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FAX TRANSMITTAL

DATE:	Monday, June 14, 2004
TO:	Arthur Baggett, Chair and Board Members
COMPANY:	State Water Resources Control Board
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RE:	Comments on "Notice of Public Solicitation of Water Quality Data and Information - 2004 Clean Water Act Section 303(d) List"
TOTAL PAGES (W/COVER)	6

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June 14, 2004

Craig J. Wilson, Chief
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State Water Resources Control Board
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VIA FACSIMILE AND U.S. MAIL

Re: Comments on "Notice of Public Solicitation of Water Quality Data and Information – 2004 Clean Water Act Section 303(d) List"

Dear Mr. Wilson:

On behalf of San Diego Baykeeper, a community-based 501(c)(3) non-profit organization dedicated to protecting and restoring the region's bays, coastal waters and watersheds, I welcome the opportunity to submit these comments on the Notice of Public Solicitation of Water Quality Data and Information – 2004 Clean Water Act Section 303(d) List (Solicitation Notice). These comments are in addition to the joint comments of the Environmental Caucus of the AB 982 Public Advisory Group that will be provided to the State Water Resources Control Board (State Board) with respect to the Solicitation Notice.

First, we remain concerned with the legality of the Solicitation Notice, particularly since it does not seem to be based on a comprehensive assembly and review of information and data on water quality and other impairments regarding all water bodies in Region 9, as the Clean Water Act and its implementing regulations require. See, e.g., 40 C.F.R. Section 130.7.

We also renew our objections to the various "off-ramp" 303(d) lists. These lists run contrary to the purpose and spirit of the Clean Water Act. We have voiced our opinion on these lists through our comments on the listing guidance, and briefly touch on them in this context as well.

Additionally, we offer specific water bodies in the San Diego region that should remain or be added to the 2004 303(d) list. We provide reference to specific studies to be examined by the State Board, through its mandate to review and assess all readily available data and information submitted pursuant to this Solicitation. We would also like to call the Board's attention to the Pew Oceans Commission report, *America's Living Oceans: Charting a Course for Sea Change*. This report on the state of the oceans contains valuable data on waterbody impairments along California's coastline.

Lastly, we prevail upon the State Board to provide regional public hearings on the 2004 listing process in order to allow San Diego Baykeeper, our Regional Board, and the public to most effectively participate.

I. Solicitation Notice is inconsistent with legal mandates of the Clean Water Act

The Solicitation Notice does not comply with Clean Water Act 303 (d) or its implementing regulations. Code of Federal Regulations 130.7 states that a state must assemble and evaluate *all* (emphasis added) existing and available data, including data from the 305(b) report, dilution calculations and predictive models, nonpoint assessments, and reports from all levels of government, the public and academic reports. However, in contrast to the requirement for assembling and evaluating all existing data, the Solicitation Notice severely limits the data it requests. Data is limited to waters inhibited by a pollutant. This is contrary to the Clean Water Act section 303(d)(1)(A), which does not require that a water body is impaired by a specific pollutant to be listed. A water body must be listed if it is not achieving water quality standards despite effluent limitations, whether or not a pollutant is causing the failure to meet water quality standards.

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The Solicitation Notice also states that the requirements of the Listing Policy will be followed. Such requirements for high quality data are too restrictive and contrary to the CWA requirement that all existing data be assembled and evaluated. EPA Region IX's February 18, 2004 letter from Alexis Strauss to Art Baggett on the draft Listing Guidance states that though high quality data should be given greater weight, all data must be considered. Furthermore, such limits to data with minimum sample sizes and high quality data are not "good cause" for excluding data from consideration, as required by the CWA.

The solicitation also limits data to that generated after May 15, 2001. This time constraint is also contrary to the Clean Water Act requirement to evaluate all existing data. The State Board should consider valid data generated before 2001 for water bodies that are not yet listed, especially data that the Board already has. This data is useful in evaluating any new data for a water body, and may also have new informational value under the latest scientific understandings.

The Solicitation Notice includes long lists of additional information and evaluations that should accompany data submitted to the board. Some of this information is not necessary for the State Board to make a determination whether to list a water body. These additional information lists are substantively and visibly discouraging to the submission of valuable data. They are also far beyond a criteria of "reliability" which is more appropriate. The board should realize that it is extremely costly to conduct water quality assessments, especially in the detail that the State Board is requesting. The Board should also remember that it retains the ultimate responsibility of creating an accurate list of impaired waters, and should make it as inviting as possible for the public to submit all relevant existing data.

