

APPENDIX B: SWRCB MEMOS RELATED TO TMDL DEVELOPMENT

This appendix contains legal memorandums issued by SWRCB's Office of Chief Counsel (OCC) relating to TMDLs. Table B-1 provides a list of the memos included.

Table B-1. TMDL-related Memos Issued by OCC

Title	Date
TMDLs for Condition-Based Impairments	6/21/02
The Distinction Between a TMDL's Numeric Targets and Water Quality Standards	6/12/02
The Extent to Which TMDLs Are Subject to the Alaska Rule	1/28/02
Legal Authority for Offsets, Pollutant Trading, and Market Programs to Supplement Water Quality Regulation in California's Impaired Waters	10/16/01
Regulatory and Statutory Time Limits Implicated in Developing California's 303(d) Listing and Delisting Policy	8/2/01
Timing Requirements for Regional Board Agenda Items	7/10/01
Guidance Regarding the Extent to Which Effluent Limitations Set Forth in NPDES Permits Can Be Relaxed in Conjunction With a TMDL	1/26/01
Guidance Regarding Section 303(d) List for the 2002 Submission	12/21/00
Economic Considerations in TMDL Development and Basin Planning	10/27/99
Do TMDLs Have to Include Implementation Plans?	3/1/99
TMDL Questions (Litigation Re: Medium and Low Priority Waters)	1/7/99
Guidance on Consideration of Economics in the Adoption of Water Quality Objectives	1/4/94



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov



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TO: TMDL Roundtable,
c/o Thomas Mumley, San Francisco Bay RWQCB
Statewide TMDL Manager

/s/

FROM: Michael J. Levy
Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: June 21, 2002

SUBJECT: TMDLS FOR CONDITION-BASED IMPAIRMENTS

The TMDL Roundtable has asked about the legal status of waters on the 303(d) list that are designated as impaired for conditions rather than pollutants. In short, when waters are listed as impaired for conditions that are caused by pollutants, the Regional Water Quality Control Boards must establish a TMDL for those pollutants that cause or contribute to the impairing condition.

Two subdivisions of section 303(d) of the Clean Water Act¹ are implicated in this analysis. Section 303(d), subdivision (1)(A), requires each state to identify the waters within its jurisdiction that are not attaining water-quality standards. (33 U.S.C. § 1313(d)(1)(A).) The result of that process is commonly known as the 303(d) list. The federal regulations additionally require the 303(d) list to include an identification of the pollutants causing or expected to cause violations of standards. (40 C.F.R. § 130.7(b)(1)(4).)

For the waters on the 303(d) list, section 303(d), subdivision (1)(C), requires the state to develop TMDLs for the pollutants that are impairing those waters. (33 U.S.C. § 1313(d)(1)(C).) In many instances, however, waters on the 303(d) list are not identified as impaired by a specific pollutant, but by conditions that are caused in whole or in part by pollutants. Examples of these stressors include accelerated eutrophication (typically associated with excessive nutrients), toxicity (miscellaneous toxic constituents), and temperature (thermal discharges and sediment). Subdivision (1)(A) does not prohibit identifying waters as impaired by such conditions, and the United States Environmental Protection Agency has approved this approach, for example, by approving the 1998 303(d) list. Such listings, however, do not impact the state's obligation under

¹ All references herein to any "section" are to the federal Clean Water Act, and references to "subdivision" are to specific subdivisions of section 303(d) of the Clean Water Act.

subdivision (1)(C) to develop TMDLs for the pollutants impairing those waters. Accordingly, where waters are listed as impaired for conditions commonly associated with pollutants, the Regional Water Quality Control Boards must identify the pollutants underlying or contributing to the conditions, and either establish TMDLs for those pollutants, or establish TMDLs that otherwise correct the conditions leading to the impairment. (33 U.S.C. § 1313(d)(1)(C).)

Should you have any questions about this memorandum, feel free to contact me at (916) 341-5193 or mlevy@swrcb.ca.gov.

cc: Mr. David Leland
TMDL Management Advocate
North Coast Regional Water
Quality Control Board
5550 Skylane Boulevard, Suite A
Santa Rosa, CA 95403

Mr. Chuck Curtis
TMDL Management Advocate
Lahontan Regional Water Quality
Control Board
2501 Lake Tahoe Boulevard
South Lake Tahoe, CA 96150

Ms. Lisa McCann
TMDL Management Advocate
Central Coast Regional Water
Quality Control Board
81 Higuera Street, Suite 200
San Luis Obispo, CA 93401-5427

Ms. Teresa Newkirk
TMDL Management Advocate
Colorado River Basin Regional Water
Quality Control Board
73-720 Fred Waring Drive, Suite 100
Palm Desert, CA 92260

Mr. Jonathan Bishop
TMDL Management Advocate
Los Angeles Regional Water Quality
Control Board
320 West 4th Street, Suite 200
Los Angeles, CA 90013

