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NATURAL RESOURCES DEFENSE COUNCIL

May 15, 2002

*Via Federal Express*

Craig J. Wilson, Chief  
Monitoring and TMDL Listing Unit  
Division of Water Quality  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Re: Comments on "Revision of California's Clean Water Act Section 303(d) List of Water Quality Limited Segments" (Draft, April 2002)

Dear Mr. Wilson:

The Natural Resources Defense Council appreciates the opportunity to submit comments on the State Water Resources Control Board's (State Board) draft "Revision of California's Clean Water Act Section 303(d) List of Water Quality Limited Segments" (Draft Report). The Natural Resources Defense Council is a national, non-profit environmental organization with over 400,000 members, approximately 80,000 of whom reside in California.

Overall, we support the State Board's efforts in developing an adequate and defensible Section 303(d) List. In particular, we support the addition of 195 water quality limited segments to the Section 303(d) List. We also support the State Board's use of the 1998 303(d) List as the basis for the 2002 list. (Draft Report, Vol. I, p. 2.). However, we are concerned about the Watch List and TMDL Completed List, as well as transparency of decisions to delist water segments.

One Section 303(d) List

We are concerned about the State Board's proposed actions to list impaired water segments on three separate lists: the Watch List, the Section 303(d) List, and the TMDL Completed List. A three-list scheme runs contrary to the Clean Water Act and its implementing regulations. Section 303(d)(1)(A) provides that "[e]ach State shall identify those waters within its boundaries for which the effluent limitations . . . are not stringent enough to implement any water quality standard applicable to such waters, taking into account the severity of the pollution and the uses to be made of such waters." 33 U.S.C. § 1313(d)(1)(A). Additionally, the implementing regulations contemplate only one comprehensive Section 303(d) List. 40 C.F.R. §

130.7(b). Thus, Section 303(d) mandates that all impaired water segments be placed on one list, the Section 303(d) List.

→ Critically, in many if not all instances, the Watch List and TMDL Completed List function to “delist” water segments from the Section 303(d) List. The two lists clearly constitute a “delisting” of water segments because the Staff Report states that the Watch List and the TMDL Completed List “should not be considered part of the Section 303(d) list.” (Draft Report, Vol. I, p.7.) As indicated above, the Clean Water Act and its implementing regulations do not contemplate the exclusion of water segments from the Section 303(d) List in the form of a Watch List and/or TMDL Completed List. (Although proposed implementing regulations discuss “priority ranking” or “four-part [303(d)] list,” the water segments in these subcategories are part of the Section 303(d) List. 33 U.S.C. § 303(d); 40 C.F.R. §§ 130.7(b); 130.27(a); (c)(1).)

→ Equally important, the 177 water segments on the Watch List are in most if not all instances water segments that should be listed on the Section 303(d) List. Since these water segments are not on the Section 303(d) List, the Watch List constitutes a delisting of these 177 water segments. By adding these 177 segments to 70 water segments already designated for delisting, the total number of water segments for delisting, 247, outweighs the 195 additions. These actions, on the whole, weaken efforts to attain water quality standards in California. Therefore, at a minimum, the Watch List and TMDL Completed List should be considered part of the Section 303(d) List.

In addition to the statutory reasons stated above, there are sound policy reasons to support listing the water segments on the Watch List and TMDL Completed List as part of the Section 303(d) List. Specifically, placing water segments on a separate Watch List or TMDL Completed List has collateral impacts on resources, such as federal grants for monitoring and restoration that are linked to water segments on the Section 303(d) List. The Section 303(d) List works as a trigger in regulations for corrective actions. For example, AB 885 (1999 Jackson) imposes septic system standard regulations for systems adjacent to Section 303(d) listed water segments. In particular, for water segments with completed TMDLs, the success of the TMDL program depends on tracking water segments on the Section 303(d) List until they attain water quality standards. Therefore, it is crucial that all impaired water segments remain on one list, the Section 303(d) List, and the Watch List and TMDL Completed List be eliminated.

