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Chair Tam Doduc and Members of the State Water Board
c/o Selica Potter, Acting Clerk to the Board
State Water Resources Control Board
Executive Office
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VIA EMAIL: commentletters@waterboards.ca.gov

Re: Comments on September 2005 Draft "Revision of California's Clean Water Act Section 303(d) List of Water Quality Limited Segments"

Dear Chair Doduc and Board Members:

On behalf of the under-signed groups, including working men and women in the fishing fleet whose livelihoods depend upon clean water, we welcome the opportunity to submit these comments on the Draft "Revision of California's Clean Water Act Section 303(d) List of Water Quality Limited Segments." Our organizations strongly support the listing of the identified impaired water bodies on California's 2006 Section 303(d) list. We also strongly support the listings of waters impaired by temperature and invasive species. The identification of these impaired waters as required by the Clean Water Act will ensure their cleanup and return to full use and enjoyment by all Californians.

We have concerns, however, with the failure to list a number of impaired or threatened waters due to misapplication of the law, Listing Guidance Policy, and other factors. One critical, overarching point is State Board staff has attempted to apply the Listing Policy retroactively in a wholesale manner by going back and reevaluating the data and information used to make previous listings using the new Listing Policy factors, ignoring the substantial deference that must be given to prior administrative decisions. Moreover, precautionary management should be the rule in determining which water bodies are impaired. As noted below, the consequences of missing an impaired water body are far greater than the unlikely event of a false listing.

Additional concerns are summarized below:

- The list fails to meet the regulatory requirement of reviewing all readily available information. In addition, fact sheets have no links to actual data submitted, rendering verification of completeness of data review impossible.
- The list violates the law by failing to list impaired waters where there is no standard or guideline for the pollutant at issue (*i.e.*, either does not list or lists based on standard or guideline for a different pollutant).
- The list violates the law by failing to list impaired waters where there is only a narrative standard or guideline for the pollutant at issue (*i.e.*, either does not list or lists based on standard or guideline for a different pollutant)

- The list violates the law by failing to list impaired waters where there is an existing TMDL.
- The list violates the law by refusing to list impaired waters where there is an "alternative program" in place.
- The list violates the Listing Guidance by refusing to allow appropriate and required Regional Water Board involvement.
- The list violates the Listing Guidance and the law by delisting waters where the original file cannot be located.
- The list violates the Listing Guidance and the law because it does not use the "weight of evidence approach" in many cases, including prior to delisting waters, thus missing impaired waters.
- The list violates the law by inappropriately downsizing the size of the water body that is listed (*i.e.* delisting part of an existing listed water body).

We urge the Board to address these problems, not only to ensure that impaired waters are properly identified and listed on the 2006 303(d) list, but also so that future impaired waters are not missed due to continued misapplication of the law and the Listing Guidance Document, which went through years of stakeholder processes and public hearings before being finalized. Each of these concerns is addressed in more detail below.

A. The Proposed Retroactive Application of the Listing Policy Is Inappropriate and Improper

The State Board should not apply the Listing Policy retroactively to reevaluate listings made prior to the adoption of the Policy. In its review, State Board staff has attempted to apply the Listing Policy retroactively in a wholesale manner by going back and reevaluating the data and information used to make previous listings using the new Listing Policy factors. Staff's proposed approach fails to recognize the substantial deference that must be given to prior administrative decisions and ignores the limited circumstances set forth in the Listing Policy for re-evaluating previous listings for de-listing.

1. Failure to Give Substantial Deference to Prior Administrative Decisions

First of all, staff's summary review of prior administrative decision-making contravenes well-established legal principles, which require substantial deference and a presumption of correctness in reviewing previous agency decisions. *Fukuda*, 20 Cal.4th at 820-21 (agency decisions are presumed to be correct); *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 739 (same); *see also Imperial Irrigation Dist.* 225 Cal.App.3d at 568 (holding that agency's interpretation of the Clean Water Act is due substantial deference.). Staff has failed to adhere to the legal presumption of correctness by ignoring the required standard of substantial deference and the corresponding high burden of evidence in evaluating the majority of the proposed de-listings.

The flaws in this approach are shown most acutely in staff's proposals to de-list waters for which TMDLs have already been developed and adopted. Given the necessarily summary nature of the

State Board's review of the original listing decisions,[1] these proposals cannot be justified under basic legal principles. In the process of developing the TMDLs for these waters, the Regional Boards will have conducted a comprehensive re-evaluation of the water segments and the impairing pollutants and conditions in order to confirm the impairments and conduct source evaluations and pollutant targets. This re-evaluation would encompass all available information, including all new data and evidence regarding the water body. Indeed, during the TMDL development process, where the Regional Boards found a lack of data supporting an impairment caused by certain pollutants, they did not develop TMDLs for those pollutants in the water body. Given the comprehensive re-evaluation and analysis done during the TMDL process, it is not appropriate for the State Board to propose to de-list these same segments after performing only a summary re-evaluation of the original listing data as compared to the new factors. As described, the latter was a much less rigorous process. To the contrary, in order to reverse the administrative decision made by the Regional Board and approved by the State Board and USEPA, the State Board would have to meet a high burden of proof to show that the earlier decision was incorrect. The State Board has not done this here.

Staff is also proposing to de-list water bodies if there are no approved guidelines under the new Listing Policy to evaluate the original data set, the original data was lost or anecdotal, or if the original data set does not meet all of the requirements of Sections 4.1 to 4.10 of the new Listing Policy. Again, the State Board must make a substantial showing in order to overcome the presumption of correctness that applies to the original regional board decision. Notably, staff has made certain express assumptions to avoid this burden altogether. *See* Staff Report at 11-12. This is a clear violation of the law. The State Board is required to provide substantial evidence in all cases to overturn prior agency decisions. Moreover, in most cases, the regional boards had sufficient evidence to place these water bodies on the 303(d) List when the original administrative decision was made. The regional boards are much more knowledgeable about their local water bodies and local conditions than the State Board is or can be, particularly in the current process where State Board staff has been tasked with reviewing a huge amount of information for the entire state. Thus, it is not appropriate, or legal, for the State Board to propose to overturn these prior administrative decisions without providing substantial evidence to show that the earlier decision was not correct. This is a high burden, and in most cases, the State Board has not met it in the Draft Revisions.

2. <u>The Listing Policy Allows Reevaluation of Prior Listings Only In Specified Situations</u>

The Draft Revisions also go well beyond the letter and intent of the Listing Policy. As discussed, staff has attempted to engage in a wholesale reconsideration of all previous listings. This directly contravenes the letter and spirit of the State Board's own Listing Policy.

