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Tri-TAC

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League of California Cities
California Association of Sanitation Agencies
California Water Environment Association

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Via Electronic and U.S. Mail

November 1, 2002

Arthur G. Baggett, Jr., Chair
and Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

**SUBJECT: COMMENTS REGARDING THE PROPOSED 2002 CLEAN
WATER ACT SECTION 303(d) LIST—Agenda Item 3, Workshop of
November 6, 2002**

Dear Chairman Baggett and Members:

The California Association of Sanitation Agencies (CASA) and Tri-TAC appreciate the opportunity to provide comments regarding the revised proposed 2002 Section 303(d) List. CASA and Tri-TAC are statewide organizations comprised of members from public agencies and other professionals responsible for wastewater treatment. Tri-TAC is jointly sponsored by CASA, the California Water Environment Association, and the League of California Cities. The constituency base for CASA and Tri-TAC collects, treats and reclaims more than two billion gallons of wastewater each day and serves most of the sewered population of California.

CASA and Tri-TAC submitted comments regarding the initial draft of the list (Letter to Arthur G. Baggett, Jr. dated May 17, 2002) and presented testimony at the May 23, 2002

public hearing. We wish to reiterate our support for several of the aspects of the proposed list, including:

- 1 • Establishment of a "Monitoring" List, and placement of waters on the "Monitoring" List where data are insufficient to show exceedance of a standard or where the stressor is unknown.
- 2 • Establishment of an "Enforceable Program" List, where an alternative enforceable program expected to lead to attainment of water quality standards is in place..
- 3 • De-Listing of Waters Where Impairment is Due to Natural Conditions. We note that a number of additional waters originally proposed for 303(d) listing are now recommended for the "Monitoring" List, such as numerous waterbodies identified in Region 6 that were originally listed for salinity, TDS, chloride, arsenic, metals, and radiation, and we support these recommendations.
- 4 • De-Listing where data show no impairment of beneficial uses.
- 5 • De-Listing where the listings were based on Elevated Data Levels (EDLs).
- 6 • Require water-body-specific information for new listings.
- 7 • Proposed exclusion of listings where no QA/QC procedures were used.
- 8 • Development of a "TMDLs Completed" List.

These aspects of the proposed 2002 303(d) List reflect a constructive and technically sound approach to 303(d) listing. However, a number of significant issues raised in our earlier comments regarding the 2002 List have not been adequately addressed, and some of the revisions to the proposed list raise new concerns. As set forth below, we believe the SWRCB must make further revisions to the List prior to its adoption.

9 **1. Specific Listings Carried Over From the 1998 List Should Be Re-Evaluated to Ensure Consistency and Fairness in the Listing Process.**

10 While we understand the workload challenges involved in reviewing each of the existing listings, it is the SWRCB's obligation to prepare an appropriate and scientifically-based List. In our previous comments, CASA and Tri-TAC urged the SWRCB to review, at a minimum, those 1998 Listings that have been identified in individual comment letters as warranting de-listing or placement on the "Monitoring" List, and those for which development of a TMDL is planned in the next several years. It appears that this has been done in part. The SWRCB staff has reevaluated those listings where interested parties provided "new data or information." In some cases, this reassessment has resulted in proposed revisions to the List. We applaud this effort, but this limited review does not fully address our concerns. Many of the "grandfathered" listings suffer from the same flaws identified and addressed by the

11 SWRCB staff in reviewing the regional boards' proposed changes to the List, such as listings based on inadequate data and listings for impairments for which the stressor or pollutant has not been identified. For example, numerous listings for impairments due to "algae" remain on the list (e.g. for the San Gabriel and Los Angeles River watersheds in the Los Angeles Region), despite the fact that they are similar to newly proposed algae listings which are being placed on the "Monitoring" List (e.g. Cold Creek within the Malibu Creek watershed in the Los Angeles Region). In the case of Cold Creek, the SWRCB concluded that "the pollutant causing the algae growth has not been identified." (SWRCB, Proposed 2002 CWA section 303(d) List of Water Quality Limited Segments: Fact Sheets, Volume II at 4-82.) Regardless of whether or not "new data and information" were received by the State or Regional Boards, CASA and Tri-TAC believe that the SWRCB cannot reach divergent conclusions about similar listing situations and still achieve the goal of adopting a legally sound and scientifically-based 2002 303(d) List.

12 In cases where the information used to place waters on the list in the first instance have now been deemed to be insufficient to support listing—such as single data points, EDLs, no water-body specific data—it simply does not make sense to require an affirmative showing of new data and information to rebut the erroneous listing. There was, in effect, no reliable information to justify the listing in the first place, and thus no basis for carrying the listing forward.