II. The 303(d) "off-ramp" lists should be eliminated

The TMDL's completed list is contrary to the Clean Water Act and its implementing regulations. The CWA 303(d) and 40 CFR 130.29 (b) and (c) require that once listed, a water body must remain on the 303(d) list until it is *attaining and maintaining* water quality standards. This shows strong support that a water body should remain on the 303(d) list and receive funding until there is no doubt that it is no longer impaired. Past EPA guidance and the Clean Water Act itself state that water bodies should not be de-listed until water quality standards are achieved. As we and many others have asserted to the board in the past, putting a water body on any other list besides the 303(d) list is a de-listing of the water body because it no longer receives the attention and funding it would receive if it remained on the 303(d) list.

The monitoring list is also contrary to the Clean Water Act. 40 CFR 130.7(b) contemplates a comprehensive 303(d) list. Therefore, the listing process should err on the side of protecting water quality, human health and environmental health. Having lists besides the 303(d) list makes the listing process subject to political manipulation and abuse by dischargers. It is especially improper to place a water body on the monitoring list for the reason that the source of the impairment of the water body is unknown. Such a water body would not receive the attention it would receive under the 303(d) list, and would only cause further degradation of the water body.

Finally, the alternative programs list should also be eliminated. The Clean Water Act requires waters that have alternative programs to be listed. 33 USC 1313 (d)(1)(A) and 40 CFR 130.7(a) require states to identify waters for which effluent limits through other regulatory programs are not stringent enough to implement any water quality standard. If water bodies are taken off the 303(d) list and put on the alternative programs list just because of the existence of alternative programs for a water body, all water bodies would be de-listed. The existence of alternative programs is irrelevant to whether a water body is impaired. In fact, the whole point of the 303(d) list is to list waters that have alternative programs but still are not obtaining water quality standards and beneficial uses.

III. Specific Region 9 Water Bodies Meeting Listing Requirements

San Diego Baykeeper recommends the following water bodies and impairments for inclusion in the section 303(d) list of impaired waters update for the San Diego region. A narrative description follows, and the table below summarizes several recommendations and available data sources.



Mission Bay	Visitors Center at Cudahy Creek	906.5	Bacteria	CSD DEH data and data compilations found at www.healthebay.org .	Ongoing sewage spills and beach postings
Mission Bay	Bonita Cove (north cove)	906.4	Bacteria	CSD DEH data, data compilations found at www.healthebay.org and 2003-2004 Heal the Bay annual beach report.	
Mission Bay	Santa Clara Cove	906.4	Bacteria	CSD DEH data, data compilations found at www.healthebay.org and 2003-2004 Heal the Bay annual beach report.	
Palca Creek	Entire Creek	908.3	Trash & Sedimentation	SWRCB 319(h) Contract #00-096-259-0	A final report and recommendations were submitted to regional board
Imperial Beach	South end of Seacourt Dr.	911.1	Bacteria	CSD DEH data found at http://www.cityofib.com/sewage.htm and U.S EPA Border XXI Federal Grant # 97939701	A final data report and recommendations were submitted to U.S. EPA
Imperial Beach	Carnation Drive (Camp Surf)	910.1	Bacteria	CSD DEH data found at http://www.cityofib.com/sewage.htm and U.S EPA Border XXI Federal Grant # 97939701	A final data report and recommendations were submitted to U.S. EPA

South San Diego Bay at South Bay Power Plant

We recommend listing for excess temperature and low dissolved oxygen, based on a report prepared for the San Diego Bay Council: Recommended Options For Maximum Water Temperature Limits And Minimum Dissolved Oxygen Limits At A Compliance Point For Discharges From The South Bay Power Plant In San Diego Bay, Necessary To Protect Beneficial Uses, Richard F. Ford, Ph.D., Professor Emeritus of Biology at San Diego State University, April, 2003.

San Diego Baykeeper, the Environmental Health Coalition, and other local environmental groups have also presented site-specific studies on the area that have shown, year after year, that the beneficial uses in the South Bay are not being protected, and that the waters suffer from impairment by heat, chlorine, and copper. Moreover, the vast majority of this data has been available to the Regional Board for a substantial period of time, but the severity of the impacts to South San Diego Bay continues to be overlooked.

Upper San Diego River

The upper San Diego River should be listed based on evidence of both illegal and "legal" dumping into the river. The State Board has data that was submitted in 2002 by Suzanne M. Michel, Ph.D., Water Resources Geography, which states that contaminants were dumped into the river by Lakeside Land Co, and sediment from Pier 3 was dumped into the river by the Naval Station. In the Santee portion of the San Diego River there have been visual observations that reveal foam and algal blooms, foul river odors, and trash dumping.