The Listing Policy is very clear on the issue of removing previously listed waters from the 303(d) List. Specifically, Section 4 of the Listing Policy sets forth <u>three</u> situations under which a listing may be reevaluated. Listing Policy at 11. The first is if the listing was based on faulty data, such as typographical errors, improper QA/QC or limitations in the analytical methods that

[1] Indeed, at the State Board hearing on the Listing Policy, State Board counsel noted that going back and second guessing previous decisions would be an extreme administrative burden on staff. SWRCB Hearing Transcript, Sept. 30, 2004.

would lead to improper conclusions as to the status of the water body, and the listing would not have occurred absent this data. *Id.* The second is if a water quality standard or objective has been revised. *Id.* The third situation is if any interested party requests a reevaluation of a particular listing. *Id.* The factors in 4.1 to 4.11 are to be used in such a reevaluation, but only if it is raised under one of these three specified circumstances. *Id.* By listing these specific situations, the Listing Policy prohibits a wholesale reconsideration of previous listings.[2]

As stated above, the Listing Policy went through an intensive stakeholder and public process before it was finalized. As a result, a great deal of debate was involved in drafting each of its various provisions. Given this level of debate and participation, to read more into any provision than is expressly stated is a clear violation of the well-known canon of construction *expressio unius est exclusio alterius*—the expression of one thing ordinarily implies the exclusion of other things. *See In re J.W.* (2002) 29 Cal.4th 200, 209. Here, the specific situations were delineated in order to prevent a haphazard re-evaluation of prior listings with all of the attendant problems that have now in fact resulted from the application of the proposed wholesale approach. In an analogous situation, this maxim is applied where specific exemptions are set forth in a statute. In that situation, the canon forestalls a court from implying additional exemptions. *See Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230. That same maxim would apply similarly here – it forestalls the State Board from implying an authorization for a broader re-evaluation of all prior listings based on its own initiative. The only time that a re-evaluation should be conducted is on a case by case basis pursuant to the three specific situations expressly set forth in the much discussed and debated Listing Policy.

3. The Proposed De-Listing Approach Is Not Adequately Protective of Water Quality

From an overall policy perspective, the proposed retroactive de-listing approach, in addition to being contrary to law, is not adequately protective of water quality for all of the same reasons set forth above. In addition, de-listing based on applying the new Policy retroactively provides a perverse incentive to **avoid** monitoring or collecting further data on currently listed segments where there is limited numerical data. California must provide incentives for additional monitoring, not dissuade it, if we are to fully characterize the condition of our waterways.

4. Conclusion

Given all of the above, the Board should do the following:

(1) state that as a rule previous listings for which TMDLs have already been adopted should not be re-evaluated and overturned during the listing process and that this issue is more properly addressed as part of TMDL implementation;

(2) make clear that the Listing Policy should not be used retroactively to overturn prior listing decisions unless one of the three specified situations exists and there is substantial evidence to demonstrate with a high degree of persuasion that the earlier decision was not

[2] Again, the Listing Policy went through an intensive stakeholder and public process before it was finalized. Thus, a great deal of care was taken in drafting its various provisions. To read more into them than is expressly stated would violate years of donated time by stakeholders and jeopardize the viability of future stakeholder processes.

correct; and

(3) direct State Board staff to forego re-evaluating previous listings in this round and leave that task to the individual regional boards, who are more knowledgeable about their own local water bodies and listing decisions, to implement during the next round of listing in 2008 in accordance with the above clarifications.

B. A Precautionary Approach Should Be Used

As an overarching premise, the Section 303(d) listing process should err on the side of protecting water quality and beneficial uses. The Precautionary Principle was endorsed at the United Nations Conference on Environment and Development in 1992 as an appropriate guideline in environmental decision-making.[3] This Principle encourages environmental managers to err on the side of caution, in order to ensure that neither human nor environmental health is compromised. *Id.* In implementing this approach, uncertainty should not be a valid rationale for inaction. *Id.*

In the 303(d) Program, the implications of a false negative (failing to list an impaired water body) are much worse than a false positive (listing a non-impaired water body), as the latter can be corrected early on in the TMDL development process, as indeed it has in many of the TMDLs completed to date. In contrast, a failure to list an impaired water body has potential impacts on human health and aquatic life. Where uncertainty exists, decisions should be made in favor of protecting water quality, as well as human health and the environment.

The State Board recognized this principle in adopting the Listing Policy in 2004. Significantly, the State Board intended that, as a rule, a strong evidentiary showing is required to remove water body/pollutant combinations from the 303(d) List. This intent was also made clear during the final hearing that the Listing Policy where the Board voiced its intent that an affirmative showing of attainment is required before waters may be de-listed. SWRCB Hearing Transcript. Specifically, Board Member Sutley suggested that it is not enough to simply state that the listing was made by mistake – the boards must affirmatively demonstrate a lack of **current** impairment. *Id.* ("If it's on the list...then you have to have some information that says that they [fish] are not dying now and that the water body is not currently impaired....").[4] Yet, while staff appears to acknowledge this burden in its Staff Report and in its Response to Comments on the FED,[5] it fails to apply it either in letter or in spirit throughout the proposed revisions. Staff

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[3] United Nations, Rio Declaration on Environment and Development, June 14, 1992, 31 ILM 874.

[4] Ms. Sutley further stated that she was "Okay with not adding language [to the Listing Policy] as long as we're all in agreement and that's the direction of the regional boards that you have to look at the current conditions as well [before de-listing]." SWRCB Hearing Transcript. At that point the Board discussed the fact, and staff agreed, that the situation-specific weight of the evidence factor must be considered in all listing and de-listing decisions, and the Board added new language to Sections 3.11 and 4.11 that says "providing any data or information including current conditions supporting the decision." *Id.*

[5] The State Board stated: "Using the balanced error approach, the delisting requirements are not more rigorous by design so the burden of proof is equivalent." Response to Comments, FED at B-158. The State Board did provide a higher burden for de-listing toxic pollutants, however: "The Policy has been modified to require for toxicants that there be more certainty when delisting because of the concerns about the expected impacts of these chemicals. The policy requires more data to remove a water body or pollutant from the list." *Id.*

Report at 12, Response to Comments on FED at B-158. To the contrary, the staff has applied a very lax standard, *i.e.* that a water body is clean until proven dirty, to proposed de-listing decisions (as well as listing decisions) in the Draft Revisions. No evidence that a water body is currently in attainment is provided to back up the majority of the proposed de-listings. The necessary burden is to demonstrate that the water quality standard is being met, not that there is insufficient information to show it is not being met.

For example, without any new evidence demonstrating attainment, the State proposes to de-list several water bodies for pollutants or conditions that are not quantifiable or do not have numeric evaluation guidelines, or where original listings were based upon guidelines that are not approved under the new Listing Policy. Similarly, staff proposes to de-list segments for which there is some uncertainty regarding the original listing or the original data has been lost. This is inappropriate and improper. The Regional Board exercised its Best Professional Judgment in listing these segments originally. Notably, the use of BPJ is permitted under Sections 3.11 and 4.11 of the Listing Policy. There must be some affirmative proof that the water body is not impaired before de-listing on any of these bases.

Further, although there are no numeric standards or guidelines for some pollutants, narrative standards still apply. The State's Porter-Cologne Water Quality Control Act (Porter-Cologne") acknowledges both narrative and numeric water quality objectives. 40 C.F.R. § 131.3(b). Yet, in the majority of cases, staff has failed to present any data or information in the Draft Revisions to demonstrate that narrative standards are met in these water segments. The onus is on the State Board to demonstrate that these water segments are no longer impaired before removing them from the 303(d) List. Only where the State has affirmative and demonstrable knowledge that water quality standards are being attained and maintained should they remove a water segment from the list. The State Board must make this clear in reviewing the Draft Revisions and approving the 2006 List.

