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CRAIG A. SHERMAN
ATTORNEY AT LAW

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10/25/06 BdMtg Item 10
303(d) List
Deadline: 10/20/06 5pm

1901 FIRST AVENUE, SUITE 335
SAN DIEGO, CA 92101-2380

TELEPHONE
(619) 702-7892

FACSIMILE
(619) 702-9291

October 20, 2006

Via Facsimile (916) 341-5620
Followed By Email
commentletters@waterboards.ca.gov

Board Members and Executive Director
c/o Ms. Song Her, Clerk of the Board
STATE WATER RESOURCES CONTROL BOARD
1001 I Street
Sacramento, CA 95814



Re: Comment Letter – 2006 Federal CWA 303(d) List
Proposed Delisting of Palo Verde Outfall Drain

Dear Madams and Sirs:

This office represents CITIZENS LEGAL ENFORCEMENT AND RESTORATION (“CLEAR”) through its CLEAR Water Project. CLEAR is an unincorporated non-profit organization formed and registered in the State of California and Imperial County for the purpose of preservation and restoration of the natural waterways of the Palo Verde Lagoon, the Colorado River and its tributaries. The members and participants of CLEAR include a broad-based and community-wide association of non-partisan individuals, businesses and organizations concerned with bodies of water near and adjacent to the Lower Colorado River both north and south of the town of Palo Verde, California.

The Subject Water Body

What the SWRCB and RWQCB7 refer to as the “Palo Verde Outfall Drain” is really the **Palo Verde Lagoon** - a historic water body and “waters of the United States” commencing from the town of Ripley, California extending southwest through the town of Palo Verde, California, eventually connecting to the historic Colorado River channel on the state boundary line of California and Arizona. For reference purposes herein, Palo Verde Lagoon is synonymous with the Palo Verde Outfall Drain.

As your offices are well aware, many primary portions of the Palo Verde Lagoon have become compromised, demised or unusable for known, documented, and uninterrupted historic uses including navigation, recreation, access and fishing. In fact, water quality conditions have become so bad that Imperial County health officials have posted warning signs for humans to avoid contact in the Bypassed Lagoon portion in and around the town of Palo Verde.

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Proposed Action for Delisting

On or about 1998 the subject natural channel of the Palo Verde Lagoon, including the Bypassed Lagoon and bypass segment or outfall drain going around the Lagoon and the town of Palo Verde, was included on the Impaired Water Body List because of bacteria-laden water that precluded beneficial uses identified in the applicable Colorado River Basin Plan (Table 2-2).

The RWQCB and SWRCB now propose to remove the Palo Verde Lagoon from the Impaired Water Body List. Meanwhile, the subject water body has and will remain unusable for most every designated beneficial use and Imperial County health department "avoid contact" signs remain posted warning CLEAR and other members of the public.

Legal and Factual Reasons Delisting is Improper, Unsubstantiated, and in Violation of the federal CWA

By proposing to delist, the SWRCB is indicating a clear intent to not protect the designated beneficial uses based on an unreasonably narrow and misleading calculation method, including (1) using sample sites outside and upstream of the Palo Verde Lagoon in PVID outfall drains, (2) considering only *E. coli* presence rather than *total coliform* and other bacteria indicators such as *Enterococci* (the geometric mean of the Enterococci concentrations for the water body is on the order of 3000, or about 10 times the water quality criteria), (3) looking at a limited number and narrowed scope of 41 samples taken only by RWQCB and ignoring other independent and SWRCB or RWQCB funded studies showing water quality objectives are not being met on multiple other grounds, (4) use of a geometric mean rather than 30-day average thereby allowing daily levels hundreds or thousands of times above 30-day standard without violating the 30-day geometric mean, (5) arbitrarily now trying to consider only human-related bacteria contributions as opposed to other sources which cause violation of water standards.

By its proposal for delisting, the SWRCB is falsely masking high levels of related bacteria which cause the subject water body to not meet water quality objectives and render it unusable.

It is questioned, as asserted by the SWRCB and RWQCB, that they have considered "all readily available data and information." This office conducted a recent Public Records Act review of documents present in the RWQCB's own files and found references to the following which do not support a delisting:

"Based on 71 lab samples taken between June 3, 2002 and April 2003, there is no margin of safety since the Enterococci limit was exceeded 98.6% of the time."