Ms. Hope Smythe
TMDL Management Advocate
Santa Ana Regional Water Quality
Control Board
3737 Main Street, Suite 500
Riverside, CA 92501-3339

Mr. Jerry Bruns
TMDL Management Advocate
Central Valley Regional Water Quality
Control Board
3443 Routier Road
Sacramento, CA 95827-3003

Ms. Deborah Jayne
TMDL Management Advocate
San Diego Regional Water Quality
Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Ken Harris, DWQ
Craig M. Wilson, OCC
All OCC WQ Attorneys

TMDL Roundtable,
c/o Thomas Mumley,
Statewide TMDL Manager

- 3 -

June 21, 2002

cc: (Continued)

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MJLevy/JLBashaw

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INFORMATION

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Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov



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TO: Ken Harris, DWQ
Paul Lillebo, DWQ

FROM: Michael J. Levy
Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: June 12, 2002

SUBJECT: THE DISTINCTION BETWEEN A TMDL'S NUMERIC TARGETS AND
WATER QUALITY STANDARDS

This memorandum is intended to explain the distinction between numeric targets in a total maximum daily load (TMDL) and water quality standards. In general, section 303(d) of the Federal Clean Water Act (CWA)¹ requires each state to establish a TMDL for waters within its boundaries for which effluent limitations are not stringent enough to implement applicable water quality standards.² TMDLs, in turn, must be established at a level necessary to implement the applicable water quality standards.³ In short:

1. TMDLs require a quantitative numeric target necessary to implement existing water quality standards;
2. While a TMDL's numeric target is an interpretation of existing water quality standards, it is not a water quality standard itself, and therefore, the processes required when adopting such standards do not apply;
3. Strategies to attain water quality standards, such as TMDLs, do not change the fact that enforcement of the Clean Water Act against point source dischargers is primarily through their NPDES permits; A TMDL's numeric target is not directly enforceable against dischargers absent a corresponding permit provision.

¹ The CWA is more accurately identified as the "Federal Water Pollution Control Act." (See 33 U.S.C. § 1251 et seq.) As used above, "section 303(d)" refers to the section number of the CWA as enacted by Congress. The same section is codified in title 33 of the United States Code in section 1313(d). Text in the body of this memorandum refers to the sections of the CWA as enacted by Congress. Corresponding citations to title 33 appear in footnotes.

² See generally 33 U.S.C. § 1313(d)(1)(A)-(D); see also 40 C.F.R. § 130.7.

³ 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.7(c)(1).

I. TMDLs Require the Calculation of a Quantitative Numeric Target Necessary to Implement Water Quality Standards in Impaired Water Bodies

Section 303(d) contains two sentences regarding what a TMDL actually is. The first sentence requires establishment of the “total maximum daily load” for those pollutants suitable “for such calculation.” The second sentence states that “[s]uch load shall be established 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.”⁴ Based on these statements, a TMDL should be based on a quantitative value, or target,⁵ designed to attain water quality standards in a particular water body.

The federal regulations corroborate that TMDLs require a quantitative numeric target. First, they repeat essentially the same statements from the statute.⁶ Next, they define a TMDL as the “sum” of the individual waste load “allocations” for point sources and load “allocations” for nonpoint sources and natural background.⁷ Both types of allocations are based on the concept of “loading capacity,” which the regulations define as the greatest “amount” of loading (i.e., the introduction of matter or thermal energy) that a water body can receive without violating water quality standards.⁸ Finally, the regulations provide that TMDLs can be expressed in terms of mass per time, toxicity, or other appropriate “measures.”⁹ Federal regulations, therefore, envision TMDLs (including the respective load and waste load allocations) as establishing a quantitative target for a particular water body that will assure attainment of water quality standards.

The developing body of federal case law also views TMDLs in the same way. As was recently noted by the United States District Court for the Northern District of California, “[a] TMDL defines the specified maximum amount of a pollutant which can be discharged or ‘loaded’ into

⁴ 33 U.S.C. § 1313(d)(1)(C).

⁵ Although the term “numeric target” does not appear in the CWA, use of the phrase is a matter of convenience due to a peculiarity in the CWA vernacular. The term “TMDL” has come to have two meanings, the first of which is the numeric target, or the literal “load” referenced in section 303(d). The term “TMDL” is also used to reference not merely the load, but the allocations of the load and the implementation plan as well. For clarity, in this document the term “target” or “numeric target” refers to the “load”, and the term “TMDL” is reserved to describe the culmination of the state’s responsibilities under section 303(d), i.e., the load, allocations, and implementation plan.

⁶ 40 C.F.R. § 130.7(c)(1).

⁷ *Id.*, § 130.2(i).

⁸ *Id.*, §§ 130.2(e) and (f).

