CASQA
California Stormwater Quality Association®
Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

May 28, 2010

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: Comment Letter – 2010 Integrated Report / Section 303(d) List

The California Stormwater Quality Association (CASQA[1]) appreciates the opportunity to comment on the proposed 2010 Integrated Report, including the Section 303(d) List of impaired waters. Our members will be directly and immediately impacted by the additions to the list. CASQA will not be commenting on particular listings at this time, but on the broader listing policy.

The 303(d) List has a significant impact on municipal stormwater programs. Increasingly, the need to implement enhanced best management practices (BMPs) and install stormwater treatment facilities is being driven by total maximum daily loads (TMDLs), rather than by the mandate to remove pollutants to the maximum extent practicable (MEP). The 1,269 (net) new additions to the list represent an increase of 57% over the 2006 list and will increase these impacts on municipal programs.

CASQA congratulates State Water Board staff for their continued efforts to improve the 303(d) List. While we do not agree with all aspects of the Water Control Policy for Developing California's Clean Water Act Section 303(d) List (Listing/Delisting Policy), we are pleased that Water Board staff members attempted to faithfully implement the Policy as they prepared the proposed 2010 Integrated Report/Section 303(d) List. Consistent statewide development is a critical element for improving water quality in California.

The List Should Focus on Specific Pollutants

While CASQA is generally pleased with the continued improvements being made to the 303(d) list by the State Water Board, we think that both the list and Listing/Delisting Policy can be further improved. The usefulness of the list would be improved if it focused more specifically on pollutants. 40 CFR 130.7(b)(iii)(4) specifies that the 303(d) List "shall identify the pollutants causing or expected to cause violations of the applicable water quality standards." This requirement

[1] CASQA is comprised of stormwater quality management organizations and individuals, including cities, counties, special districts, industries, and consulting firms throughout California. Our membership provides stormwater quality management services to more than 26 million people in California. CASQA was originally formed in 1989 as the Stormwater Quality Task Force to recommend approaches for stormwater quality management to the California State Water Resources Control Board.

recognizes that the 303(d) List is intended to drive development of valid TMDLs and that preparation of TMDLs is dependent on knowledge of the pollutants causing impairments.

CASQA recommends that proposed listings should *not* be included in Category 5 of the 303(d) list for conditions where pollutants are not established. sRather, they should be included in a new category 4C of impairments for which the pollutants causing or expected to cause violations of the applicable water quality standards have not been identified.

Legacy Pollutants Should Be Addressed Separately – Not As Requiring a TMDL

CASQA is concerned that the proposed 303(d) List has many legacy pollutant listings in Category 5. Legacy pollutant impairments should not be included in the 303(d) List as requiring a TMDL because the framework for issuing a TMDL through waste load allocations and load allocations places undue burden and responsibility on agencies that have no regulatory authority on the use or sources of the legacy pollutants. 303(d) listings for legacy pollutants that have been banned from manufacture and for which current use is either completely banned or restricted by other federal or state agencies, should be listed as "Being Addressed by Action Other Than TMDL" or, if such action has not yet been completed, as "Requiring Action Other Than a TMDL," on the 303(d) List. There are numerous listings for DDT, chlordane, PCBs and other legacy pollutants for nearshore and offshore areas, in sediments of lakes, and in contaminated sediments in bays and harbors. The most appropriate management measures for such impairment are actions that have already been taken or are in the process of being developed through:

- Federal Insecticide Fungicide and Rodenticide Act (FIFRA) regulations that ban the manufacture and use of DDT, chlordane, dieldrin, among others;
- The Federal Toxic Substances Control Act (TSCA), which banned the manufacture of PCBs and has restricted the use and distribution in commerce of existing PCB-containing equipment and products;
- Settlement agreements, consent decrees, and cleanup and abatement orders for the source control/remediation of historic deposits of these compounds; and
- Deposits of contaminated sediments that may not be subject to federal Superfund oversight can be dealt with through DTSC or SWRCB cleanup and abatement orders with responsible parties, or the manager of the water body, be it a lake or harbor. Also, USEPA has recently issued an advance notice of proposed rulemaking to consider further restricting existing uses and lowering the threshold for PCB content of regulated PCB-containing equipment and products (FR Volume 75, NO. 66, Wednesday, April 7, 2010, proposed rules page 17645-17666.) CASQA requests that the State Water Board respond to the USEPA request for comment and information regarding the 303d listings for PCBs throughout the State.

Geomean Standard

CASQA is also concerned that fecal coliform geomeans in some instances are being calculated inappropriately: fecal indicator bacteria geomeans have been calculated for set monthly periods, regardless of the number of samples collected within that period. To be consistent with the fecal coliform geomean portion standard (fecal coliform concentration: log mean less than 200

MPN/100 mL, based on five or more samples per 30 day period, and not more than 10% of the samples exceed 400 organisms/100 mL for any 30-day period), the geomean should not be calculated for periods where less than 5 samples have been collected.

Listing of channels not included in a Basin Plan, and with no assigned beneficial uses

Although we are not commenting on particular listings, we are aware of a type of proposed listing that is troubling – the listing of man-made channels that are not included in a Basin Plan, have no assigned beneficial uses, and apparently are not waters of the U.S. Listings of this type seem wholly inappropriate.

Programmatic Concerns
Further, CASQA has several major programmatic concerns with the proposed 303(d) List.