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By this statement, it is clear the SWRCB's effort and intent to narrowly confine its inquiry to E coli to support its delisting is arbitrary, capricious, not based on best available science, and is not supported by the substantial evidence.

"The data clearly illustrates excess bacteria exists in PVOD. The question at hand is: what is the source, the load, and means of delivery. The cause for high concentrations of bacteria in PVOD is uncertain at this time."

This is the standard used for 303(d) listing. Things have not changed. The narrowly confined quantitative approach to look at the situation based on the new particularized and questionable statistical analysis of E.Coli, is arbitrary, capricious, a failure to proceed in the manner required by law, and violates the intent and purpose of the CWA with respect to 303(d) listings.¹

"Because water quality violations were first reported there, sampling was initially conducted (2000-2001) at various sites in the Palo Verde Lagoon. Next, samples were obtained at mouths of drains tributary to the Outfall Drain. As it was determined that concentrations were in violation of water quality objectives at tributary mouths, the next sampling trip gathered data from the same tributary but upstream from the mouth in August, November, and December 2002. These upstream locations span a distance of approximately two miles. The canal below the Palo Verde Irrigation District Diversion Dam was also sampled in November and December 2002."

"In August 2002, Sampling Site #2 had a fecal coliform count of 230 MPN/100 ml and Sampling Site #3 had a fecal coliform count of 5000 MPN/100 ml. Nearly all samples exceeded the Regional Board's 200 MPN/100 ml Water Quality Objective for fecal coliform in November and December 2002. The exceedances ranged from 300 MPN/100 ml at the mouth of Central Drain to 2,400 MPN/100 ml downstream of the Diversion Dam (Sampling Site #1)."

It is apparent that 1000's of samples showing (more reliably) high levels of E.Coli and/or total fecal coliform that were taken and logged in conjunction with the Ribotype study (Kitts, et al).

The use of 41 samples between August 2000 and October 2000 selection is too selective, too limited and is an arbitrary selection of a single data set to use to delist. There have

¹ See, the proposed *Ballona Creek, Ballona Estuary and Sepulveda Channel - TMDL for Bacteria* and the supporting documents therefore in the (1) Proposed Amendment (2) State Water Board Draft Agenda Item and Resolution, and (3) Los Angeles RWQCB Resolution 2006-011(adopted 6/8/06) showing the arbitrariness of the application being applied for Palo Verde Lagoon and the appropriateness of numerical limits used to support the original Palo Verde listing are still being used. All documents from those related files are incorporated herein by such reference.

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been many additional samples and test analyses performed by the RWQCB in the subject area of the Palo Verde Lagoon, e.g., during November and December 2002. See also, RWQCB7 File Nos. 7-8 (April 8, 2003) and 7-81 (June 3, 2002). What does the new analytical test-analysis-"null hypothesis"-approach for delisting say from these other data sets?

"Future monitoring should focus on E.coli as the best indicator of human-related contamination in the area."

"Bacteria concentrations in the outfall drain pose a public health threat. Currently, bacteria concentrations are at levels known to have a significant adverse impact on aquatic ecosystems, and are in violation of the water quality objectives listed above. The bacteria levels in the Palo Verde Outfall drain violate these objectives."

The intent of the delisting to shift focus to only E.coli and human contributors has been artificially and arbitrarily created to support an unlawful delisting.

Overall, the intent and conduct of the SWRCB to support delisting - by ignoring total fecal coliform, enterococci and other pathogens that are an absolute cause of the Palo Verde Lagoon being rendered and posted as *non swimmable, no contact health risk* - is in contravention of the CWA.

The SWRCB's rationale and frustration of not being able to find, control or address the non-human nonpoint bacteria sources - causing years of continuous total coliform exceedences of water quality objectives (and nonattainment of designated beneficial uses) - supports a continued listing, not delisting. The sudden shift and focus to only E.coli to form a basis for delisting is not supported by the evidence and is contrary to the CWA.

It is also contended that there is no authority under the Clean Water Act for any such delisting, yet alone as proposed. Assuming the standards and policies established by the SWRCB and USEPA for delisting are even somehow legally valid, they are not met in this case.

Concluding Remarks

My client thanks you in advance for considering the above comments that the proposed de-listing proposed for the Palo Verde Lagoon is not warranted, appropriate or supported by law or fact.

Sincerely,



Craig A. Sherman