



Tri-TAC

Jointly Sponsored by:
League of California Cities
California Association of Sanitation Agencies
California Water Environment Association

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July 8, 2003

Via Electronic and U.S. Mail

Mr. David W. Smith, TMDL Team Leader
Water Division
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

Dear Mr. Smith:

Comments on Partial Approval and Partial Disapproval of
California's 2002 303(d) List (68 FR 33693)

On behalf of the California Association of Sanitation Agencies (CASA) and Tri-TAC, I am pleased to submit comments on EPA's recent proposed action on California's 2002 303(d) list. CASA and Tri-TAC are statewide organizations comprised of members from public agencies and other professionals responsible for wastewater treatment. Tri-TAC is jointly sponsored by CASA, the California Water Environment Association, and the League of California Cities. The constituency base for CASA and Tri-TAC collects, treats and reclaims more than two billion gallons of wastewater each day and serves most of the sewered population of California.

CASA and Tri-TAC have followed closely the development of the 2002 303(d) list, and have submitted comments during State Water Resources Control Board (SWRCB) development of the list (see, e.g., Letters from CASA & Tri-TAC to Arthur G. Baggett, Jr. dated May 17, 2002 and November 1, 2002). We are pleased that many of our prior comments have been addressed. We support EPA's approval of the State's development of a Monitoring List, a list of waters for which Total Maximum Daily Loads (TMDL) have been completed, and an Enforceable Programs list, in addition to a list of water quality-limited segments. We believe that the separate non-303(d) lists – which do not trigger the

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requirement that a TMDL be developed but still have an important function in tracking various waterbodies – are sound from both a policy perspective and a legal perspective. As EPA notes in the Staff Report, these lists are also consistent with EPA guidance issued in 2001 (see EPA Office of Water, Memorandum regarding “2002 Integrated Water Quality Monitoring and Assessment Report Guidance,” November 19, 2001).

While we support the general structure and approach to listing decisions developed by the State and approved by EPA, we are concerned about certain of the proposed new listings by EPA, pursuant to EPA’s proposed disapproval of California’s decision not to list certain waters. As you know, the State’s decision on the composition of the State’s 303(d) List is among the most important water quality regulatory issues facing California today. This list determines where TMDLs will be developed, and thus where California’s limited water quality resources will be directed over the next several years. Under the SWRCB’s current practice, whether a water body is included on the List also affects NPDES permitting during the interim period between listing and TMDL development. In light of the consequences of listing, we believe it is critically important that the 303(d) List include only those water quality limited segments for which TMDLs are required. Our concerns center on situations in which EPA is substituting its judgment – and listing criteria -- for that of the State, which we believe has broad discretion in listing decisions. Our specific comments on EPA’s proposed additions to the list follow.

Humboldt Bay (PCBs), Laguna de Santa Rosa (total phosphorus), Calleguas Creek Reach 4 (Boron, Sulfate, TDS), Anaheim Bay (dieldrin, PCBs), Huntington Harbor (dieldrin, PCBs)

CASA and Tri-TAC have long been concerned about the use of informal advisory criteria used to interpret narrative objectives as the basis for listing decisions. If adopted water quality objectives are not providing adequate use protection, those objectives should be revisited through the standard-setting process. The Clean Water Act and Porter-Cologne Water Quality Control Act include requirements that serve important purposes in establishing water quality objectives. Most notably, Water Code Section 13241 requires that a Regional Board consider specified factors in establishing water quality objectives. Listing waters based on a non regulatory advisory criterion and proceeding with TMDL development constitutes an “end-run” around the statutorily mandated standard setting process.

EPA regulations require States to “provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 35).” 40 CFR §131.11(a)(2) This information is sometimes referred to as a “narrative translator.” To our knowledge, neither the State, nor EPA acting in place of the State pursuant to 40 CFR §131.22, have adopted legally valid water quality objectives for the substances for which these waters are proposed to be listed pursuant to the California Water Code, nor have the State or EPA adopted legally valid narrative translators (for toxic pollutants) with respect to the criteria being applied for listing in these cases. Prior to adoption of valid water quality standards and narrative translator mechanisms, it is invalid for EPA to list waters based on these informal criteria. Indeed, EPA has acknowledged this in other contexts. (See letter from Alexis Strauss, EPA Region IX, to Celeste Cantu, SWRCB, dated February 15, 2002.)

Humboldt Bay (PCBs), San Antonio Creek (Boron), Bolsa Chica (Copper and Nickel), Anaheim Bay (Copper, Nickel, Dieldrin, and PCBs), Huntington Harbor (Copper, Nickel, Dieldrin, and PCBs)

CASA and Tri-TAC question the validity of these proposed listings, which are all based on datasets of fewer than 10 samples. Although the State did not establish a set minimum number of samples, nor do EPA's regulations specify the number of samples required, the State did indicate that it generally looked for a minimum of 10 samples. (SWRCB Staff Report at 7.) The State also provided a detailed explanation of its approach to this issue in its Response to Comments, which explained how the State evaluated the amount and quality of the data, including the variability of the pollutant and reliability of the data. (SWRCB Response to Comments, January 2003 (Comment G.11.23).) In the absence of a clear regulatory guideline, we do not believe it is appropriate for EPA to “second-guess” the State's decisions about the amount or adequacy of the data.¹

¹ If EPA engages in this practice for listing decisions, fairness requires that the Agency re-evaluate all existing listings to determine if sufficient valid data were available to support the original listings. If such a review were performed, we are confident it would show that some listings that EPA is not disapproving lack a valid basis. EPA's approach appears to be to add waters/pollutants to the State's list, but never to remove any listings, regardless of their validity.

