a holistic way and not in a statistical way,  
19 then the weight of evidence for delisting should be  
20 phrased somewhat differently.

21 MEMBER SUTLEY: I guess I would agree with  
22 Linda on that. I think you would have to be thorough and  
23 careful because you would first have to deal with the  
24 evidence that is already, I guess, in the record with  
25 respect to why it was listed in the first place, as well

1 as --

2 MEMBER SILVA: They are producing evidence.

3 MEMBER SUTLEY: Right. As well as producing  
4 whatever other information that is available. But I do  
5 think we need to be careful about, and maybe our counsel  
6 can help us out here, in drafting something that made it  
7 clear that you have to go back and -- once something is on  
8 the list at some point there was some reason that it was,  
9 and you need to deal with that and explain if it, in fact,  
10 it was either mistakenly put on the list or that condition  
11 no longer exists.

12 It seems to me that is the kind of thing you would  
13 have to do first, and then consider, I guess, any other  
14 evidence that the water body should be listed for that.

15 MEMBER CARLTON: Well, I'm all for being  
16 thorough and careful in everything we do. About what I  
17 understood the current situation to be is that a petition  
18 could be submitted to the Regional Board for delisting and  
19 they say, "No, sorry, we are not going to do that." I  
20 don't care for that. That is not thorough or carefully --

21 MEMBER SUTLEY: I agree with you on that.

22 CHAIRMAN BAGGETT: Any other questions for  
23 Linda? Or for staff?

24 Thanks, Linda.

25 Well, I think we -- that is all the cards.

1                   MEMBER SUTLEY:  Maybe I've just one other  
2 question.  I guess on the toxics I would be -- I don't  
3 think the rule of two is arbitrary.  They disagree with it  
4 for other reasons, but it seems to me that a larger sample  
5 size, if you have a lot of hits, I don't understand how a  
6 Regional Board wouldn't list even for toxics.  I am less  
7 concerned about the larger sample sizes.

8                   It is my understanding that generally the Regional  
9 Boards don't have a lot of samples, and that this would  
10 cover many of the cases.  So I'm less concerned about  
11 that.  I guess the other issue is responding on the  
12 conventional pollutants, why we shouldn't make a similar  
13 policy finding, I guess, with respect to small sample  
14 sizes for conventional pollutants.  I think we can address  
15 that.

16                   CHAIRMAN BAGGETT:  We want to hear from --  
17 there were legal issues raised, Craig?  Maybe Michael can  
18 come up.  I think we have some questions.

19                   MR. LEVY:  Good morning, Chairman Baggett,  
20 Members of the Board.  Michael Levy, Senior Staff Counsel,  
21 Office of Chief Counsel.  I just wanted to address the  
22 unknown toxicity issue because that was battered around a  
23 lot by the regulated community.

24                   The Clean Water Act, Section 303(d)(1)(A) says:  
25                   Each state shall identify those waters

1           within their boundaries for which certain  
2           effluent limitations are not stringent  
3           enough to implement any water quality  
4           standard.                   (Reading)

5           It says nothing about listing of pollutants. In  
6 fact, the (d) (1) (A) goes on further and says:

7           The State shall establish a priority  
8           ranking for such waters, taking into  
9           account the severity of pollution.

10           (Reading)

11           The only place the listing of the pollutant comes  
12 into play is for establishing TMDLs, which is a separate  
13 section apart from the listing section. That is where you  
14 then get Section 303(d) (1) (C) and (d) (1) (D). It says:

15           For pollutants for impaired waters  
16           establish the total daily maximum load.

17           (Reading)

18           It is not in the listing sections of the TMDL  
19 section. EPA regs have said in 130.7 (b) (4), when you  
20 submit your list, identify the pollutants also. Of  
21 course, regulations can't be less stringent or different  
22 from the statutes, so we have to read it to be consistent.  
23 The only way to read it to be consistent is to say when  
24 you know the pollutant, list the pollutant. If you don't  
25 know, it doesn't mean don't list it. You've got to list

1 it anyway. In fact, EPA has consistently held that its  
2 own regs require listing for unknown toxicity, low  
3 dissolved oxygen and other conditions like nuisance  
4 conditions. So we have no choice but to list for those  
5 conditions.