C. The List Fails To Meet Regulatory Requirement Of Reviewing All Readily Available Information

1. General Legal Principles

The body of regulations and guidance that bear on 303(d) listing are unambiguous about the information that should be considered in making listing decisions: all of it. TMDL regulations state clearly that "[e]ach State shall assemble and evaluate all existing and readily available water quality-related data and information to develop the [303(d)] list."[6] The regulations go on to mandate that local, state and federal agencies, members of the public, and academic institutions "should be actively solicited for research they may be conducting or reporting."[7] Furthermore, EPA's 2004 Integrated Guidance similarly states that "[a]ll existing and readily available data and information must be considered during the assessment process."

The regulations and guidance are even more explicit about not excluding data on the basis of age and sample size. The Integrated Guidance states clearly that "[d]ata should not be excluded from

[6] 40 C.F.R.§ 130.7(b)(5).
[7] 40 C.F.R.§ 130.7(b)(5)(iii).

consideration solely on the basis of age,"[8] and "does not recommend the use of rigid, across the board, minimum sample size requirements in the assessment process."[9] EPA adds that "the methodology should provide decision rules for concluding nonattainment even in cases where target data quantity expectations are not met, but the available data and information indicate a reasonable likelihood of WQC exceedance."[10] As an illustration, EPA explains that "[w]hen considering small numbers of samples, it is important to consider not only the absolute number of samples, but also the percentage of total samples, with concentrations higher than those specific in the relevant WQC."[11] EPA applied these rules in its review of California's 2002 303(d) list, finding that "it is inconsistent with federal listing requirements for the State to dismiss a water from further consideration in the Section 303(d) listing process simply because a minimum sample size threshold was not met for a particular water body. This is particularly true . . . where the impairments are caused by toxic pollutants."[12]

2. Listing Policy Requirements

Recognizing these principles, the Listing Policy clearly states that "all readily available data and information shall be evaluated." Listing Policy at § 6. It further states that the "RWQCBs and SWRCB shall actively solicit, assemble, and consider all readily available data and information." *Id.* at § 6.1 (emphasis original); *see also* Functional Equivalent Document, Appendix B, Response to Comments at B-142 ("If data and information is available, it is required that it be assessed.)"

Nevertheless, a review of the proposed List shows that the SWRCB has so far failed to implement these bedrock requirements. Board staff has admitted that perhaps as little as 25% of available data has, in fact, been reviewed. Moreover, staff circumscribed the set of data used to formulate the list by restricting it to a public solicitation that ended in June of 2004, eighteen months ago. *See* Staff Report, Volume I, Revision of the Clean Water Act Section 303(d) List of Water Quality Limited Segments (September 2005) at 4. The result of both of these actions is that the List may, or may not, actually set forth the full extent of impaired waters. Moreover, in many instances staff proposes to delist well-studied waters notwithstanding the availability of high quality data that contradicts staff's conclusions. Both of these results are at odds with applicable regulations, guidance, the Listing Policy—and the basic "safety net" policy rationale for Section 303(d).[13]

Finally, while U.S. EPA provided a file format for actual data submissions, no access to the underlying data used in creation of the fact sheets is provided. Parties who submitted data have no method of verifying that the data was considered in creation of the listings. This makes it extremely difficult for the public and US EPA to determine whether California complied with the federal requirement to consider all readily available data.

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[8] 2004 Integrated Guidance at 23-24.
[9] *Id.* at 25.
[10] *Id.* at 26.
[11] *Id.* at 27. EPA refers the reader to Section D.6, page 47 last paragraph through page 50 of CALM for further discussion of this point.
[12] Letter from Alexis Strauss, U.S. EPA Region IX to Celeste Cantu, SWRCB (July 25, 2003).
[13] Houck, Oliver A., *The Clean Water Act TMDL Program* 49 (Envtl. Law Inst. 1999).

D. The List Violates The Law By Failing To List Impaired Waters Where There Is No Standard Or Guideline For The Pollutant At Issue

Staff is proposing numerous de-listings based on the assertion that there is no existing and/or acceptable evaluation guideline under the provisions of the new Listing Policy.[14] This is improper for two reasons. First, this rationale is not included in the list of three situations in which de-listing may be considered. Listing Policy at 11. Second, this line of reasoning is inappropriate in the absence of any evidence indicating that the segment is in attainment with water quality standards. Once the water is listed, the substantial deference standard applies and a high burden of proof is required for de-listing. The assertion of this line of reasoning by the State Board also ignores the regional boards' own best professional judgment and the precautionary principle.

In short, it is evident that these proposed de-listings are based solely on a "guess" that there is no impairment, with no scientific evidence or data indicating that water quality standards, including beneficial uses, are being attained. Staff admittedly made no attempt to obtain additional information or more recent data that would reveal whether or not the water segments are indeed in attainment. Given the nature of some of the chemicals affected – like DDT, a highly toxic, persistent and bioaccumulative compound – this proposed approach is not justified. As stated in the Federal regulations, "[The] State must demonstrate good cause for not including a water or waters on the list. Good cause includes...more recent or accurate data..." 40 C.F.R. §130.7. The burden of proof is squarely on the State to provide such data. It has not met that burden here.

The CWA and its implementing regulations cast a wide net to assure that water quality standards are met. This is apparent throughout Section 303(d) and its regulations, which require TMDLs to be established and also require a margin of safety where uncertainty is present. 33 U.S.C. §1313(d).

Given all the above, the State Board should direct staff to list all impaired waters, regardless of whether there is a specific standard or guideline for the pollutant(s) that may be at issue. This includes retaining all proposed de-listings based on this erroneous procedure.

1. De-Listings Should Not Be Made Based on New Standards for Evaluation Guidelines

Moreover, staff contends that several previous listings based upon Maximum Tissue Residue Levels (MTRLs) and Elevated Data Levels (EDLs) should be removed from the list because the new Listing Policy "does not recognize" these guidelines. This is another good example of how staff's proposed retroactive application of the Listing Policy fails. Once again, this is not one of the three express situations in which previous listings may be re-evaluated under Section 4 of the Listing Policy. Moreover, staff has not provided any affirmative evidence that the water bodies proposed for de-listing are not currently impaired under the situation-specific weight of the

[14] Evaluation guidelines do exist for several of the pollutants said to have no guideline. For example, currently there is a National Academy of Science ("NAS") guideline for aldrin and dieldrin, an OEHHA guideline for chlordane, and an ERM guideline for DDT. It is unclear if these guidelines were used to re-evaluate the data.

evidence standard or otherwise. Finally, the proposed approach again ignores the deference due to prior agency decisions.

Although MTRLs and EDLs are not permissible in data evaluations under Section 6.13 of the new Listing Policy, the Policy must be read as a whole. *See e.g., Food and Drug Admin. v. Brown and Williamson Tobacco Co.* (2000) 529 U.S. 120, 133 ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") It is another well-established canon of construction that courts must interpret a statute "'as a symmetrical and coherent regulatory scheme' [citation] and 'fit, if possible, all parts into an harmonious whole.'" *Id.* The same canon applies here, where the Listing Policy, a regulatory guidance document, is issued with an intent to provide regulatory guidance for consistent implementation of a section of the CWA. Following this principle in this case, it becomes clear that the regional boards are to consider the totality of the evidence using the situation-specific weight of the evidence factor in Section 4.11 before a water body may be de-listed for any reason. The State Board staff did not do this for proposed de-listings based on the previous use of MTRLs and EDLs. Thus, the de-listings proposed on this basis are inappropriate and improper.