13 Another troubling change is the addition of stream segments to the list with no data to support the impairment determination, as a result of a re-definition of stream reaches. Since the 1998 list was prepared, the way in which stream reaches are defined has changed. Rather than match the data on which the 1998 listing decisions were made with the stream reach where it was collected, the SWRCB has listed all reaches as impaired, regardless of whether there is any data to demonstrate impairment within that stream segment. (e.g. Calleguas Creek watershed, Laguna de Santa Rosa.) This approach is in conflict with the purpose of the 303(d) list, as outlined in federal regulations and guidance, which is to inventory water quality limited segments (WQLS) and prepare TMDLs for those segments that are not attaining standards. We urge the SWRCB to include on the List only those stream reaches where sufficient data exist to determine whether water quality standards are being exceeded. The remaining stream segments should be placed on the "Monitoring" List and additional monitoring should be conducted.

14 **2. Listing Should Not Be Based on Exceedances of Draft Guidance or Informal Criteria that are Not Adopted Water Quality Objectives**

15 In our earlier comment letter, CASA and Tri-TAC argued that informal criteria that are not adopted water quality objectives should not be used as the basis for listing. In response, SWRCB staff has clarified the way in which these informal criteria have been used. While

we appreciate the attempt at clarification, the staff response does not address the real issue, which is the absence of public review and comment, economic analysis, and other procedural and substantive protections that accompany the adoption of water quality standards. It is not appropriate to substitute informal, advisory criteria for adopted objectives. If adopted objectives are not providing adequate use protection, those objectives should be revisited through the standard-setting process in accordance with the Clean Water Act and Porter Cologne Water Quality Act. Listing waters based on some other criterion and proceeding with TMDL development constitutes an "end-run" around the statutorily-mandated standard setting process.

16 **3. Water Bodies Should be Placed on the "Monitoring" List Where Site-Specific Objectives are Being Developed.**

17 We support the establishment of a 303(d) List of waters for which TMDLs are to be developed. The SWRCB is moving in this direction with the recognition that waters need not be listed where a TMDL will not lead to attainment of water quality standards (e.g. impairment is due to natural conditions), or where an alternative enforceable program is in place to ensure that water quality standards are met. We believe that our recommendation to include on the "Monitoring" List those waters where site-specific objectives (SSOs) are being developed pursuant to the process set forth in the State Implementation Policy for Toxics (SIP) is consistent with the SWRCB's overall approach. It simply does not make sense to devote limited resources to development of TMDLs to attain inappropriate objectives. SWRCB staff continues to recommend that listings be maintained until such time as an SSO is adopted. We do not believe it makes sense to direct resources to TMDL development where the SSO process may render the TMDL unnecessary, and instead we recommend that waters for which SSOs are being developed be placed on the "Monitoring" List until the applicable water quality standard is clarified and a reassessment of whether the standard is being attained can be performed.

18 **4. The Scope of the 303(d) List is Limited to Surface Waters and Should Not Include Groundwater.**

19 The proposed revised list includes several new listings in the Calleguas Creek and Santa Clara River watersheds within the Los Angeles Region (Region 4) based upon alleged impairment of the groundwater recharge use (GWR). CASA and Tri-TAC do not believe it is appropriate to attempt to resolve groundwater quality issues through the 303(d) process. The Clean Water Act's TMDL provisions are limited to surface waters. The legislative history and plain language of the Act confirm that Congress never intended the CWA to regulate groundwater, and USEPA has never set forth a definitive regulation explicitly incorporating groundwater, tributary or otherwise, into the requirements of the CWA. A variety of other state and federal statutes exist to ensure that groundwater quality is

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maintained. Moreover, no applicable water quality objectives have been set to protect the GWR use. Thus, there is no applicable water quality standard being exceeded. We believe it is improper for the Regional Board to apply section 303(d) to groundwater, directly or through the GWR use, and we recommend that water bodies listed for the GWR use be deleted from the proposed list.

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CASA and Tri-TAC support many of the SWRCB staff's proposed revisions to the 2002 303(d) List. We believe these changes signal an important policy direction to include on the 303(d) List only those waters where TMDLs are required—and where the TMDL process will yield potential water quality benefits. Without further revisions, however, we are concerned that the list will perpetuate inconsistencies among regions and water bodies and will fall short of the SWRCB's obligation to adopt a legally sound and scientifically-based List. We urge the SWRCB to make further revisions to the list as outlined above.

Thank you for your consideration of our comments.

Sincerely

David R. Williams, Chair
Tri-TAC

Roberta L. Larson
CASA

cc: Celeste Cantu, Executive Director
Craig J. Wilson, SWRCB
CASA Executive Board
Jim Kelly, Chair, CASA Water Issues Forum
James Colston, Co-Chair, Tri-TAC Water Committee
Monica Oakley, Co-Chair, Tri-TAC Water Committee