6 If you have any questions about that or anything  
7 else, I'm happy to answer it.

8 Thank you.

9 MEMBER CARLTON: I do have one question. In  
10 Mr. Jennings' presentation, one of his slides said, once  
11 listed, there is no statutory authority to remove a water  
12 body from a list. Would you comment on that?

13 MR. LEVY: Yes. That's a true statement, but  
14 there is no requirement not to list it or not to keep it  
15 on -- let me rephrase that, say it more clearly, rather.

16 There is no statutory authority to remove a water  
17 body from a list, but if the water body is no longer  
18 impaired there is no prohibition against taking it off the  
19 list.

20 MEMBER CARLTON: Thank you.

21 CHAIRMAN BAGGETT: So every three years you  
22 can go back and reevaluate the list.

23 MR. LEVY: If you want to. This comes up with  
24 the question that you were just raising about petitioning  
25 to delist. You might want to consider requiring new

1 information before they come up and say second guess the  
2 decision you made two years ago. If you are going to have  
3 somebody present the case to delist, they might want some  
4 basis rather than we want you to change your mind, here is  
5 some new information, more new data. You have authority  
6 to delist according to EPA.

7 MEMBER SUTLEY: Seems to me it wouldn't be  
8 adequate to just say this was put on by mistake. You have  
9 to also show there is currently no impairment.

10 CHAIRMAN BAGGETT: That sounds like -- so  
11 there should be some kind of language -- maybe let's just  
12 go back to the first thing brought up, the language that  
13 says you should consider weight of evidence and  
14 reasonableness, and then the water shall be placed on the  
15 303(d) list after this analysis is done.

16 Is everybody comfortable with that?

17 MEMBER SILVA: I guess as long as equivalent  
18 language on delisting.

19 CHAIRMAN BAGGETT: Some way to delist that is  
20 reasonable.

21 MEMBER SILVA: Reasonable.

22 CHAIRMAN BAGGETT: A balancing of other  
23 factors.

24 MEMBER SILVA: Right.

25 MEMBER SUTLEY: Seems to me on the delisting,

1 that this idea that the petition is for delisting  
2 addresses current -- other currently impaired as well as  
3 anything -- if they want to submit information whether it  
4 was put on the list in error.

5 MEMBER SILVA: Either case.

6 MEMBER SUTLEY: Well, right. If you are going  
7 to say it was put in on error, you also have to make the  
8 case that it is currently not impaired.

9 MEMBER SILVA: I have heard there is concerns  
10 about it being placed incorrectly in the first place.

11 CHAIRMAN BAGGETT: Craig, do you have --  
12 Michael has suggested two criteria before you can consider  
13 delist. They had to prove it was no longer impaired, and  
14 I've forgotten --

15 MR. CRAIG J. WILSON: Right now the policy  
16 allows the weight of evidence to be used equally in any  
17 case. It is just not required -- it is not a mandatory  
18 requirement that they consider the weight of evidence.  
19 That seems like the issue to me, is whether you want it to  
20 be mandatory with every listing decision that they not  
21 only consider the data and how it relates to the binomial  
22 and all that, those other listing factors. But what is  
23 being proposed is to also consider that weight of evidence  
24 every time. And if that's what you would like to do, that  
25 can be done.

1                   CHAIRMAN BAGGETT: It's already for delisting,  
2 the same --

3                   MR. CRAIG J. WILSON: Right now all the  
4 information, just the way Mr. Silva has described it, can  
5 be used for delisting decisions. It's really quite broad,  
6 but is not mandatory that it be used in every case.

7                   MR. CRAIG M. WILSON: Just to make sure that  
8 you are looking at the language, that language is on A8  
9 regarding listing and on A14 regarding delisting. Right  
10 now it's virtually identical.

11                  MR. CRAIG J. WILSON: Absolutely. So I think  
12 it satisfies your concern at the moment. The real issue  
13 is not -- there is two issues. There is your issue of  
14 having more information for delisting, of course. But  
15 there is also this issue of whether the weight of evidence  
16 is considered a mandatory fashion. And perhaps you want  
17 to take those.