Finally, the Precautionary Principle should be heeded where the constituents of concern have no other established guidelines, as is the case here. While previous guidelines may have associated uncertainties, they do indicate **potential** impairments in these water segments. For instance, EDLs are indicative of biological stress and impairment at the very minimum. Similarly, the Los Angeles Regional Board recognizes that "MTRLs have value as alert levels indicating water bodies with potential human health concerns." Los Angeles Regional Water Quality Control Board and U.S. Environmental Protection Agency, *Total Maximum Daily Load for Toxic Pollutants in Marina del Rey Harbor* (2005) at 13. As threatened waters must also be listed under Section 303(d), these waters should remain listed for this reason as well, particularly in the absence of affirmative evidence showing attainment of standards. Listing Policy at 7; 40 C.F.R. § 130.2(j).

In this vein, we also encourage the State Board to actively pursue efforts to develop new or revised guidelines. Once a new guideline is established, the water quality standard may be revised and the listing may be reevaluated properly. However, absent any new guideline or standard, and absent affirmative information to show that the water segment is not, in fact, impaired or threatened, it is inappropriate in the context of Section 303(d) to de-list previously listed segments based on staff's proposed rationale.

E. The List Violates The Law By Failing To List Impaired Waters Where There Is A Narrative Standard Or Guideline For The Pollutant At Issue

Staff is proposing to de-list a number of waters for pollutants covered under various narrative standards in the Basin Plans, on the argument that they are "conditions," not pollutants. *See e.g.,* Draft Revisions at 316. This is inconsistent both with the CWA and Porter-Cologne Act, as well as the express terms of the Listing Policy.

One of the main objectives of the CWA is to restore water quality so that all of the Nation's water bodies are fishable and swimmable. 33 U.S.C. § 101(a). The narrative standards at issue

are necessary to attain this important goal. Moreover, federal regulations explicitly state that narrative water quality standards should be assessed for the purpose of listing waters under Section 303(d). 40 CFR § 130.7(b)(3). The Porter-Cologne Act similarly acknowledges both narrative and numeric water quality standards; the state and regional boards are charged with enforcing both. Accordingly, the Functional Equivalent Document for the Listing Policy ("FED") sets forth guidelines for interpreting narrative water quality standards, and the Listing Policy provides for such listings in Section 3.7. State Water Resources Control Board, *Functional Equivalent Document: Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List* (2004) at 75-78, B-120; Listing Policy at 6. Plainly, nuisance conditions must be considered for listing on the 303(d) List.

Staff's proposed rationale for not listing these waters because they are impaired by "conditions" rather than pollutants is erroneous. Using staff's own terminology, the narrative water quality standards themselves describe a condition, not a pollutant. Presumably, these narrative standards exist because it is difficult to pinpoint one specific pollutant that causes these conditions under all circumstances. For instance, odor could be caused by algae or by petroleum or trash or a combination of factors including water temperature and flow. Regardless of the cause, it is a nuisance, and can impair the beneficial uses of the water body. Accordingly, the State and Regional Boards must and do regularly enforce narrative standards.

Under staff's proposed approach, however, a segment would not be listed, even though specific narrative standards are not attained, whenever a pollutant(s) causing the problem cannot be precisely identified during the listing process. This too is erroneous, as determining the source(s) of the non-attainment is generally done during the TMDL development process, which may include such factors as seasonality and a margin of safety.[15] From a more practical standpoint, if narrative listings cannot be made, there may be no incentive to address the problem and investigate the source. The logical and appropriate way to address this is to list water bodies for the nuisance condition where a narrative nuisance standard is not being attained. This is exactly what Section 3.7 does. Section 3.7 contains no requirement to list for a specific pollutant instead of a nuisance condition. Nor can it under the CWA. To the contrary, the express terms of Section 3.7 allow a segment to be listed for several nuisance conditions, including excessive algae growth, odor, taste or foam. Listing Policy § 3.7; *see also* testimony of State Board Legal Counsel, Sept. 30, 2004 ("When you know the pollutant, list the pollutant, if you don't know it, it doesn't mean don't list it...In fact, EPA has consistently held that its own regs [sic] require listing for unknown toxicity, low dissolved oxygen and other conditions like nuisance conditions. So we have no choice but to list for those conditions."). Thus, staff's proposed rationale that only pollutants may be listed must be rejected and relevant listings reassessed.

Staff also asserts that quantitative data is necessary for a nuisance listing. Again, this is erroneous. Translators for assessing narrative conditions are not limited to numeric objectives and guidelines. As acknowledged in Sections 3.7.1 and 3.7.2 of the Listing Policy, there are scientifically-accepted approaches to evaluating compliance with narrative objectives aside from comparison to numeric guidelines. These include biological assessment approaches and the

[15] In addition, the majority if not all of the TMDLs passed to date in California also include some amount of study and pollutant/source characterization as part of their implementation, with re-openers provided in case new information comes to light.

widely used and accepted reference system-based approach. Listing Policy at 6 ("Waters may **also** be placed on the section 303(d) list when a significant nuisance condition exists as compared to reference conditions...." (emphasis added)); *see also* Response to Comments on Listing Policy at B-27. Further, with regard to nutrient-related conditions, section 3.7.1 expressly allows listing for nuisance conditions if "nutrient concentrations cause or contribute to excessive algal growth." *Id.* ("Waters may **also** be placed on the section 303(d) list ... when nutrient concentrations cause or contribute to excessive algal growth.") This is independent of any need to pinpoint whether the cause is nitrogen (N) or phosphorous (P) or some combination of the two, to list either N or P, or whether there are applicable numeric objectives for N or P. Therefore, consistent with the very language of the Policy, the State Board should clarify that Sections 3.7 and 4.7 should not be interpreted as narrowly as staff has done in the proposed revisions.

Further, where there is no quantitative data, the State and regional boards must evaluate the nuisance condition under Sections 3.11 and 4.11 based on all available information. The State Board acknowledged in its Responses to Comments on the Listing Policy that even if a nuisance does not meet the quantitative requirements for listing, the Policy "was amended to include a situation-specific weight of evidence listing or de-listing process by which Regional Boards can list or de-list any water body-pollutant combination even if it does not meet the listing requirements of the Policy as long as the decision can be reasonably inferred from the data and information." Response to Comments at B.27. This situation-specific weight of the evidence process is provided for in Sections 3.11 and 4.11 of the Listing Policy and must be applied when the other factors fail.

F. The List Violates the Law By Failing To List Impaired Waters Where There Is An Existing TMDL

Staff has used Section 2.2 of the Listing Policy improperly to de-list water quality segments where a TMDL has been adopted but compliance with water quality standards has not yet been established. Not only is this inconsistent with the CWA, which requires listing of all segments where water quality standards are not attained and does not contemplate de-listing waters at the time of TMDLs adoption, it was not the intent of Section 2.2. 33 U.S.C. § 1313(d); Listing Policy at § 2.2. Delisting must only occur when TMDL requirements are met and beneficial uses are attained.

