#15

The Bay Foundation of Morro Bay*Butte Environmental Council*CA Sportfishing Protection Alliance
Clean Water Action*Coast Action Group*Defend the Bay*Defenders of Wildlife
Deltakeeper*Environment California*Friends of Butte Creek*Heal the Bay
Natural Resources Defense Council*The Ocean Conservancy
*Pacific Coast Federation of Fishermen's Associations*
San Diego Baykeeper*San Francisco Baykeeper*Southern CA Watershed Alliance
*Surfrider Foundation*Urban Creeks Council of California*Waterkeepers Northern California*

June 14, 2004

Arthur G. Baggett, Chair and Board Members
*State Water Resources Control Board*
1001 I Street
Sacramento, CA 95814
Facsimile: (916) 341-5620

**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 Chairman Baggett and Board Members:

On behalf of the above-listed environmental, commercial fishing and sportfishing groups, and recreational water use groups, who represent the Environmental Caucus of the AB 982 Public Advisory Group and other groups and their hundreds of thousands of members, I welcome the opportunity to submit these joint 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 any other comments by our individual organizations that will be provided to the State Water Resources Control Board (SWRCB) with respect to the Solicitation Notice.

In summary, we have significant concerns with regard to the legality of the Solicitation Notice, specifically with respect to its lack of compliance with Clean Water Act Section 303(d) and its implementing regulations. The failure of the Solicitation Notice to comply with these legal mandates makes it inherently flawed with respect to gathering information that could be relevant to decisions on the quality of the state's waters. As the agency charged with protecting the health of the waters of the state and cleaning up waters that fall through the cracks, the SWRCB should be particularly careful to comply with all statutory and regulatory mandates to cast a wide net to gather and use all existing and readily available information.

Legal Mandates

As the Solicitation Notice acknowledges, the SWRCB is required by Clean Water Act Section 303(d) and 40 C.F.R. § 130.7 to develop a list of water quality limited segments. Specifically, Section 303(d)(1) states that "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters." (33 U.S.C.§ 1313(d)(1)(A).) *Pronsolino*[1] made clear that Section 303(d)(1)(A) "appl[ies] to all waters in the state, not only to the subset covered by certain kinds of effluent controls," interpreting "not stringent enough" in Section 303(d)(1)(A) to mean "not adequate for" or "inapplicable to."[2]

The regulations at 40 C.F.R. § 130.7(b)(5) add that:

> Each State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the list required by §§130.7(b)(1) and 130.7(b)(2). At a minimum "all existing and readily available water quality-related data and information" includes but is not limited to all of the existing and readily available data and information about the following categories of waters:
>
> (i) Waters identified by the State in its most recent section 305(b) report as "partially meeting" or "not meeting" designated uses or as "threatened";
> (ii) Waters for which dilution calculations or predictive models indicate nonattainment of applicable water quality standards;
> (iii) Waters for which water quality problems have been reported by local, state, or federal agencies; members of the public; or academic institutions. These organizations and groups should be actively solicited for research they may be conducting or reporting. For example, university researchers, the United States Department of Agriculture, the National Oceanic and Atmospheric Administration, the United States Geological Survey, and the United States Fish and Wildlife Service are good sources of field data; and
> (iv) Waters identified by the State as impaired or threatened in a nonpoint assessment submitted to EPA under section 319 of the CWA or in any updates of the assessment.

(Emphasis added.) In addition, 40 C.F.R. § 130.7(b)(6) requires California to provide documentation to the EPA Region IX to support the State's determination to list or not to list its waters. This documentation must include a "rationale for any decision to not use any existing and readily available data and information for any one of the categories of waters as described in §130.7(b)(5)." (40 C.F.R. § 130.7(b)(6)(iii).) In other words, *the*

[1] *Pronsolino v. Nastri*, 291 F.3d 1123 (9th Cir. 2002).

[2] *See also Dioxin/Organochlorine Center v. Clarke*, 57 F.3d 1517, 1528 (9th Cir. 1995) ("since best practical technology effluent limitations do not apply to toxic pollutants, those limitations are, as a matter of law, 'not stringent enough' to meet water quality standards").