There is also evidence that the San Diego River has problems with total dissolved solids. See Huntley, David and Serratore, Shannon, Groundwater Management Planning Study El Monte/Santee Basin. Draft Report Prepared by the San Diego County Groundwater Authority, San Diego CA (1999). This is particularly a problem because of the Santee-El Monte Groundwater Basin which runs directly under the river bed. Therefore, there is substantial surface to groundwater interaction, and opportunity for the total dissolved solids to enter into the water supply.

Based on the evidence of impairment above, we strongly urge that the State Board make its own investigations into the water quality of the upper San Diego River.

Tijuana River and Estuary

We recommend continued listing of this area for impairment by bacteria, low dissolved oxygen, eutrophication, pesticides, solids, synthetic organics, lead, nickel, thallium, and trash. We also support listings for new impairments if suggested by the evidence. San Diego Baykeeper has been



involved in border monitoring, extensively covering this area. This report has already been submitted to the U.S. Environmental Protection Agency (Region IX) and is available from those offices (see table above).

Chollas Creek and Paleta Creek

We recommend continued listing of Chollas Creek, and expansion of area to cover impairments to Paleta Creek. Continued and expanded listings are warranted given the results of monitoring projects in this area (see table above). These studies have already been submitted to the State and San Diego Regional Boards.

Mission Bay

We recommend continued listing of Mission Bay for eutrophication, lead, and bacterial indicators. Continued and possibly expanded listings are warranted based on the results of monitoring projects in this area. These studies have already been submitted to the State and San Diego Regional Boards (see table above).

Various waters impaired for trash

Although trash impairs the beneficial uses of many of the San Diego region's waters, the Regional Water Quality Control Board has not set up TMDLs for this pollutant. The State Board should take the initiative in declaring that trash is a pollutant to water bodies in the San Diego region. The presence of trash in a water body can be a visual impairment to beneficial uses. Also, trash is a source of many different kinds of pollutants, such as oil, pH, and bacteria. It would be much more efficient to determine that trash itself is a water body pollutant instead of waiting for the pollutants that come from trash to build up to the point of the separate pollutants being discernable. Thus, if a water body was listed due to pollution from trash, it would potentially achieve water quality standards and be de-listed much sooner than if the water body that was contaminated with trash was not listed until more specific pollutants in the water body had built up and were identified. For these reasons, San Diego waters impaired by trash should be listed and TMDLs undertaken.

Coastal impairments as detailed by the Pew Oceans Commission recommendations

In their June 4, 2003 report, America's Living Oceans: Charting a Course for Sea Change, the Pew Oceans Commission referenced the TMDL process and impairment of coastal resources several times. We fear that this influential and comprehensive look at the state of our coastal environment will be overlooked in the solicitation process.

In their detailed recommendations, the Commission advocates requiring the "timely development of TMDLs, identifying point and nonpoint sources of pollution and the specific pollution reductions from point and nonpoint sources necessary to comply with the law." America's Living Oceans: Charting a Course for Sea Change, 117. While this directive is aimed at the EPA, the State Board should be aware of the regional and statewide emphasis on cleaning up our coastline. We also call the State Board's attention to the Commission's emphasis on nitrogen, other toxic pollutants, and the ecosystem effects of eutrophication (see generally chapter 13: Cleaning Coastal Waters).

We urge the State Board to thoroughly examine the Commission's report, and assess the State's coastline for inclusion on the existing section 303(d) list.

IV. Public hearings should be in region rather than Sacramento

Finally, we urge the State Board to continue and expand regional public hearings on the 2004 listing process rather than concentrate these hearings in Sacramento. In order to be an effective and useful part of the listing process, San Diego Baykeeper and other local environmental groups need to be able to attend such meetings. With limited staff and resources, we will be much better able to participate if hearings are conducted regionally rather than at the state level. The public, for whose benefit our waters are protected, will also be better served by locally held hearings. Given that regional boards will ultimately be responsible for implementation of cleanup "on the ground," a regional approach will be all the more advantageous.



On behalf of San Diego Baykeeper, I appreciate the opportunity to provide comments on the 2004 CWA section 303(d) listing process. I hope they are helpful. A great deal of work is needed to ensure a complete and accurate listing in 2004 and beyond, and Baykeeper looks forward to working the State and San Diego Regional Boards to ensure such listings. Please do not hesitate to contact me should you have any questions or need additional information.

Sincerely,

Gabriel Solmer

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