Section 2.2 defines when a water quality segment should be moved from the Water Quality Limited Segments category to the Water Quality Limited Segments Being Addressed ("WQLSBA") category of the 303(d) List. Listing Policy at 3. It says nothing more. The section was developed as an alternative to proposals either to de-list segments with a TMDL in place or to leave those segments on the main list until water quality standards are attained. As the CWA does not authorize the State to remove waters from the 303(d) List until water quality standards are attained,[16] the State chose to create a separate category on the list for these segments to distinguish them from segments still needing a TMDL. Listing Policy at 3. This is

[16] Section 303(d) of the CWA does not contemplate de-listing waters at the time that TMDLs are established. 33 U.S.C. §1313(d). Rather, Section 303(d) focuses solely on requiring TMDLs to result in the attainment and maintenance of beneficial uses. *Id.*

the sole purpose of Section 2.2, as confirmed by its placement in Section 2: *Structure of the CWA Section 303(d) List. Id.*

Staff, however, has taken Section 2.2 out of context and applied it in a way that essentially denigrates the entire purpose of that section. Basically, staff cites Section 2.2 to justify de-listing segments for which a TMDL has been adopted and approved by EPA but compliance with standards not yet attained, whenever a reevaluation of the data used for the original listing was insufficient to meet the new guidelines in the Listing Policy. This is wrong on many levels.

First of all, as discussed above, staff should not be reevaluating listing decisions for segments for which TMDLs have been adopted. Rather, for segments already listed, staff should focus solely on whether a TMDL has been approved by EPA for that segment. If so, the Listing Policy provides that it should be moved to the WQLSBA category. During the development of the Listing Policy, neither the State Board nor the public was contemplating using section 2.2 as a justification for de-listing segments for which a TMDL had been approved. Second, from a practical standpoint, it makes no sense to reanalyze the original information and decide that no listing, and thus no TMDL is required, when the State and EPA have obviously very recently re-analyzed all the information during the rigorous TMDL development process, and made a decision to develop and adopt a TMDL based on the fact that water quality standards were not being met.[17] The entire scenario belies logic.

Adding insult to injury, staff has based several of these erroneous de-listing proposals on the fact that there is *uncertainty* with regard to the original listing. Obviously, the TMDLs that were developed by the Regional Boards and approved by the state and EPA have already addressed any uncertainty in reevaluating the data and including appropriate provisions in the TMDL to address any uncertainty.[18]

Again, the State Board should clearly state that if a TMDL has been adopted, but not yet fully implemented for a water body/pollutant, the original listing should not be reevaluated for de-listing during the 303(d) list update process. Instead, those segments should be moved to the WQLSBA category as directed by the Listing Policy.

G. The List Violates the Law By Failing To List Impaired Waters Where There Is An "Alternative Program" In Place

We oppose the Staff Report's proposal to fail to list waters simply because there is an "alternative program" in place that allegedly addresses the impairment at issue. Most importantly, there is no basis under the Clean Water Act for failing to list any impaired water body, as that term is defined under section 303(d) of the Act, and preparing a TMDL for that water body. Such actions also contravene the provisions of the Listing Guidance.

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[17] It has been the state's practice to effectively de-list a pollutant by not establishing a TMDL if it discovers during the TMDL development process that the water body is no longer impaired for that pollutant. This certainly implies that the State believed that the water bodies were impaired for those pollutants for which a TMDL was established during this process.

[18] In addition, basing a de-listing on a re-evaluation of the original data where a TMDL already exists for that segment will potentially weaken existing TMDLs by opening them up for argument that they should be reopened because the State has determined the segment is no longer impaired under the new Listing Policy.

First, the action is inconsistent with the plain text of section 303(d) of the Clean Water Act. Section 303(d) expressly requires each State to identify waters within its boundaries for which "the effluent limitations required by section 301(b)(1)(A) and section 301(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). Thus, waters are to be listed, and TMDLs developed, whenever the effluent limits described in section 301(b)(1)(A) and (B) are insufficient to attain and maintain water quality standards. Importantly, sections 301(b)(1)(A) and (B) of the Act expressly relate only to effluent limits for point sources designed to meet the standards of best practicable control technology (technology-based standards) and specific POTW secondary treatment and pretreatment requirements. In general, when a statutory provision specifically includes certain items, it implies the exclusion of others. *See e.g., In re Cybernetic Svcs., Inc.*, 252 F.3d 1039 (9th Cir. 2001), *cert. denied*, 122 S.Ct. 1069 (2001). As such, only when certain baseline effluent limits, as discussed above, are stringent enough to implement all water quality standards in a particular waterway may the State Board fail to list that water.

In contravention of the clear dictates of the Act, staff have proposed to exclude impaired waters from the Section 303(d) list for a variety of improper reasons. For example, sediment concentrations for cadmium, copper, silver, and zinc in Peyton Slough in Region 2 were found to exceed evaluation guidelines; sediment toxicity was very high; and the benthic communities were only marginally viable. Despite these findings, and Regional Board staff's recommendation that Peyton Slough be listed, the State Board's decision was not to list. The listed reason is that "Peyton Slough [and Stege Marsh] is identified as a toxic hot spot [under the SWRCB Toxic Hotspots Plan and]...this plan is being addressed through a Cleanup and Abatement Order." This decision not to list was erroneous given that application of listing factor 3.1 requires inclusion on the 303(d) list, and the existence of "another applicable program" is not sufficient justification to remove it. This point was debated extensively during the stakeholder processes and the Listing Guidance specifically did not include this rationale; to unilaterally attempt to change the result of the public process deep in the appendices makes a mockery of that process.

None of these "justifications" for failing to list impaired waters can be squared with the statute. For this reason, the Board is not free—whatever its perspectives on how Section 303(d) should operate—to use an "alternative program" rationale to exempt impaired waters from their required listing.

Moreover, the language of Section 303(d), when read in the overall context of the Clean Water Act as well as Section 301, clearly indicates that Congress intended the TMDL program to coexist with other enforcement and clean up programs under the Act. There is no indication that Congress intended the operation of the Clean Water Act as a whole to disable any specific element of the Act. Yet, this would be the effect of the "alternative program" rationale. Such an impact cannot be countenanced.[19]

[19] *See Owasso Indep. Sch. Distr. No. I-011 v. Falvo*, 534 U.S. 426 (2002) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

In addition, the legitimacy of the "alternative program" rationale is severely undercut by the timing of the proposed action. The requirements of Section 301 are over 25 years old, while many of the programs, permits, or enforcement options that would serve as bases to exclude waters from the Section 303(d) list are also years if not decades old. California's patent inability to resolve water quality problems over the years through the use of the very same options it now touts as definitive solutions underscores that these programs are not, in fact, necessarily "solutions" to the identified impairments. If they were, the waters at issue would be in attainment by now. Aside from the other legal problems discussed above, it is simply too late at this juncture to use the specter of Section 301(b)(1)(A) and (B) effluent limits enforcement, municipal storm water permits, or any other program, such as BPTCP, as a basis to end-run Section 303(d). This conclusion is also supported by the fact that impaired waters were required to be listed and TMDLs developed and implemented pursuant to Section 303(d) over 20 years ago.[20] California's own delay in establishing TMDLs cannot now open the door to the use of later-developed alternatives to further limit the operation of the already delayed TMDL program. Because the proposed "alternative program: rationale ignores the Board's own experience with the "alternatives" to 303(d) listing and the temporal intent of Section 303(d), it is unlawful and unwise.