### *The Watch List*

As discussed extensively at the last two PAG meetings, we have serious concerns about the use of a Watch List. Specifically, it is unclear why the State Board decided to place water segments on the Watch List when the regional boards proposed listing the water segments on the Section 303(d) List. In Region 4 alone, the State Board decided to place 23 water segments on the Watch List despite the local regional board’s recommendation to list these 23 water segments. If the regional board staff scientists and regulators have determined that the water

segments should be listed, the State Board must articulate a sound reason for not listing these water segments, and in this case, for placing the water on the Watch List.

In this connection, the State Board cannot list waters on the Watch List, instead of the Section 303(d) List, because of other existing "regulatory" programs. For example, in Region 4, the Los Angeles Water Quality Control Board recommended listing several segments of the Los Angeles Harbor-Consolidated Slip. (Staff Report, Vol. II at 4-11-12.) However, the State Board has decided to place these segments on the Watch List because of another "enforceable program in place," in this case the BPTCP. *Id.*; see also Region 2 (State Board placing Central Basin/ Stege Marsh for Sediment Toxicity and Benthic Community; South Bay Basin/ Islais Creek for Sediment Toxicity and Benthic Community; South Bay Basin/ Mission Creek Sediment Toxicity and Benthic Community on Watch List because of existing Consolidated Clean Up Plan).

The State Board's decision to place water segments on the Watch List because of the alleged existence of other water quality programs, such as a toxic hot spot program, is directly contrary to the law. Section 303(d) and its implementing regulations do not provide for a separate list of water segments where there is "a regulatory program in place to control the pollutant but data are not available to demonstrate that the program is successful," as the Draft Staff Report states (Draft Report, Vol. I, p. 6.) Rather, Section 303(d) specifically notes that states must identify waters for which effluent limitations through other regulatory programs "are not stringent enough to implement any water quality standard." 33 U.S.C. § 1313(d)(1)(A); 40 C.F.R. § 130.7(a).

Taking the BPTCP example listed above, the very existence of the program is proof of the fact that effluent limitations through other regulatory programs "are not stringent enough to implement any water quality standard"—and hence we have toxic hot spots in harbors and bays. This is precisely the situation in which TMDLs are mandatory. 40 C.F.R. § 130.7(a). Indeed, the State Board cannot say, and has not said, when the BPTCP program (or any other regulatory program that it would contend obviates the need for a TMDL) will bring affected waters into compliance with water quality standards. For this reason alone, vague assurances that other programs are in place cannot displace the TMDL requirement of federal law.

Further, we are concerned about the number of water segments for toxicity that are placed on the Watch List instead of on the Section 303(d) List. See e.g. Central Basin/Stage Marsh, San Pablo Basin/Castro Cove, South Bay Basin/Oakland Inner Harbor, and Lower Putah Creek. Because of the bio-accumulative nature of toxicity, these water segments remain impaired and thus, must be listed on the Section 303(d) List. Moreover, as the State Board recognizes, repeated testing and monitoring must be conducted to determine if the water segment is no longer impaired. However, there is no discussion of funding for monitoring and testing. The State Board must address funding for monitoring and testing in order to assure the accuracy of the Section 303(d) List.

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It is also unclear why a water segment is on the Watch List, even where data are available. For example, for water segments on the Watch List because there is "insufficient information," there are no guidelines on what "insufficient information" means. The argument that they were placed on the Watch List so as not to "lose them" makes no sense; neither the environmental community nor staff are likely to forget about them, and putting them on a list with no basis in statute will not make them better priorities for monitoring money.

*TMDL Completed List*

→ Similar to the Watch List, the TMDL Completed List is contrary to the Clean Water Act. As discussed at the AB 982 PAG meetings, there is no basis in the Clean Water Act for delisting a water body simply because a TMDL has been written. Section 303 of the Act mandates that impaired water segments be listed; it does not grant EPA authority to allow states to remove water segments from the list while the impairment is continuing.