1. Lack of CEQA Documentation

The State Water Board intends to approve the list in the absence of the impact analysis required by the California Environmental Quality Act (CEQA). The basis for this decision is apparently the assumption that no impacts occur until the TMDLs are implemented and therefore CEQA documentation is prepared for the individual TMDLs. However, the listing itself has immediate regulatory and permitting consequences. Once waters are listed, Water Boards often include new provisions in reissued permits requiring actions by permittees before a required TMDL, let alone an Implementation Plan is developed (see 6. Immediate Impacts below for more information). In addition, delaying all impact assessments until the individual TMDLs are drafted means that cumulative impacts are never addressed or may not be addressed adequately, as required by CEQA. Similarly, regional and statewide impacts also may not be assessed. A process that does not fully address CEQA has significant programmatic impacts as discussed in the following points.

2. The Need to Examine Alternatives

The benefit of fully complying with CEQA is that it compels the examination of alternatives. Alternatives for addressing many of these pollutant/waterway combinations include enhanced statewide source control via action by the State Water Board, DTSC's Green Chemistry Initiative, or through legislative action (similar to the ban on copper sewer treatments). An assessment of alternatives would require the consideration of addressing pollutants and sources together for an individual waterway (a comprehensive watershed approach) rather than sequentially adopting TMDLs.

Further, the CEQA document for the 303(d) List should examine the alternative of listing the legacy pollutants, as described in the comments regarding legacy pollutants above, as "Being Addressed by Action Other Than TMDL." This option would allow the dischargers to focus their limited resources on pollutants currently being released into the environment and for which they have the potential to implement source or treatment controls."

Other alternatives that could be assessed in a 303(d) List CEQA document include prioritization of watersheds (per the Water Board's Strategic Plan), and the possible use of statewide Use Attainability Analyses (UAAs) for pollutants such as bacteria in constructed waterways.

3. Inefficiencies Due to Sequential TMDLs

An additional concern for permitted dischargers is the sequential or incremental nature of the listings, which are dependent on when sufficient monitoring data becomes available to support the listing. This can result in the piecemeal development of TMDLs, which hinders implementation of a watershed approach with coordinated implementation of controls. It also can result in later TMDLs requiring treatment or other management controls that are incompatible with controls adopted for earlier TMDLs.

4. The Need for a Statewide Strategy

The approximately 1,200 proposed new listings will create a substantial new burden on stormwater and wastewater agencies. The number of new listings implies degradation of California waterways; however, the State Water Board notice states that the new listings "do not necessarily reflect further degradation of water quality … but are more likely due to the availability of more data." This trend will likely continue with each successive list adding more waterway/pollutant combinations as more data is collected through the Surface Water Ambient Monitoring Program (SWAMP), MS4 monitoring, and other monitoring efforts. Listings are increasing exponentially (see Figure 1 on the Staff Report). We believe the Water Boards should examine the overall feasibility of the stormwater and wastewater agencies being able to fund and manage all the resultant TMDLs. We suggest that the funds are simply unavailable and the Water Boards should consider prioritizing watersheds and waterways so that the most significant environmental and public health problems are addressed first. A futures assessment is critically needed.

5. Premature Listings

Placement on the 303(d) List is required for waters for which technology-based regulations and other required controls are not stringent enough to comply with water quality standards. The technology-based standard for stormwater is the mandate to remove pollutants to the maximum extent practicable (MEP). However, MEP is an evolving performance standard that becomes increasingly more stringent with each permit cycle. Since permittees implement the new levels of MEP during the 5-year cycle, it is not appropriate at this time to conclude that full implementation of a technology-based standard would not provide for attainment of water quality standards for at least some of the current pollutants of concern.

6. Immediate Impacts

The listing process itself has immediate impacts that should be assessed directly by CEQA. Following are examples of the immediate impact of listing a pollutant/waterway on the 303(d) List.

1) Listing may trigger policies or regulations governing how listed contaminants are addressed in NPDES permitting. As an example, the Receiving Water (RW) Risk Factor Worksheet for the recently-adopted Construction General Permit uses the presence of sediment on the 303(d) List as a factor in its scoring, even in the absence of a TMDL.[2] This directly affects the type of controls implemented.

   Another example is the State Implementation Policy (SIP),[3] which uses 303(d) listing status in the determining the need for water quality-based effluent limitations (see Section 1.3). For bioaccumulative priority pollutants, the SIP also requires that Regional Water Boards consider whether the mass loading of the pollutant should be limited to representative, current levels, pending TMDL development (Section 2.1.1). Compliance schedules may also be limited to specific time periods, depending on whether the pollutant in question is on the 303(d) List. These are all impacts prior to TMDL completion.

   The 303(d) listing of dioxins for San Francisco Bay has created a major compliance issue for POTWs discharging to the Bay, and potentially for stormwater even though the TMDL is years in the future.

2) Listing limits and may prevent the addition of new discharges to waterways for the pollutant listed. This prohibition occurs even before the TMDL is completed. In the case of Friends of Pinto Creek v. United States Environmental Protection Agency[4], the appeals court held that discharges into waterways that do not meet water quality standards (based on 303(d) listing) are prohibited, even if the discharge is offset.

These immediate impacts result from listing and by themselves trigger CEQA.

Lastly, CASQA recommends that the State Water Board hold a public workshop soon after adoption of the 2010 Integrated Report/Section 303(d) List to assess implementation of the listing/delisting policy. Such a workshop was envisioned in Resolution No. 2004-0063, adopting the policy. With the approval of the 2010 303(d) List, we will have had two listing cycles of experience implementing the policy. It is time to assess implementation of the policy to determine if any changes are required.

Thank you for the opportunity to provide comments. Please contact me at (760) 603-6242 or Geoff Brosseau, our Executive Director, at (650) 365-8620 if you have any questions or would like to discuss this further.

Sincerely,

Scott Taylor, Chair
California Stormwater Quality Association

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[2] See CGP, Appendix 1, Risk Determination Worksheet, posted here.
3 Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California, posted here
[4] "Pinto Creek," posted here.