Lastly, in addition to all of the above, we are concerned that the proposed "alternative program" rationale will create a circular feedback loop whereby numerous impaired waters will never be properly listed and subject to a TMDL that will ensure the water body will be restored. For instance, under the proposed program, the State Board may fail to list a water body due to the existence of an "alternative program" during any given listing cycle, with very little justification or assurance that water quality standards will be met. Then, at the next listing cycle, even if the water body is still impaired, the Board may again elect to do the same thing based on the same alternative program. This may continue indefinitely under the program as proposed by the staff report. The result of such an indefinite feedback loop will be that numerous waters that are impaired will remain impaired. This is completely at odds with the intent of Section 303(d).

Accordingly, we urge the Board to reject the "alternative program" rationale, and place the impaired waters at issue on the 2006 303(d) List.

H. The List Violates The Listing Guidance By Refusing To Allow Appropriate And Required Regional Water Board Involvement

After more than two years of stakeholder negotiation, the Listing Policy calibrated a relationship between the SWRCB and RWQCBs designed to enable these agencies collectively to manage the workload involved in preparing the Section 303(d) list for a state as large as California. Just as important, the Listing Policy took into account the need to provide adequate public participation opportunities.

The Policy resolved these issues by providing for the RWQCBs to play a central role in the Section 303(d) process by (1) preparing the lists in the first instance, including the implementation of the Situation-Specific Weight of Evidence Listing Factor (Listing Policy at § 3.11); (2) holding public hearings; and (3) submitting proposed regional lists to the SWRCB for

[20] *See e.g., Scott v. Hammond,* 741 F.2d 992 (1984).

final review and approval. Functional Equivalent Document, Appendix B, Response to Comments at B-167. One of the chief functions of the RWQCBs is to allow for detailed factual review of local water quality conditions; by contrast, the SWRCB role is as a final "check" on the entire process as well as to consider matters of statewide interest or significance. *Id.* ("the SWRCB approval process is the last stage of review.") This central role of the RWQCB is conveyed not only by these provisions but also by the more than one hundred references to the RWQCBs in the FED and in the Listing Policy itself.

Nevertheless, in its first implementation of the Listing Policy, the SWRCB has turned these procedures on their head by eliminating RWQCB formulation and public consideration of lists, as well as the other basic structural steps carefully set forth in the Listing Policy. It is not difficult to connect this failure to follow the Listing Policy to the SWRCB's related failure to consider all readily available information, given the scope of this task in a state as large as California. Moreover, the related failure to implement a weight of the evidence analysis, as required whenever evidence suggests non-attainment of standards, appears connected to the attenuated role played by the RWQCBs in making listing decisions in the first instance.

In particular, Section 6.3 of the Listing Guidance states that "[d]uring the development of the **2004** section 303(d) list, SWRCB shall perform all tasks required by this Policy. Subsequent to the 2004 listing cycle, SWRCB shall evaluate RWQCB-developed water body fact sheets... and consolidate all the RWQCB lists into the statewide section 303(d) list." Listing Policy at 26 (emphasis added). In other words, the SWRCB completes the 2004 List, and the Regions take the lead after that. This reading of the express language of the Listing Guidance is supported by Section 6.2 (same page), which describes the public hearing process that the regional boards need to go through after 2004 to discuss and pass their lists. This was clearly not done, even though this process is required in 2005 (when the List was prepared and released for public comment) and 2006 (when it likely will be adopted). Indeed, preparation of the List followed US EPA's Integrated Guidance for the 2006 list of impaired waters,[21] which was released in draft in February 2005 and finalized July 2005. In light of these facts, it is clear that any reliance staff may have placed on the public review process for listing in 2004 was misplaced.

The implications of this violation of the public process became evident in the December hearing on the List, when members of the public traveling from Region 1 to Sacramento testified that many more public members had wanted to comment, but could not travel that distance. They added that they should have been able to raise their concerns at the regional level, when the process would have been far more open. Their concerns were reflected throughout the state. The public should have had this opportunity to comment to decisionmakers on their local waters, as dictated by the Listing Guidance.

I. The List Violates The Listing Guidance And The Law By Delisting Waters Where The File Cannot Be Located

A particularly troublesome example of where staff made express unilateral decisions that go beyond the Listing Policy is the "lost file" rationale for delisting. For instance, Tecolotito and

[21] US EPA, "Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act," (July 29, 2005).

Carneros Creeks in Goleta Slough, which are currently listed for coliform and TSS, are proposed for delisting because of "lost data." This type of action violates both the law and the Listing Guidance.

On pages 11-12 of the Staff Report, staff provides a list of assumptions, *in addition* to those contained in the Listing Policy, which it used to evaluate potential de-listings. Draft Revisions, Vol. I at 11-12. These additional assumptions include de-listing previously listed segments if "data or information justifying the original listing was anecdotal" or "data or information to support the original listing simply does not exist." Staff's support for this includes the following: "This approach was used to *avoid requiring a large burden of proof to delist* a water body pollutant combination if the original listing was found to be baseless in terms of Listing Policy procedures." *Id.* (emphasis added). Significantly, this approach also illegally avoids the Listing Policy's requirement to show that the segment would not have been listed absent the faulty or non-existent original data.

The application of these additional assumptions is plainly in direct contradiction to the Listing Policy. It is particularly problematic because this very issue was extensively discussed and debated in stakeholder meetings and public hearings, and the Listing Guidance was subsequently adopted without these assumptions. These additional assumptions therefore go well beyond the intent of the Listing Policy, which requires a high burden of proof for de-listing. As staff acknowledges, these factors in fact **negate** that required burden. Given that the regional boards must have had a justification for listing the majority of these water bodies in the first place, substantial deference must be given to the original listing. A high degree of persuasion is necessary to overturn this presumption of correctness.

The State Board should remove these additional assumptions from the process. They constitute revisions to the Listing Policy and thus must be undertaken as part of a separate process to revise the Policy. The State Board also should clarify that in the absence of any new data showing attainment of water quality standards, these listings should remain on the 2006 List. They may be reviewed again by the regional boards in the next round of listing using Section 4.11, the site-specific weight-of-the-evidence approach.