As discussed above, the Clean Water Act Section 303(d) does not contemplate placing water segments on a separate TMDL Completed List or delisting water segments once TMDLs have been established for the water segments. See 33 U.S.C. § 1313(d). Rather, Section 303(d) focuses on impaired water segments meeting attainment standards. Similarly, the regulations implementing Section 303(d) do not discuss placing water segments on a separate TMDL Completed List or delisting water segments based merely on the fact that a TMDL has been calculated. 40 C.F.R. 130.7. In fact, 40 C.F.R. § 130.29(b)<sup>1</sup> directs states that "you must keep each impaired waterbody on your list for a particular pollutant until it is attaining and maintaining applicable water quality standards for that pollutant." Additionally, 40 C.F.R. § 130.29(c) provides that states "may remove a listed waterbody for a particular pollutant if new data or information indicate that the waterbody is attaining and maintaining the applicable water quality standards for the pollutant." Thus, it is improper to place water segments on a Completed TMDL List that is not part of the Section 303(d) List or delist water segments simply because a TMDL has been completed, unless the regional board, the State Board, and EPA determine that the water segments are attaining water quality standards.<sup>2</sup> Further, it is inappropriate to delist or

<sup>1</sup> Although 40 C.F.R. 130.29 does not become effective until 2003, it functions as persuasive authority for development of the Section 303(d) List.

<sup>2</sup> Notably, placing water segments on a TMDL Completed List and removing water segments with a completed TMDL from the Section 303(d) List runs contrary to EPA guidance. Specifically, EPA's 2002 Integrated Water Quality Monitoring and Assessment Report Guidance provides that a water segment with a completed TMDL may be removed from the Section 303(d) List (category 5) when TMDL implementation is "expected to result in full attainment of all standards." 2002 EPA Guidance at 6. EPA also endorsed this position in its previous 1994 guidance, in which EPA provided that states may "keep waterbodies on the Section 303(d) list, notwithstanding establishment of an approvable TMDL, until water quality standards have been met." 1994 EPA Guidance at 3. In the 1994 Guidance, EPA reasoned, "this approach would keep waterbodies on the 303(d) list for which TMDLs have been approved but not yet implemented, or approved and implemented, but for which water quality standards have not yet been attained." *Id.* Unless there is evidence that the water segments are attaining water quality standards and

place water segments on a TMDL Completed List that are not, at the minimum, meeting beneficial uses, especially when many TMDLs have lengthy implementation periods and any such delistings may be years in advance of any noticeable water quality improvement (i.e., the Los Angeles River Trash TMDL as adopted by this Regional Board has an implementation period that spans more than a decade). Thus, our position remains that an impaired water segment with a completed TMDL should stay on the Section 303(d) List at least until it attains water quality standards, because the water quality assessment is an empirical assessment, not a legal assessment.

Part of 8

Transparency/Clarification

The State Board's reasons for deleting water segments must be transparent in order to assure complete public review. Specifically, Volume I, Table 2 contains a list of proposed deletions from the 1998 Section 303(d) List. However, the table does not provide a basis for these deletions. Thus, we request that the State Board add a column to that table that briefly describes the reason for the delisting; these reasons should be made readily available to the concerned public.

9

Under "SWRCB Review of RWQCB Recommendations" on page 4, Volume I, there is a list of factors that the staff says they "considered . . . in making recommendations." On this list are "source of pollutant" (#12) and "availability of an alternative enforceable program" (#13). Such variables may be interesting as background data, but they cannot be used to decide whether to list a water body, since they are completely irrelevant to whether the water body is impaired.

10

We are also concerned about water segments that are delisted based on elevated data levels ("EDL"). Generally, it is unclear if the delisting of water segments based on EDLs only eliminates the TMDL requirement as it relates to assuring healthy fish tissue in that segment, or if the delisting applies more broadly and eliminates the TMDL requirement for the pollutant in that entire water segment.<sup>3</sup> Specifically, we are concerned about the 36 water segments proposed for delisting based on EDLs in Region 4. In this connection, the Los Angeles Regional Water Quality Control Board proposes delisting Ballona Creek for lead based EDLs. The list narrative should clearly state whether this proposed delisting applies only to lead in animal tissue or whether it eliminates a TMDL requirement for lead in Ballona Creek entirely.

11

Additionally, we do not believe it is proper in the context of Section 303(d) to delist water segments that were originally listed based on EDLs unless affirmative information is proffered to show that the water segment is not, in fact, impaired. Section 303(d) and its regulations incorporate the idea that actions should be taken that include a

12

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TMDL implementation is complete, the water segments should not be on a separate TMDL Completed List that is not part of the Section 303(d) List.