18                  CHAIRMAN BAGGETT: We have to use it for  
19 listing, and the argument is we should use it for  
20 delisting.

21                  MEMBER KATZ: Craig is saying that it is  
22 already in there.

23                  MEMBER SILVA: The question is whether we want  
24 that mandatory.

25                  MEMBER KATZ: I would want to make it

1 mandatory because the Regional Boards are so good at  
2 following direction.

3 CHAIRMAN BAGGETT: I am comfortable with that.  
4 For the delisting maybe we should list those two provisos,  
5 that there has to be new information and maybe that is  
6 logical.

7 MEMBER SILVA: It depends on what the new  
8 information is. If you have new information --

9 MEMBER SUTLEY: New information has to be that  
10 the water body is not impaired.

11 CHAIRMAN BAGGETT: Not necessarily. That  
12 there was a mistake.

13 MEMBER SILVA: There was a mistake in  
14 listing.

15 MEMBER SUTLEY: There was a mistake and it is  
16 now not impaired.

17 MEMBER KATZ: If it was a mistake, it wasn't  
18 impaired when it was listed. That was the mistake.

19 MEMBER SUTLEY: It would -- that's right. If  
20 it was listed mistakenly, it would have to continue to not  
21 be impaired for us to say it was okay to take it off the  
22 list.

23 MEMBER CARLTON: If there was a mistake  
24 originally, though, it wasn't impaired originally.

25 MEMBER SUTLEY: But if their argument was that

1 it was some fish that died in 1986, it would seem to me  
2 that you would want to know if the fish are dying in 2004.

3 CHAIRMAN BAGGETT: Which would be the evidence  
4 that they are going to bring, I would assume.

5 MR. LEVY: Michael Levy again. Just as a  
6 matter of administrative efficiency, you don't probably  
7 want to set up a requirement on yourself where somebody  
8 can force you to reevaluate something that you've done two  
9 years ago or second guess, unless somebody presents new  
10 information. What new information they need and what it's  
11 got to prove, that is your policy call. But to make you  
12 second guess your own decision just because somebody  
13 didn't like it presents a big administrative burden on  
14 staff and yourselves.

15 MR. CRAIG J. WILSON: There is also that claim  
16 that is out that many listings are not supported by data.  
17 So by requiring that you would get more data to decide  
18 whether to take it off. Then there is fairness issue in  
19 the first place, whether it was based on anything  
20 reasonable, and that's the balance here.

21 CHAIRMAN BAGGETT: The first requirement, I  
22 think the suggestion is first you have to bring in new  
23 information on why it was listed in error or why it should  
24 be listed. Then you go through balance of reasonableness.  
25 Does that make sense?

1 MEMBER SUTLEY: Yeah. I'd be comfortable if  
2 the --

3 MEMBER SILVA: I just don't like the term "new  
4 information." I am not sure what it means.

5 MEMBER SUTLEY: I think the issue is it  
6 mistaken that the fish didn't die in 1986 also have to  
7 have -- you also have to have some evidence that the fish  
8 aren't dying now. Because whether or not -- it seems to  
9 me if it's on the list because it was thought to be  
10 impaired because fish were dying, fish died in 1986. Then  
11 you have to have some information that says they are not  
12 dying now and that the water body is not currently  
13 impaired.

14 MEMBER SILVA: Gary mentioned also maybe it  
15 wasn't impaired initially because of bad listing.

16 MEMBER SUTLEY: That shouldn't be a very high  
17 burden to show it is not impaired.

18 MEMBER SILVA: That's my point. Maybe there  
19 wasn't new information, so to speak, challenging, because  
20 it is not necessarily new information.

21 CHAIRMAN BAGGETT: Maybe we don't say new,  
22 just information.

23 MEMBER SILVA: The new bothers me.

24 MEMBER SUTLEY: But I think you have to  
25 address the current conditions, too.

1 MEMBER SILVA: Sure. That would be part of  
2 it.

3 MEMBER SUTLEY: I'm okay as long as we are  
4 addressing current conditions and not just whether it was  
5 put on by mistake.

6 MEMBER KATZ: New doesn't necessarily have to  
7 do with the timing of the information. Doesn't new have  
8 to deal whether or not it was in that record when that  
9 decision was made before. Anything not in the record  
10 would be considered new information.