J. The List Violates The Listing Guidance And The Law By Failing To Use The "Weight Of Evidence Approach"

The Situation-Specific Weight-of-the-Evidence Approach set forth in Sections 3.11 and 4.11 of the Listing Policy was included to cure well-understood legal and technical inadequacies in a the SWRCB's draft binomial-only listing policy. *See* Environmental Caucus of the AB 982 Public Advisory Group Comments on SWRCB, "Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List" (2/18/04). Board members required that a weight of evidence approach complement the specified listing and delisting factors, acting as a "safety net" to ensure that all impaired water bodies are included on the 303(d) List. Both of these sections require an evaluation of all available evidence under the situation-specific weight of the evidence process whenever there is any information that indicates non-attainment of standards. Together, these sections provide flexibility to allow the State to use its best professional judgment in listing and de-listing decisions so that it can meet Section 303(d)

standards and submit impaired waters lists that EPA can approve. For instance, Section 3.11 states

> When all other Listing Factors do not result in the listing of a water segment but information indicates non-attainment of standards, a water segment shall be evaluated to determine whether the weight of evidence demonstrates that a water quality standard is not attained. If the weight of evidence indicates non-attainment, the water segment shall be placed on the section 303(d) List.

Section 4.11 is, and was intended, to be a direct counterpart to Section 3.11. Thus, the Board inserted the exact same language in section 4.11 by simply substituting the terms de-listing and attainment for the terms listing and non-attainment.

> When all other Delisting Factors do not result in the delisting of a water segment but information indicates attainment of standards, a water segment shall be evaluated to determine whether the weight of evidence demonstrates that a water quality standard is attained. If the weight of evidence indicates attainment, the water segment shall be removed from the section 303(d) List. <u>If warranted, a listing may be maintained if the weight of evidence indicates a water quality standard is not attained</u>.

Listing Policy at 8. Unfortunately, SWRCB staff apparently is misinterpreting this language when it appears in Section 4 of the Policy to mean that the weight of evidence approach does not have to be employed as a "check" when delisting appears appropriate under the specified delisting factors but would not be appropriate when all evidence is considered.

Staff's interpretation is flawed. First, if the Listing Policy is faithfully implemented, staff's interpretation amounts to a distinction without a difference. Proceeding in a step-wise fashion through the biannual Section 303(d) process requires consideration of all readily available information as a fundament of the process. Even if staff believe (erroneously, as discussed immediately below) that delisting is appropriate without employing a weight of the evidence analysis under Section 4, the evidence available must in any case be considered under Section 3—it cannot be ignored without violating basic Section 303(d) principles. So, whether Staff employs the weight of the evidence approach under Section 4, or under Section 3, this analysis must be undertaken before a Section 303(d) list of impaired waters can be completed.[22]

Second, staff's interpretation of Section 4 is wrong, in any case. This interpretation would set a far less stringent standard for del-listing than to list water bodies. This plainly was not the intent of the Board nor is it the standard set forth in the Listing Policy. *See e.g.,* Sept. 30, 2004 Hearing Transcript; SWRCB, Functional Equivalent Document, Appendix B, Response to Comments at B-158-159 (responding to the comment that "the burden of proof [for listing and delisting] is equivalent" by noting "this is true."). Second, if staff believes the language chosen in Section 4

[22] .It would be far simpler for Staff to employ the weight of evidence approach before delisting under Section 4, but they could reach a provisional decision to delist under Section 4 and then analyze the same water body and the same information under Section 3 before completing the process. This would appear to be less efficient.

of the Listing Policy fails to clearly reflect the underlying principle of the Listing Policy, staff need only read Section 4 along with Section 3 and in light of the well-documented intent of the State Water Board in approving the Listing Policy. *See e.g., Food and Drug Admin. v. Brown and Williamson Tobacco Co.* (2000) 529 U.S. 120, 133 ("the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") Notably, the SWRCB relies on the fact that the Policy employs adequate measures to assure that impaired waters are identified and placed on the Section 303(d) list in the first instance—and not improperly removed thereafter—as a basis of its approval and its related certification that "this policy will not have a significant adverse impact on the environment." Were staff to persist in contending that delisting is proper when evidence indicates impairment but specified listing factors are not triggered, these critical findings would have no basis and would be subject to challenge.

The need for this flexibility and judgment is highlighted by the fact that some well-known and obviously polluted water bodies may not meet the specific requirements of the Listing Policy's other de-listing or listing factors. Similarly, the binomial table approach doesn't work in the absence of any quantitative data, yet there may be other information indicating impairment. Instead of acknowledging this flexibility, staff has improperly taken a very narrow and conservative interpretation of these sections to avoid utilizing them, even in situations where it is clearly warranted. De-listings made in this manner would be clearly arbitrary and capricious in view of the totality of the information. State and regional board staff thus need clear direction from the State Board that they are **required** to apply Sections 3.11 and 4.11 whenever there is any information indicating impairment regardless of the other factors, consistent with both the language of the Listing Policy and the intent of the State Board in including these sections.

The State Board should therefore direct its staff and the regional boards on the appropriate application of section 4.11 of the Listing Policy to situations where evidence exists to support retaining a listing even if the precise requirements of Sections 4.1 to 4.10 are not met or all of the required data sets do not exist. This is the only interpretation consistent with the Listing Policy as a whole and the recognized equal burden of proof applicable to both listing and de-listing decisions.

1. <u>Sediment Chemistry Data Should be Evaluated under Situation-Specific Weight of Evidence</u>

Staff recommends *not* listing numerous water segment- pollutant combinations despite the fact that a "sufficient number of samples exceeded the sediment quality guidelines." For instance, although six of twenty-four sediment samples in Los Angeles Harbor-Cabrillo Marina exceed the copper sediment quality guideline ("SQG"), which satisfies the required frequency for listing under the binomial distribution table, staff asserts that no listing should occur because there was no observed toxicity. Draft Revisions at 371. Section 3.6 of the Listing Policy is cited as the basis for this decision. This line of reasoning is inappropriate.

Section 3.6 of the Listing Policy provides listing factors for water and sediment toxicity, but **not** for pollutants in sediment. In fact, there are no specific listing factors provided in Section 3 of the Listing Policy for pollutants in sediment. Listing Policy at 5-6. An exceedance of a SQG, in

and of itself, is an indicator that water quality standards are not being attained. For example, ERMs are set at a chemical concentration above which adverse biological effects are frequently observed. Long, E.R., MacDonald, D.D., Smith, S.L., and F.D. Calder. (1995). Incidence of Adverse Biological Effects Within Ranges of Chemical Concentrations in Marine and Estuarine Sediments, *Environmental Management* at 19(1): 81-97. Thus, it is unfounded to require sediment *and* observed toxicity data before listing is considered.

Sediment quality data are sufficient for listing decisions on their own merit. As there is no specific section addressing this, pollutants in sediment must be evaluated using a situation-specific weight of evidence under Section 3.11 of the Listing Policy. The magnitude of the SQG exceedance may also be considered in conducting this situation-specific weight of evidence analysis. The State Board therefore should require its staff and the regional boards to evaluate available sediment quality data using the Section 3.11 situation-specific weight of evidence approach, regardless of the availability of overall sediment toxicity data.