Moreover, since EPA itself is establishing these listings, it is appropriate to examine EPA's listing guidance. In the September 1997 Guidelines for Preparation of the Comprehensive State Water Quality Assessments (305(b) Reports) and Electronic Updates, EPA stated that for toxicants such as priority pollutants, metals, chlorine and ammonia, the assessment guidelines assume that at least 10 samples are available over a 3-year period. EPA recommends that if fewer than 10 samples are available, States should consider other factors such as the magnitude of the exceedance and variability of the contaminant. Factors such as temporal and spatial variability also ought to be considered. It is not clear that, in these instances in which fewer than 10 samples were available, EPA considered any such factors.

Humboldt Bay (PCBs), Lake Merced (Dissolved Oxygen, pH), Chumash Creek (Dissolved Oxygen), Llagas Creek (Dissolved Oxygen), Los Osos Creek (Dissolved Oxygen), Orcutt Solomon Creek (Boron), San Antonio Creek (Boron), Bolsa Chica (Copper, Nickel), Anaheim Bay (Copper, Nickel, Dieldrin, PCBs), Huntington Harbor (Copper, Nickel, Dieldrin, PCBs)

For each of these proposed listings, EPA states in the Staff Report that there is "no current evidence of beneficial use impairments associated with this pollutant." Proceeding to list these waters without regard to this fact is inconsistent with the Clean Water Act (CWA). Section 303(d)(1)(A) states, in pertinent part, "[e]ach State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any *water quality standard* applicable to such waters." (emphasis added) In turn, the term "water quality standard" is defined by Section 303(c)(2) of the CWA as consisting of "the designated uses of the navigable waters involved *and* the water quality criteria for such waters based upon such uses." (emphasis added)

Thus, the Act clearly states that a water quality standard consists of the combination of a beneficial use and the criteria to protect that use. EPA has instead applied these two interrelated components separately, as if each component had meaning independent of the other. Because EPA has made a finding that there is no evidence of beneficial use impairments associated with the specified pollutants, the proposed listings should more

appropriately be placed on the Monitoring List so that further investigations can be conducted to determine if there is indeed an impairment, or alternatively, whether the criteria/objective has been set at the level to appropriate for protecting the use. If the latter is not the case,

this situation should be addressed during the Triennial Review process, rather than adding another waterbody/pollutant combination to the 303(d) list, which triggers the mandatory duty to establish what may be a completely unnecessary TMDL.

San Gabriel River Reaches 1 and 3 (Toxicity), Coyote Creek (Toxicity)

We appreciate that EPA concurred with the State's decision to remove listings for ammonia for these waterbodies due to the presence of an enforceable program. We disagree, however, with the proposed re-listing of these waters for toxicity. Simply put, toxicity is a *condition* caused by a chemical, not a "pollutant."² As such, these listings should be for the pollutants causing the toxic effects, not for the toxicity itself, for which there is no rational way to develop a TMDL.³ We recommend that these waters be placed on the Monitoring List, and, if specific toxicants are identified as a result of further investigations, those pollutants can be added to the 303(d) list during a future listing cycle.

In summary, development of the 303(d) List is primarily a State function, and in most respects, the State of California has conducted a fairly comprehensive and thoughtful evaluation of the waterbodies of the State. The SWRCB used relatively consistent criteria to make decisions about placing waterbodies in various categories, including whether to place a waterbody on the 303(d) List, triggering the development of a TMDL. We urge EPA to reevaluate the bases for these proposed listings and to give greater consideration to the technical and policy judgments made by the SWRCB after a lengthy and very public process.

² The CWA directs States to establish TMDLs for the waters identified in paragraph (1)(A) of section 303(d) "for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation." 33 U.S.C. 1313(d)(1)(C) The term "pollutant" as defined in Section 502 of the CWA does not appear to include toxicity. Further, federal regulations define whole effluent toxicity as "the aggregate toxic *effect* of an effluent measured directly by a toxicity test." (emphasis added) 40 CFR §122.2.

³ As noted in footnote 2, per Section 303(d)(1)(C), the Administrator must have identified the pollutant as suitable for calculation of a TMDL. If EPA persists in listing these waters for toxicity, we request that EPA demonstrate that toxicity is in fact a pollutant suitable for calculation of a TMDL.

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Thank you very much for the opportunity to comment on this proposed action.

Sincerely,



Roberta L. Larson, Director
Legal and Regulatory Affairs
CASA



David R. Williams
Chair
Tri-TAC

cc: Arthur G. Baggett, Jr., Chair, SWRCB
Tom Howard, Deputy Executive Director, SWRCB
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