11 CHAIRMAN BAGGETT: Not considered by.

12 Do you have any suggestions, Craig?

13 MR. CRAIG J. WILSON: Right now the policy  
14 allows -- if you are going to use the weight of evidence,  
15 it allows -- it requires that information be brought  
16 forward.

17 MEMBER SUTLEY: I want to use some language.

18 MEMBER KATZ: Pete's point was it was new  
19 information implies information that we just learned today  
20 as opposed to information that was not considered way back  
21 when, which is why I am saying, why I am using the  
22 definition of having been in the record. Anything that is  
23 not in the record is considered new, even if it was from  
24 that time.

25 MEMBER SILVA: You get the point.

1 MR. CRAIG J. WILSON: Take a moment to -- maybe  
2 we can have a statement --

3 MEMBER KATZ: One of the Wilson brothers.

4 MR. CRAIG M. WILSON: I keep reading and  
5 rereading the language on A8 and A14, and it seems to be  
6 pretty consistent that it seems to have some mandatory  
7 aspects to it, and it seems to require a justification of  
8 why the change should be made. We could try to tweak it a  
9 little bit, but it seems like it covers most of the basis  
10 of what the discussion is about.

11 CHAIRMAN BAGGETT: A14 is the delisting. The  
12 listing, I think there is concurrenents here that we add the  
13 sentence at the end that was requested, the waters segment  
14 shall be placed on with all those criteria. So we make it  
15 mandatory and add that. There is consensus there on the  
16 listing part. Now the delisting is whether we apply --  
17 what I am hearing is whether we apply the same standards  
18 to delist.

19 MEMBER SILVA: It should be the same standard.  
20 I don't know why --

21 MEMBER KATZ: Nancy's point was only that the  
22 same standard ought to apply, and the question was that  
23 you take a look at the current status of the water body.

24 CHAIRMAN BAGGETT: Listing may be maintained  
25 if the weight of evidence does not, so that takes care of

1 the one.

2 MEMBER SUTLEY: I think -- well, I hope that  
3 it is clear that that includes current conditions. I'm  
4 okay with not adding language as long as we are all in  
5 agreement that that is the direction of the Regional  
6 Board, you have to look at current conditions as well.

7 MR. CRAIG M. WILSON: Maybe it would be as  
8 simple if there is some bullets listed on both A8 and A14.  
9 And the very first bullet talks about providing any data,  
10 and maybe the word "current" could be added to both of  
11 those bullets, both the listing section and the delisting  
12 section.

13 MR. CRAIG J. WILSON: Specifically in the  
14 first bullet on --

15 MEMBER SUTLEY: Data or information.

16 MR. CRAIG J. WILSON: The first bullet on 14  
17 current says providing any data or information supporting  
18 the delisting, providing any data or information including  
19 current conditions supporting the delisting.

20 MEMBER SUTLEY: That includes current  
21 conditions, I think that would make me happy.

22 MR. CRAIG J. WILSON: Should that statement  
23 also be placed in the listing? It should be.

24 MEMBER SILVA: Yes.

25 CHAIRMAN BAGGETT: Current conditions, that is

1 what you are listing for, current conditions.

2 MR. CRAIG J. WILSON: That's the idea.

3 CHAIRMAN BAGGETT: We just had some  
4 miscommunication.

5 MEMBER SUTLEY: I think that would work.

6 CHAIRMAN BAGGETT: That is the first issue.  
7 What was the second one?

8 MEMBER SUTLEY: Still haven't addressed  
9 conventional pollutants.

10 CHAIRMAN BAGGETT: Conventional pollutant  
11 issue --

12 MEMBER KATZ: The mandatory?

13 CHAIRMAN BAGGETT: The mandatory, I think  
14 there was concurrence as long as it was on both 14 and 8.

15 MEMBER KATZ: Right.

16 CHAIRMAN BAGGETT: And then bring it back for  
17 a workshop, I would suggest -- I don't know if we put that  
18 in here, but come back for workshop after EPA, the next  
19 listing cycle after EPA had completed the next listing  
20 cycle.

