

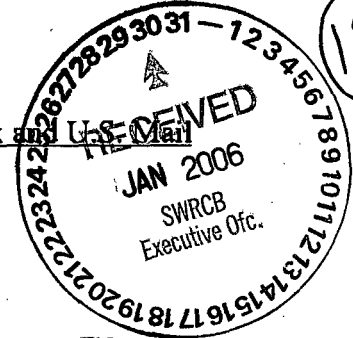
COALITION FOR PRACTICAL REGULATION

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"It's about saving jobs"

24 January 2006

Via Fax and US Mail



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State Water Resources Control Board
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303 (d) Deadline:
1/31/06

Subject: Comments on Proposed Revision to Federal Clean Water Act Section 303(d) List of Water Quality Limited Segments for California

Dear Ms. Potter and Members of the Board:

On behalf of the Coalition for Practical Regulation (CPR), an *ad hoc* group of 43 cities within Los Angeles County that have come together to address water quality issues, I would like to submit the following comments regarding the proposed Revision to Federal Clean Water Act Section 303(d) List of Water Quality Limited Segments for California. Our comments are based, in part, on comments made by Richard Watson on behalf of CPR at the 05 January 2006 Public Workshop on Development of the 2006 303(d) List and on comments made by Ken Farfaring, City Manager for the City of Signal Hill, at the same workshop. In addition, some of our comments were stimulated by comments made by others at the workshop.

First, CPR would like to commend the State Board staff for the improvements it has already made to the 303(d) list, and for recommending changes that will further improve the list. Staff made a number of recommendations for de-listings where pollutant-segment combinations were not appropriately listed in the first place. Staff recommends de-listing erroneously listed waterbody-pollutant combinations, including those for which data demonstrated that the applicable water quality standards are not exceeded, those for which data used to list a pollutant was actually from a different water body, those for which data used to list a waterbody cannot be found, those for which an insufficient number of samples exceeded the CTR criteria, those for which biological impacts documented were not associated with toxicity or pollutant concentrations, and those for which the listing was based on faulty data.

- ARCADIA
- ARTESIA
- BALDWIN PARK
- BELL
- BELL GARDENS
- BELLFLOWER
- BRADBURY
- CERRITOS
- COMMERCE
- COMPTON
- COVINA
- DIAMOND BAR
- DOWNNEY
- GARDENA
- HAWAIIAN GARDENS
- INDUSTRY
- IRWINDALE
- LA CANADA FLINTRIDGE
- LA MIRADA
- LAKEWOOD
- LAWDALE
- MONROVIA
- MONTEBELLO
- MONTEREY PARK
- NORWALK
- PALOS VERDES ESTATES
- PARAMOUNT
- PICO RIVERA
- POMONA
- RANCHO PALOS VERDES
- ROSEMEAD
- SANTA FE SPRINGS
- SAN GABRIEL
- SIERRA MADRE
- SIGNAL HILL
- SOUTH EL MONTE
- SOUTH GATE
- SOUTH PASADENA
- VERNON
- WALNUT
- WEST COVINA
- WHITTIER

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We are particularly pleased to see the recommended de-listing for conditions where actual pollutants have not been identified. If implemented, these recommendations will signify real progress in establishing the 303(d) list as a technically solid basis for setting water quality priorities in California. Further, these recommendations indicate that staff acknowledges the importance of the 303(d) list being developed and maintained as one characterized by scientific integrity. Staff indicates through these recommendations that they understand that the current 303(d) list is flawed, and we appreciate their efforts to begin to remedy this situation.

However, we are concerned about a number of remaining listings that are not based on science. The problem is that the recommendations do not go far enough toward making the 303(d) list a focused and technically defensible instrument. The list still contains many listings that should not be included, particularly those based on potential future uses rather than probable future uses. Potentiality is an unreasonably broad concept on which to base anything, and in the case of the 303(d) list and water quality in California, listings based on potential future uses could be disastrous. Cities could be forced to spend untold millions of dollars to implement TMDLs triggered by uses that do not exist and are not likely to exist.