K. The List Violates The Law By Inappropriately Downsizing The Size Of The Water Body That Is Listed

EPA's 2006 Integrated Guidance discusses the methodology for segmenting waters in the state's Integrated 303(d)/305(b) report.[23] The Guidance describes as "fundamental" the use of a "consistent and rational segmentation and geo-referencing approach for all segments including rivers, streams, lakes, wetlands, estuaries, and coastal waters." It continues that "it is important that the selected segmentation approach be consistent with the state's water quality standards and be capable of providing a spatial scale that is adequate to characterize the WQS attainment status of the segment." Segments "should be larger than a sampling station but small enough to represent a relatively homogenous parcel of water (with regard to hydrology, land use influences, point and nonpoint source loadings, etc.)."[24]

EPA mandates that states "document the process used for defining water segments in their methodologies."[25] The Listing Guidance fails to do this because California has not identified a uniform definition of "segments" (formerly called "assessment units"). In particular, the data management system (GEOWBS) that was previously used by the state to explicitly identify water bodies and their segments was discontinued under the assertion that CIWQS would provide such features. However, the prototype CIWQS system is inadequate to implement this task.

As a result of these inadequacies, impaired waters such as "Pacific Ocean at Arroyo Burro Beach," "Pacific Ocean at Carpinteria State Beach" and "Pacific Ocean at Jalama Beach" in Region 3 have been downsized, with no supporting documentation, from a size of up to 3.3 miles down to a mere 0.06 miles. Staff Report, Volume II at 202-05. Examples exist in other regions as well. We urge the State Water Board to retain these waters as listed until full documentation,

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[23] US EPA, "Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act," p. 46 (July 29, 2005).
[24] *Id.* at 47.
[25] *Id.*

in accordance with federal law and the state Listing Guidance, is provided to fully support any such delistings.

* * *

As described in the Attachment to this letter, Section 303(d) of the Clean Water Act was established and intended by Congress to be the "safety net" that is used when other elements of the Act fail to protect water quality. If the state fails to implement this backstop program fully, it is assured that existing impaired and threatened waters will only continue to degrade. This slide will increasingly impact the health and livelihood of Californians, all of whom depend on clean water. The state can invest now or later in the continued health of its waters; what is certain is that investment now will surely be more cost-effective than later. We urge the State Board to consider and implement these recommended improvements to the 2006 Impaired Waters List, to ensure that Californians will enjoy clean water now and in the future.

Thank you for your attention to these comments. If you have any questions, please do not hesitate to call.

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APPENDIX I:
LEGAL BACKGROUND ON SECTION 303(D) OF THE CLEAN WATER ACT

The TMDL Program Is the Clean Water Act's "Safety Net"

Stripped of technicalities, Section 303(d) represents the Clean Water Act's "safety net."[26] It is the bedrock component of the Clean Water Act, the requirement that all waters be restored so that they are safe for fishing and swimming, and meet all other water quality standards.[27] As U.S. EPA Assistant Administrator for Water Robert Perciasepe noted:

> Almost twenty-five years after the passage of the [Clean Water Act], the national water program is at a defining moment . . . . The [Total Maximum Daily Load (TMDL)] program is crucial to success because it brings rigor, accountability, and statutory authority to the process.[28]

TMDLs are "the maximum amount of pollutants a water body can receive daily without violating the state's water quality standard."[29] Specifically, Section 303(d) requires the states to identify, and U.S. EPA independently to review and assess, those waters within their boundaries for which existing technology-based pollution controls are not stringent enough to ensure that the water quality standards ("WQSs") applicable to such waters are achieved and maintained.[30] Because Congress made clear that TMDLs must be calculated not only for waters that do not meet water quality standard, but also those that are not expected to meet those standards, it is clear that "threatened" waters must also be listed.[31]

The resulting list is called the "303(d) list." For each water body and type of pollution listed on a 303(d) list, the state must calculate the total maximum daily load (or "TMDL") necessary to implement the applicable WQS.[32] In simple terms, then, each TMDL defines the maximum amount of a type of pollution (*e.g.*, oil or grease) that an individual water body can assimilate in a day without violating its WQSs (*i.e.*, without becoming "dirty"). Once a TMDL is calculated for a water body and pollutant, any allowable pollution is allocated among the various dischargers of that pollutant to the water body for which the TMDL has been established.[33]

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[26] Houck, Oliver A., *The Clean Water Act TMDL Program* 49 (Envtl. Law Inst. 1999).

[27] *See* 33 U.S.C. § 1313(d){ TA \l "33 U.S.C. Section 1313(d)" \s "33 U.S.C. Section 1313(d)" \c 2 }.

[28] New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs), Memorandum from Robert Perciasepe, Assistant Administrator for Water, U.S. EPA, to Regional Administrators and Regional Water Division Administrators, U.S. EPA (August 8, 1997).

[29] *Alaska Center for Environment v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994).

[30] 33 U.S.C. § 1313(d{ TA \s "33 U.S.C. § 1313(d" })(1) and (2); *see also* 40 C.F.R. § 130.7(b)(1).

[31] *Id.*

[32] 33 U.S.C. § 1313(d{ TA \s "33 U.S.C. § 1313(d" })(1)(C).

[33] 40 C.F.R. §§ 130.2(g)-(i){ TA \l "40 C.F.R. § 130.2(g)-(i)" \s "40 C.F.R. § 130.2(g)-(i)" \c 6 }. The TMDLs must be set "at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality." 33 U.S.C.A. §1313(d)(1)(c).

The Consequences for Listing Unimpaired Waters Are Insignificant

Legal developments in California in recent years have essentially eliminated any negative consequence of a mistaken listing (*i.e.*, including a "clean" water on the 303(d) list). Prior to 2001, dischargers mentioned two concerns prominently: the presumption that listing equates to a permit finding of no assimilative capacity and the inclusion of alternative final effluent limits in permits based on the mere fact of a listing. However, the Board's order in Order WQ 2001 – 06 ("Tosco") addressed those implications.[34] As a result, given the undisputed fact that Section 303(d) functions as the last effective regulatory approach to remedying threatened or impaired waters, it is clear that the implications of not listing an actually impaired waterway are far more severe than those attendant to any improper listing of a non-impaired waterway.

The Listing Regulation Must Be Consistent with the Mandate of Section 303(d) and the Policy Choices Embodied Therein

Any regulation or policy for identifying impaired waters must be consistent with the mandate of its enabling statute, in this case, Section 303(d) of the Clean Water Act.[35] Importantly, "in reviewing an agency's statutory construction, [courts] must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement." *Brower v. Evans*, 257 F.3d 1058, 1065; *Bureau of Alcohol, Tobacco and Firearms* 464 U.S. at 97 (stating that courts must not "rubber-stamp . . . administrative decisions they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute.")

Section 303(d) represents the Clean Water Act's "safety net."[36] It is the bedrock component of the Clean Water Act, enacted 30 years ago, that all waters be restored so that they are safe for swimming, and meet all other water quality standards.[37] In this first application of California's Listing Guidance, it is critical to ensure that the state complies with the law and ensures that these standards will be met in impaired waters.

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[34] In Tosco, the Board stated that it "agrees with Tosco, WSPA, and other petitioners, that a 303(d)-listing alone is not a sufficient basis on which to conclude that a water necessarily lacks assimilative capacity for an impairing pollutant. The listing itself is only suggestive; it is not determinative." (Tosco at 20.) The Board further stated that it "concludes that the alternative final limits findings [in a permit based on the fact of a water's inclusion on the 303(d) list] are inappropriate for several reasons." (Id. at 22.)

[35] *See Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983).

[36] Houck, *supra* n. 1.

[37] *See* 33 U.S.C. §1313(d).