21 MR. CRAIG J. WILSON: On that point, the '04  
22 list is being prepared by State Board staff. We can come  
23 back after the '04 list and present to you how we did it.  
24 A better test might be that if we come back in '06. That  
25 is when the Regional Boards will have had their first shot

1 at using the policy, and I believe that might be a better  
2 test of the implementation of this policy.

3 MEMBER SILVA: I guess my concern, too, is  
4 there used to be time past if anybody wanting to delist if  
5 that's worked or not, too. I think that would take longer  
6 just in terms of collecting the samples, coming back for  
7 delisting.

8 CHAIRMAN BAGGETT: Doesn't seem to be that  
9 burdensome. After we're done with the next listing cycle,  
10 you all do it. You put it together. We adopt it. It  
11 goes to EPA. See what they do with it. Then let's have a  
12 workshop to see how it went.

13 MEMBER KATZ: More of a status.

14 CHAIRMAN BAGGETT: Just a status report.  
15 Basically, a report card of how this policy fit with what  
16 Region 9 EPA.

17 MR. CRAIG J. WILSON: So that change would be  
18 in the resolution and we would change 2006 -- 2006 to  
19 2004.

20 MEMBER KATZ: Do we really want to do this  
21 between now and the end of the year?

22 MR. CRAIG J. WILSON: It's weighing heavily on  
23 me right now.

24 CHAIRMAN BAGGETT: That is what you call the  
25 next listing cycle, is called 2004 even though it's in

1 2005.

2 MR. CRAIG J. WILSON: It's the 2004 listing  
3 cycle. Pardon the confusion there; it is not the year.

4 CHAIRMAN BAGGETT: Just be, like, a year from  
5 now, probably by the time it gets to EPA.

6 MR. CRAIG J. WILSON: It will be a year.

7 MEMBER KATZ: Okay. Now we are --

8 CHAIRMAN BAGGETT: Is it conventional? Is  
9 that all we are --

10 MR. CRAIG J. WILSON: On the conventionals,  
11 that was not discussed specifically at the September 8th  
12 workshop. The values that we use come out -- the 10  
13 percent lower value and 25 percent value, first came from  
14 the 1997 305(b) guidance. The 10 percent is where  
15 beneficial uses are protected. The 25 percent is where  
16 they are not protected, where they are impacted. There is  
17 that area, ten to 25, where it is partial.

18 EPA picked up those numbers in the CAM guidance,  
19 which is admittedly a draft document. Many EPA documents  
20 are draft. It is the way they do their business. But it  
21 was a very reasonable approach, 10 and 25's been suggested  
22 in published literature. That's where we got that value.  
23 I think it is quite defensible. If you want to have a  
24 lower exceedance frequency, less than five, you need to  
25 change those cutoffs, the pegs that Dr. Lorden talked

1 about. We didn't propose any changes in that section  
2 because that wasn't discussed. We talked about toxics on  
3 September 8th.

4 MEMBER SUTLEY: I guess my question on that is  
5 if the concern is -- I think the concern that I raised in  
6 the workshop was that with respect to small sample sizes.  
7 The least statistical method will give you an answer, but  
8 the answer may not mean anything. So if we were looking  
9 at it that way, I think I heard you suggest that it  
10 wouldn't warrant a change in any case because EPA guidance  
11 says 10 percent for conventional pollutants. And if I am  
12 looking at Table 3.2, sample sizes between five and 30, it  
13 is five exceedances to list, which that would be  
14 consistent with that.

15 MR. CRAIG J. WILSON: That's correct.

16 MEMBER SUTLEY: Okay.

17 MR. CRAIG J. WILSON: Just to be clear on this  
18 point. EPA has suggested all kinds of different cutoffs  
19 for all kinds of different values. We picked this ten and  
20 25 to be the most defensible from our perspective.

21 MEMBER KATZ: Can I get either Ms. Mintz or  
22 Ms. Sheehan to sort of go on the conventional issue,  
23 respond to what Craig said?

24 MR. LEVY: Sorry, Michael Levy. Sorry to  
25 belabor the point. On the 3.11, which is the situation

1 specific weight of evidence approach. It's pointed out to  
2 me that you've added the word "current data or information  
3 to list," but the regs require that you have to use all  
4 data and information, not just current data and  
5 information.