*state must explain why it did not seek out and assemble existing and readily available information.*

Inconsistencies Between Solicitation Notice and Legal Mandates

In a number of places, the Solicitation Notice sets limitations on the solicitation process such that the Notice violates the basic requirement to "assemble and evaluate all existing and readily available information" to develop the required list of "water quality-limited segments." (40 C.F.R. §§ 130.7 (b)(1), (b)(2) and (b)(5).) These include, but are not limited to, the following:

- The Solicitation Notice asks for information to "assess the State's water bodies for possible inclusion on or removal from the existing section 303(d) list," and then defines the list as including only those waters exhibiting "deleterious impacts from a pollutant or pollutants." However, nothing in Clean Water Act Section 303(d)(1)(A), which defines the scope of the list, or in the regulations limits the application of the listing requirement to only waters in which water quality standards are not met because of the presence of a "pollutant." The list must include all waters in which water quality standards are not achieved despite the application of effluent limitations, regardless of whether a pollutant is causing this failure to achieve water quality standards. Limitation of the Solicitation Notice in this way illegally limits the amount of information being solicited below the "all existing and readily available" threshold.
- The Solicitation Notice states that "[r]equirements for data and information from the Listing Policy – including those for quality control and assurance, temporal and spatial characteristics, and minimum sample sizes – will be followed when reviewing data and information." EPA Region IX's February 18, 2004 letter from Alexis Strauss to Art Baggett on the draft Listing Guidance makes clear that though "'high quality' data should be accorded the greatest weight . . . all data and information must be considered (see EPA, 1997a and EPA, 2003)" for listing decisions. (*See also* U.S. EPA, *Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act* (July 21, 2003) p. 25 (stating in response to the question "How should a State address data and information quantity?" that "All existing and readily available data and information must be considered during the assessment process") [hereafter "July 2003 Guidance"].)
- The Notice states that "[a]ll available data and assessment information generated since May 15, 2001 will be considered." This artificially short time constraint eliminates many potentially valuable pieces of information and again conflicts with the "all existing and readily available" standard. As EPA reiterated in July 2003 Guidance "[d]ata should not be excluded from consideration solely on the basis of age. . . . A State should consider all data and information." (July 2003 Guidance p. 25.) There are many situations in which information from before the last listing cycle would be submitted, including but not limited to: older data that recently became relevant due to new scientific understandings about the

relationships between the constituents at issue and impairment of beneficial uses, and older information that is meaningful and important in combination with more recent data.

- In paragraphs 6 through 9, the Notice states that "[a]ll" data and information submitted should be accompanied by numerous additional pieces of information and additional evaluations. Some of these additional requirements are simply unnecessary to the SWRCB's decision on whether a water body is impaired or threatened, and some represent tasks that even the regional water boards and SWRCB cannot currently perform. More importantly, virtually none, if any, of the additional information and evaluations called for in the Solicitation Notice is required under the broad "all existing and readily available" standard. Again, the end result is to severely discourage organizations and people from submitting what could be useful information, an extremely short-sighted decision given the paucity of SWRCB-collected and -organized data.[3] The SWRCB should instead indicate that such accompanying information and evaluations would be "welcome and useful," rather than require such additional information or evaluations or create the perception that such information and evaluations are required.

Finally, the Solicitation Notice states that the "final list will be based on data and information available to SWRCB" no later than June 14, 2004. (Emphasis added.) This language, which focuses updating the 303(d) list only on information *made available* to the SWRCB, makes it sound as if all that will be reviewed is the information handed to the SWRCB as part of the solicitation process. This, however, limits the data and information in a way that violates federal requirements and ignores the state's responsibility under federal regulations to seek out and use the myriad sources of information on water quality that are "existing and readily available." As set forth in those regulations, the State must base the 303(d) list on all existing and readily available data and information *that it has assembled.* (40 C.F.R. § 130.7(b)(5) "each state *shall assemble* . . . all existing and readily available . . . data and information" (emphasis added).) As such, the State is under a mandatory duty to collect, assemble and use all readily available data and information. (*See Forest Guardians v. Babbitt* (10th Cir. 1999) 174 F.3d 1178, 1187 ("'shall means shall," which imposes "a mandatory duty upon the subject of the command").)