For example, State Board staff has recommended 92 new listings in Region 4, many of which are for potential beneficial uses, not for probable future uses. California Water Code Section 13241 lists past, present, and probable future uses as beneficial uses to be protected through the establishment of water quality objectives, and these are the uses to be considered in developing the 303(d) list. Among the potential uses in the Basin Plan for the Coastal Watershed of Los Angeles and Ventura Counties are several washes listed as having potential REC-1 uses that are specifically noted as having access prohibited in concrete-channelized areas. These channels are not for body-contact recreation and our member cities should not be required to spend money to protect a non-existent use that is, in fact, prohibited. It is logical and technically defensible to apply the standard of protecting uses that actually existed in the past, currently exist, or are probable in the future. Introducing conjecture into what should be a realistic and science-based process is neither logical nor technically defensible.

What we need are Basin Plans and a 303(d) list that are consistent with California Water Code Section 13241, which specifies establishment of water quality objectives to protect past, present, and probable future uses. Those three categories are sound; they represent real uses and therefore a real picture of the beneficial uses of a waterbody. Extraneous listings for potential future uses, such as REC-1 uses for waterbody segments where people have not, do not, and would not be reasonably expected to ever legally or safely swim, only add unnecessary complexity and expense to the process. They do not protect an actual or probable future use. We strongly suggest that your Board apply these – and only these – three general categories of beneficial uses when revising the 303(d) list.

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CPR also has a few specific comments, questions, and suggestions regarding the draft 2006 303(d) List resulting from the 05 January 2006 Public Workshop:

1. CPR agrees with the Los Angeles Regional Board's request that the high flow exemption for REC-1 uses in flood control channels be recognized and reflected in the revised 303(d) List. The high flow exemption recognizes that during and immediately after a storm event that recreational uses of these channels is dangerous and illegal.
2. CPR disagrees with the Staff Scientist for Heal the Bay who said at the 05 January 2006 Public Workshop that the State Board has no choice but to list even if the pollutant is not identified. Such a claim is clearly inconsistent with 40 CFR 130.7(b)(iii)(4), which requires that the 303(d) list "shall identify the pollutants causing or expected to cause violations of the applicable water quality standards."
3. CPR strongly disagrees with the assertions of the Science and Policy Director for Heal the Bay that delistings are better done by the Regional Boards and that the Regional Boards are better equipped than the State Board to handle the listing/de-listing process. Until State Board staff was given responsibility for developing the 303(d) lists, the process was inconsistent, not always objective, sometimes not supported by valid data, and not as transparent as it is today.
4. CPR agrees that the State Board has probably not reviewed all data that is currently available. However, they appear to have considered data that was readily available as of their cut-off date for submission of data as well as more recent SWAMP data. Furthermore, the next listing cycle will most probably start immediately after the 2006 303(d) List is approved. One answer to the availability of new data that staff have not been able to consider might be to give a low priority and deferred completion schedule for any TMDL associated with a listing for which new data is now available but was not able to be reviewed during the current listing cycle.
5. CPR disagrees with David Beckman's assertion that the State Board needs affirmative evidence in order to delist. That is akin to proving a negative or being guilty until proven innocent. Given the absence of rules for listing until the Listing/De-listing Policy was adopted in September 2004 and the inconsistent, often poorly documented, earlier listings proposed by Regional Board staffs and ratified by the State Board without careful review, listings for which rigorous supporting data is missing should not be preserved in the name of the "Precautionary Principle."
6. CPR disagrees with David Beckman's assertion that the State Board cannot acknowledge a nuisance and take it off the list. Such an assertion is inconsistent with 40 CFR 130.7(b)(iii)(4), which requires that the 303(d) list "shall identify the pollutants causing or expected to cause violations of the applicable water quality