6 MEMBER SUTLEY: I'm sorry, Michael, I thought  
7 what we were adding was including current conditions. I  
8 don't think it was meant to be exclusive of other data.

9 MR. CRAIG J. WILSON: That is correct.

10 MR. LEVY: Can we have the language back again

11 CHAIRMAN BAGGETT: Craig understands it.

12 MR. CRAIG J. WILSON: It is including current  
13 conditions. That's the direction.

14 MR. LEVY: Thank you.

15 MEMBER KATZ: Now can we get to the question I  
16 asked?

17 MS. SHEEHAN: Of course, now I forgot what  
18 Craig said, but I can tell you what EPA said.

19 MEMBER SUTLEY: The question is: Is 10  
20 percent okay?

21 MEMBER KATZ: Linda, we get worried when you  
22 quote EPA.

23 MS. SHEEHAN: Scary thing, isn't it. I can  
24 limp back and grab our letter, but I believe what we said  
25 was less than 10 percent exceedance for conventionals.

1                   MEMBER SUTLEY: Just humor me for a second  
2 here. Sorry for everybody else to belabor these points.  
3 But if we look at Table 3.2, and looking at sample sizes  
4 between five and 30, it says five listed, the number of  
5 exceedances is equal or greater than five, then you  
6 wouldn't have a problem with that piece of it?

7                   MS. SHEEHAN: Five percent exceedance to list?

8                   MEMBER SUTLEY: Between five and 30.

9                   MS. SHEEHAN: I apologize that my statistical  
10 expert is not here today. She is vacationing in Long  
11 Island.

12                   MEMBER SUTLEY: Which is a lovely place to be.

13                   MS. SHEEHAN: It is. Not as nice as Italy, but  
14 it is very nice.

15                   MEMBER SUTLEY: I was born and raised there.

16                   MS. SHEEHAN: There you go. But I think the  
17 concern is that the statistical models that we're looking  
18 at just break down at the small sample sizes.

19                   MEMBER SUTLEY: Trying to deal with the small  
20 sample sizes as a policy matter. The way that -- the  
21 effect of this table is to produce listings where sample  
22 sizes less than 30 listing at 10 percent or less.

23                   MS. SHEEHAN: That is what we had asked for.

24                   MEMBER SUTLEY: So a small sample size you  
25 don't have a problem with the effect of the table.

1 Whether or not you think the method is a good one or not,  
2 the effect of the table does not cause you --

3 MS. SHEEHAN: It does cause me some problems  
4 because I don't think that it actually does reflect what  
5 we had asked for in the original line as to the line  
6 policy. You have the table in front of you, and I can run  
7 back and get it and read it, but the number of exceedances  
8 of the smaller size is quite less than five. It is more  
9 scientifically supportable. I honestly don't recall the  
10 percentages because I relied on her for that. What we  
11 worked out with our statistical expert was two exceedances  
12 at the smaller sample sizes, not five. I can run back and  
13 try to formulate a more specific response. With relation  
14 to delisting, yeah.

15 MR. CRAIG J. WILSON: On the table that was  
16 proposed in the line edits, it's simply the raw score  
17 approach. And when you calculate this out, the error  
18 rates that you get, and I believe these error rates mean  
19 something, they are balanced at about 50 percent. If they  
20 are balanced at 50 percent, that is no better than  
21 guessing, to my mind. If you are going to guess, maybe we  
22 don't need data. Maybe we need something else.

23 Suggesting the 20 percent pushes the limits on  
24 errors. Most scientists are in the 90 to 99 percent range  
25 on errors, which would require more hits, frankly, to

1 list. Going the other way, makes this, in my view,  
2 indefensible process. And EPA has been criticized using  
3 this raw score approach in the scientific literature and  
4 elsewhere because it's not a good statistic.

5 MS. SHEEHAN: In the last hearing Sarah did a  
6 PowerPoint that went into a lot of the details as to why  
7 we believe you are actually going to miss quite a lot of  
8 waters if you draw the line at this rule of five that we  
9 have in front of us. And I can't do the statistics for  
10 you. She did, I am sure, an excellent job last time. I  
11 can present to you the table that we came up with in terms  
12 of trying to get a better assessment and stop missing so  
13 many waters at lower sample sizes. The statistical  
14 literature talks about a number of different things, but  
15 EPA ultimately is going to be the one deciding on whether  
16 our water body list is good or not, and EPA doesn't like  
17 what is in there. So it is just a question of whether or  
18 not, once we apply it, we see whether EPA is happy with  
19 the results.