---

[3] EPA Region IX commented on a similar approach in the state's draft Listing Policy, finding that "[t]he policy's minimum sample size and high quality data provisions and supporting rationale do not provide a 'good cause' rationale for excluding data and information from consideration (see 40 CFR 130.7(b)). These regulatory provisions create a rebuttable presumption that all readily available data and information will be used in the assessment process. A great deal of useful data from STORET, academic and agency reports, and volunteer monitoring groups would appear to be excluded from consideration under the proposed rule, an outcome which appears inconsistent with the federal requirements." (Letter from Alexis Strauss to Art Baggett, February 18, 2004.) EPA also noted in this letter that "the proposed policy appears to set a higher burden of proof than typically used in California's administrative proceedings." (Citations.) The onerous responsibilities for submitting information that the Solicitation Notice places on the public, many of which the SWRCB does not place on even itself, similarly appear to be more stringent that the principles governing the admissibility of evidence and opportunities for public participation typically used in California administrative proceedings.

It is insufficient, therefore, for the State to base the final 303(d) list merely on data and information that it has been handed. Rather, the State must complete its mandate and *actively gather and collect* all existing and readily available information from all potential sources, many of which are readily obvious to members of the public (who do not have the resources to do the state's job for them) and should be similarly obvious to the SWRCB. These include but are not limited to USGS data, DPR data, Monterey Bay Sanctuary data, DHS's Source Water Assessment database, and numerous other data sources, some of which are included in the state's draft Listing Policy. In its February 18th letter on the Policy, EPA Region IX specifically called on the state to "include all EPA monitoring data (not just EMAP) as well as other agencies that operate high quality sampling programs (*e.g.*, U.S. Fish and Wildlife Service, US Department of Agriculture, US Army Corps of Engineers, and National Oceanic and Atmospheric Administration)."

The apparent self-restriction on SWRCB data collection assembly activities is particularly problematic in light of the SWRCB's refusal to support the funding and implementation of a meaningful ambient monitoring program, or to effectively integrate the myriad databases that exist and that contain useful information. We would appreciate additional details from the SWRCB on its and the regional boards' activities to collect, assemble on their own initiative, and use to develop the 303(d) list "all existing and readily available information," over and above that provided as a result of the Solicitation Notice. (40 C.F.R. § 130.7 (b)(5).)

* * *

It is our understanding that the SWRCB is cutting $1.4 million in contract funds from the Surface Water Ambient Monitoring Program (SWAMP), which already is seriously under-funded. This is not the first time that this important program has been in jeopardy of near-collapse. The SWRCB must place monitoring information at a much higher priority if it is to adequately protect the health of the waters on which we all depend. Artificial and illegal constraints on the amount of information sought as part of the 2004 solicitation process, and continued assaults on SWAMP, appear to indicate that the SWRCB places a low value on obtaining the monitoring data its needs to do its job.

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

Sincerely,

Linda Sheehan
The Ocean Conservancy
Co-Chair, AB 982 Public Advisory Group

On behalf of:

Dave Paradies
The Bay Foundation of Morro Bay

Barbara Vlamis
Butte Environmental Council

John Beuttler
California Sportfishing Protection Alliance

Lena Brook
Clean Water Action

Alan Levine
Coast Action Group

Bill Jennings
DeltaKeeper

Robert Caustin
Defend the Bay

Kim Delfino
Defenders of Wildlife

Sujatha Jahagirdar
Environment California

Alan Hart
Friends of Butte Creek

Leslie Mintz
Heal the Bay

David Beckman
Natural Resources Defense Council

Zeke Grader
Pacific Coast Federation of Fishermen's Associations

Bruce Reznik
San Diego Baykeeper

Sejal Choksi
San Francisco Baykeeper

Conner Everts
*Southern California Watershed Alliance,*
Urban Creeks Council of California

Chad Nelson
Surfrider Foundation

Leo O'Brien
WaterKeepers Northern California

cc: Celeste Cantu, Executive Director, SWRCB
Craig Wilson, Chief Counsel, SWRCB
Craig J. Wilson, Chief, Monitoring and TMDL Listing Unit, SWRCB
Alexis Strauss, U.S. EPA, Region IX