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- standards." Furthermore, nuisance is a Porter-Cologne concept. Therefore, it is not be an appropriate basis for adding a waterbody to the 303(d) list and requiring a TMDL to be prepared.
7. CPR was impressed by the testimony of the representatives of the Sweetwater Authority and the City of San Diego Water Department. The proposed listings for their reservoirs and the waterbodies upstream from their reservoirs demonstrated the problems resulting from implementation of the State Board's *Sources of Drinking Water Policy* (State Board Resolution 88-63). Raw water sources and storage reservoirs are being judged in relation to criteria intended to apply at the point of delivery of municipal or domestic water supplies.
 8. CPR agrees with the County Sanitation Districts of Los Angeles County that it is an incorrect application of the *Sources of Drinking Water Policy* to list conditional potential MUN uses on the 303(d) List. The Los Angeles River Metals TMDLs Staff Report cites a February 15, 2002 memorandum from Alexis Strauss (USEPA) to SWRCB Executive Director Celeste Cantú indicating that conditional uses are not recognized under federal law. Therefore, they are not water quality standards to be used as a basis for determination of impairments.
 9. CPR noted with interest the statement by the County of Orange that the Santa Ana-Delhi Channel has been listed as impaired although no beneficial uses have been designated for the channel. This appears to be another inappropriate application of the "Tributary Rule." It is totally inappropriate to not complete the process of determining past, present, and probable future uses for a waterbody and, instead, to transfer the beneficial uses of a receiving water upstream from a receiving water no matter what the characteristics of the upstream waterbody. CPR acknowledges that this is not a 303(d) list issue; it is a Basin Plan issue that causes problems for the listing/de-listing process. It is a clear indication that the State Board, as the responsible party for Water Quality Policy, must act to ensure that the Basin Plans are properly reviewed and revised, when necessary.
 10. CPR agrees with the County of Orange's assertion that screening values should not be inappropriately used as water quality standards for determining impairments.
 11. CPR agrees with the building industry that the "big elephant in the room" is Basin Plans and their water quality objectives. Several of the impairment problems discussed at the Public Workshop were really problems with water quality objectives. We support the BIA's request to the State Board to consider how the process to address impaired waters and the 303(d) List could be used to address problems with water quality standards in Basin Plans.
 12. CPR agrees with the Construction Industry Coalition for Water Quality that we should all be encouraged by the Los Angeles Regional Water Board's

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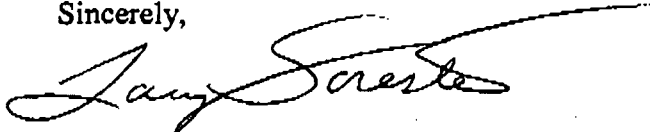
establishment of a Wet Weather Task Force and by work being done by a work group of this Task Force to define a design storm for the application of water quality standards. In the absence of a design storm, the regulated community is expected to meet water quality standards even during and after very large storms that could result in State and/or federal disaster designations.

We also would like to remind your Board that the combined 303(d)/TMDL processes are intended to be a backstop to ensure attainment of water quality standards and that the listing process and the lists themselves have been improved since State Board staff was assigned responsibility for developing the lists. CPR supports a continued division of labor in which the State Board develops the 303(d) list and the Regional Boards focus on water quality standards and on the development of TMDLs and other programs to address impaired waters and ensure that beneficial uses are attained. This system provides the most effective allocation of resources and should remain in place.

In addition, we would like to suggest that in the future the data and data analyses used to support listing and de-listing recommendations should be made available at the appropriate Regional Board offices to make the data and analyses more easily available for review by municipalities and other permittees as well as other interested parties.

Thank you for the opportunity to provide these comments on the proposed Revision to Federal Clean Water Act Section 303(d) of Water Quality Limited Segments for California. We recognize that as soon as the 2006 303(d) List is adopted, preparation of the 2008 list will begin, and we look forward to the State Board's continuing efforts to improve the list.

Sincerely,



Larry Forester
CPR Steering Committee
City Council Member, City of Signal Hill

cc: CPR Steering Committee
CPR Members