20 CHAIRMAN BAGGETT: Question?

21 MEMBER CARLTON: Yes. I want to go back to  
22 the delisting policy. On Page A14 the way this currently  
23 reads is:

24 When recommending delisting, based on  
25 situation specific weight of evidence,

1 Regional Board must justify its  
2 recommendation by. (Reading)

3 I would like to suggest that this should be changed  
4 to when making a delisting decision the Regional Board  
5 must justify its recommendation, either way. Justify it  
6 that they're not going to delist and equally justify that  
7 they are going to delist. But one of the comments I heard  
8 today is right now what happens in a petition process to  
9 Regional Board, information can be presented. Regional  
10 Board says thank you very much, we decided not to change  
11 our mind here, and we go on.

12 It seems like there should be a equal level of  
13 requirement for justifying a decision to not grant a  
14 delisting as to grant a delisting. I don't understand why  
15 it is biased the way it is.

16 CHAIRMAN BAGGETT: So you have the language  
17 proposed?

18 MR. CRAIG J. WILSON: It would read when  
19 making a delisting decision based on the situation  
20 specific weight of evidence, the Regional Board must  
21 justify?

22 MEMBER CARLTON: Yes.

23 MR. CRAIG J. WILSON: Is that correct?

24 MEMBER CARLTON: Must justify its  
25 recommendation. Then you go to the bullets and you say

1 providing any data or information supporting the decision.

2 CHAIRMAN BAGGETT: That is what it says right  
3 now.

4 MEMBER CARLTON: No, it's just the delisting.  
5 It says if they are making a recommendation to delist,  
6 they have to do all these things because you are making --

7 CHAIRMAN BAGGETT: You're saying delisting or  
8 denying it.

9 MEMBER SUTLEY: Language, when making the  
10 delisting decision.

11 MEMBER CARLTON: I'm trying to be responsive  
12 to what I heard.

13 MR. CRAIG J. WILSON: Just so I am clear on  
14 it, could you specify --

15 MEMBER KATZ: We want a mirror on both sides,  
16 correct?

17 MEMBERS CARLTON: Yes.

18 MEMBER KATZ: What Gary was saying, as opposed  
19 to when making the recommendation, when making the  
20 decision.

21 MR. CRAIG J. WILSON: I've got that. There  
22 was providing the -- there was that phrase at the end that  
23 I didn't catch.

24 MEMBER SUTLEY: The only I thing you were  
25 changing was the first few words of that sentence, right?

1 MEMBER CARLTON: Yes, but there is some  
2 associated words in the bullets. This whole section is  
3 focused around the Regional Board making a decision to  
4 delist. And they are required to do these things if they  
5 make a decision to delist.

6 MEMBER SUTLEY: Is your problem solved if we  
7 just add, wherever it says delisting, "and decision" after  
8 it?

9 MEMBER CARLTON: No. I would like this  
10 language to cover both a decision to delist and a decision  
11 to not delist.

12 MEMBER SUTLEY: Sort of making, in the first  
13 part saying we are making a delisting decision, whether it  
14 is to approve the delisting or not, then it is supporting  
15 the decision, not the delisting.

16 So maybe instead of adding decision after delisting  
17 just replace in the bullets delisting with decision.

18 CHAIRMAN BAGGETT: Because it is under 4.11  
19 already. The title is delisting factors. So you are  
20 saying making the decision based on situation specific.

21 MEMBER SUTLEY: You want them to show their  
22 work.

23 MEMBER CARLTON: Yes, regardless of what their  
24 decision is, not only their decision to delist.

25 MEMBER SUTLEY: I think everywhere in the

1 bullets where it says delisting, just use the word  
2 "decision."

3 MEMBER CARLTON: There you go, that would do  
4 it.

5 CHAIRMAN BAGGETT: Put decision, in supporting  
6 the decision, supporting in which the decision can be used  
7 under delisting factors.