<sup>3</sup> Because the EDL database consists of concentrations of toxins detected in mussel or clam tissue, they apply narrowly to pollutant impairments in tissue.

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margin of safety. The implementing regulations broadly interpret "readily available water quality-related data" and require states to demonstrate "good cause" for not including water segments on the Section 303(d) List, upon EPA's request. 40 C.F.R. §130.7(b)(5). Hence, delisting water segments based on new and informal perspective on the utility of EDL information, alone, and without considering other data and information regarding that water segment, is improper under the Clean Water Act and its implementing regulations.<sup>4</sup>

Part of  
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With respect to the water segments proposed for delisting based on EDLs, these delistings are improper because the EDLs, at minimum, are indicative of biological stress and impairment, at least in the absence of other data and information, which reveal that the EDL is not indicative of impairment. In this connection, we do not believe the requisite "good cause" standard for delisting the water segments has been explained by showing why EDLs are an inaccurate measure of impairment for those water segments. Hence, even if EDLs were not an accurate measure of impairment, other data regarding the water segment would illuminate if a water segment remains impaired. Because the State Board and regional boards have not explained why EDLs are a flawed method for listing nor discussed any other data pertaining to the proposed delistings based on exceeding EDLs, such delistings from the Section 303(d) List are improper.



We are also concerned about the delisting of water segments based on either "outdated NAS guideline," "no guideline," or "no defensible guideline." See e.g. Region 4 Revolon Slough Main Branch: Mugu Lagoon to Central Avenue, Draft Report at 4-4. As discussed above in connection with EDLs, we are concerned that delistings based on outdated NAS guidelines, no guideline, or no defensible guideline are improper delistings considering the Clean Water Act's and its implement regulations' broad inclusion of water segments on the Section 303(d) List. Similarly, the fact sheets regarding the delisting of these proposed water segments do not provide a statement of "good cause" for not including these water segments on the Section 303(d) List, as discussed in EPA's 2002 Guidance. Nor is there any discussion of other information or data that may reveal whether the water segments remain impaired.

13

As relates to water segments that are proposed for delisting based on no guideline or no defensible guideline, it is unclear why there is no guideline for these water segments or why the guidelines are no longer defensible. It is unclear why the regional boards did not adopt EPA's or

14

<sup>4</sup> Indeed, EPA's 2002 guidance allows delisting for flawed information, but not based simply on the fact that a regional board no longer wishes to rely on valid data sets. In particular, EPA's 2002 guidance states:

With regards to delisting, EPA is reiterating the importance of the "good cause" provisions of the existing regulation 130.7. "Good cause" may include, but is not limited to, situations where more recent or accurate data becomes available, more sophisticated or improved water quality modeling has been completed, or *flaws in the original analysis have led to water being improperly listed*. For waters that are delisted on the basis that, consistent with a State's methodology, adequate and/or information does not exist to support listing, *EPA encourages the state or territory to obtain additional data and information as a basis for future attainment and listing decisions*.

2002 EPA Guidance at 2 (emphasis added).

another regional board's guideline regarding a specific pollutant, as it has in the past. Further, as relates to the water segments proposed for delisting based on outdated NAS guidelines, it is unclear why these NAS guidelines are outdated. Moreover, if the NAS guidelines are outdated, it is unclear if there are other guidelines or data available regarding the impairment of the water segments. Because the regional boards have not explained why there are no guidelines or why the guidelines are not defensible or why the NAS guidelines are outdated, the basis of these delistings do not satisfy the "good cause" requirement for delisting under 40 C.F.R. § 130.7 or EPA's 2002 Guidance. Therefore, we are concerned that such delistings from the Section 303(d) List are improper.

In addition to our concerns about delisting of water segments, we request clarification of the discussion in Volume I, p. 5, regarding how the "size affected" values for the 1998 list may have changed in the 2002 list because new GeoWBS data. There is no summary of these changes in the public documents. We request that, in order to increase transparency in the process, these changes be summarized in a table in order to have meaningful public review and comment.

Thank you for the opportunity to provide these comments. Please do not hesitate to contact us if you have any questions.

Sincerely,



David S. Beckman  
Anjali I. Jaiswal  
Natural Resources Defense Council

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