8 Does that make sense to you?

9 MR. CRAIG J. WILSON: Tom was just speaking to  
10 me. I'm sorry I didn't hear that.

11 CHAIRMAN BAGGETT: On Page A14, 4.11, the  
12 suggestion is where it says -- it would say, when  
13 recommending a delisting -- instead of delisting you say  
14 when making a decision based on site specific situation,  
15 et cetera.

16 MR. CRAIG J. WILSON: Whether or not to delist  
17 --

18 CHAIRMAN BAGGETT: We didn't put that on  
19 there, when making a decision because it is under the  
20 delisting.

21 MEMBER KATZ: When making a delisting decision  
22 based on blah, blah, blah.

23 MEMBER SUTLEY: Let me try this. When making  
24 a delisting decision based on the -- so that would be the  
25 only change in that sentence, beginning when. In the

1 first bullet substituting the word "decision" for  
2 delisting. In the second bullet, substituting the word  
3 "decision" for delisting. And then I don't think you need  
4 to make any other changes.

5 MEMBER CARLTON: Right, that would be fine.

6 MR. CRAIG J. WILSON: I think I have it.

7 MEMBER SUTLEY: Keep up with us here.

8 MEMBER KATZ: Now on the other section.

9 MR. CRAIG J. WILSON: Basically, when making a  
10 delisting decision based on the situation specific weight  
11 of evidence. That would be the lead-in. And then in the  
12 first bullet the changes are all of the changes we've  
13 talked about, providing any data and information including  
14 currents, the decision.

15 MEMBER KATZ: Supporting the decision.

16 CHAIRMAN BAGGETT: That way, as one of the  
17 criticisms from the regulated community, they can just  
18 blow us off, basically. This way they have to say why  
19 they are blowing us off.

20 MR. CRAIG J. WILSON: In the second bullet,  
21 strike delisting and replace it with decision.

22 MEMBER CARLTON: Right.

23 MR. CRAIG J. WILSON: And that is the only  
24 change.

25 CHAIRMAN BAGGETT: All right. We have this

1 whole -- they shall apply this whole other test. That  
2 covers everything, to some extent.

3 MEMBER KATZ: Makes everything else moot.

4 CHAIRMAN BAGGETT: To some extent.

5 MR. CRAIG J. WILSON: The weight of evidence  
6 will be mandatory for both cases, for listing and  
7 delisting.

8 CHAIRMAN BAGGETT: You do have to come in with  
9 information that is going to be compelling either way,  
10 beyond a reasonable doubt.

11 MEMBER KATZ: Preponderance of the evidence.

12 CHAIRMAN BAGGETT: Anything else?

13 This is to next month. We need a motion.

14 MEMBER SILVA: I will do the motion. But just  
15 for the record, I am still a little uncomfortable with  
16 having different standards for listing and delisting. But  
17 I will vote for the policy just to get a policy out there,  
18 but I am still uncomfortable.

19 MEMBER KATZ: Move it.

20 MEMBER SILVA: Second.

21 CHAIRMAN BAGGETT: Any other discussion,  
22 comments?

23 I think we will be back here within less than a  
24 year.

25 Thank everybody for their patience and all the

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comments.

All in favor.

Motion carries unanimously.

(Whereupon, the Board goes into closed session.)

(Item 9 concluded at 11:40 a.m.)

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1 REPORTER'S CERTIFICATE

2  
3  
4 STATE OF CALIFORNIA )  
5 COUNTY OF SACRAMENTO ) ss.

6  
7  
8 I, ESTHER F. SCHWARTZ, certify that I was the  
9 official Court Reporter for the proceedings named herein,  
10 and that as such reporter, I reported in verbatim  
11 shorthand writing those proceedings;

12 That I thereafter caused my shorthand writing to be  
13 reduced to printed format, and the pages numbered 3  
14 through 93 herein constitute a complete, true and correct  
15 record of the proceedings.

16  
17 IN WITNESS WHEREOF, I have subscribed this  
18 certificate at Sacramento, California, on this 6th day of  
19 October, 2004.

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ESTHER F. SCHWARTZ  
CSR NO. 1564