⁹ *Id.*, § 130.2(i).

the waters at issue from all combined sources.”¹⁰ Federal courts outside of California and the Ninth Circuit share the same view.¹¹

The U.S. Environmental Protection Agency, Region IX (EPA) also views TMDLs as containing water body-specific targets necessary to attain water quality standards. According to a recent publication from EPA:

“[a] TMDL is a written, quantitative assessment of water quality problems and contributing pollutant sources. It identifies one or more numeric targets based on applicable water quality standards, specifies the maximum amount of a pollutant that can be discharged (or the amount of a pollutant that needs to be reduced) to meet water quality standards, allocates pollutant loads among sources in the watershed, and provides a basis for taking actions needed to meet numeric target(s) and implement water quality standards.”¹²

Numerous pages of that publication are devoted to explaining how TMDL targets are used to interpret narrative or numeric water quality standards and to explaining the requirement to quantify the loading capacity and allocations.¹³

In short, the Clean Water Act, federal regulations, case law, and interpretive guidance from EPA all describe TMDLs as requiring numeric pollutant targets that are established at levels necessary to achieve water quality standards in impaired waters.

II. A TMDL Implements Existing Water Quality Standards; It Does Not Create New Standards

The federal regulations specify essentially four components of water quality standards. These are use designations, water quality criteria based upon those uses, an antidegradation policy, and certain policies generally affecting the application and implementation of water quality standards.¹⁴ Water quality criteria are defined as “elements of State water quality standards,

¹⁰ *Pronsolino v. Natri* (9th Cir., 2002) --- F.3d ----, 2002 WL 1082428, p. 3, quoting *Dioxin/Organochlorine Center v. Clarke* (9th Cir. 1995) 57 F.3d 1517, 1520.

¹¹ See, e.g., *American Iron and Steel Institute v. EPA* (D.C.Cir. 1997) 115 F.3d 979, 1002, citing 40 C.F.R. § 132.2; *Manasota-88, Inc. v. Tidwell* (11th Cir. 1990) 896 F.2d 1318, 1321; *Scott v. City of Hammond* (7th Cir. 1984) 741 F.2d 1318, 1321.

¹² U.S. Environmental Protection Agency, Region IX, Guidance for Developing TMDLs in California (January 7, 2000), p. 1, which is available at: www.epa.gov/region09/water/tmdl.

¹³ *Id.*, pp. 2-6.

¹⁴ 40 C.F.R. §§ 131.6(a), (c), and (d); 40 C.F.R. § 131.13. Unlike TMDLs, which are specific plans to attain standards in a specific water body, section 131.13 policies are generally applicable policies, e.g., mixing zones, low flows, and variances. See Memorandum to Paul Lillebo, Basin Planning Unit Chief, Division of Water Quality,

expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.”¹⁵ Federal law contemplates, “[w]hen criteria are met, water quality will generally protect the designated use.”¹⁶

Similar to federal requirements, under state law, each Regional Board must establish water quality objectives that will ensure the reasonable protection of beneficial uses and the prevention of nuisance.¹⁷ Water quality objectives are “the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area.”¹⁸ The Water Code provides that such beneficial uses include, but are not limited to: domestic, municipal, agricultural, and industrial supply; power generation; recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves.¹⁹

Under state and federal law, therefore, water quality standards designate the uses to be made of the water and set criteria necessary to protect the uses. These standards have two functions: (1) they establish the water quality goals for a specific water body; and (2) they serve as the regulatory basis for establishing water quality-based treatment controls and strategies (such as TMDLs) beyond the required technology-based levels of treatment.²⁰

Water quality objectives or criteria can be expressed in numeric terms (i.e., concentration or mass per time), or narrative terms (e.g., “no toxics in toxic amounts”).²¹ When adopting a TMDL for an impaired water body, sometimes the numeric criteria can be used as the TMDL target (e.g., mass-per-time criteria). More typically, however, to comply with TMDL requirements, the objective will need to be translated into another measure amenable to allocating the total load (e.g., concentration-based numeric criteria, or narrative criteria). While this translation involves articulating a new number to express the existing criteria for the purposes of section 303(d), selection of this new number does not establish a new water quality standard.

from Michael J. Levy, Staff Counsel, Office of Chief Counsel, re: *The Extent to Which TMDLs are Subject to the Alaska Rule* (January 28, 2002) (hereinafter “*TMDLs and the Alaska Rule*”).

¹⁵ 40 C.F.R. § 131.3(b).

¹⁶ *Ibid.*; 33 U.S.C. § 1313(c)(2)(A).

¹⁷ Wat. Code, § 13241.

¹⁸ *Id.*, § 13050, subd. (h).

¹⁹ *Id.*, § 13050, subd. (f).

²⁰ 40 C.F.R. § 131.2.

²¹ 40 C.F.R. § 131.11.

Although the assignment of a numeric value that ultimately must be implemented in NPDES permits may at first glance appear similar to establishment of a water quality standard, a comparison of the statutory requirements for TMDLs and water quality standards demonstrates they are quite distinct: section 303(c) of the Clean Water Act requires creation of the water quality standards; section 303(d) requires TMDLs to implement those standards when technology-based limits are insufficient.²² “[T]he basic purpose for which the § 303(d) list and TMDLs are compiled [is] the eventual attainment of state-defined water quality standards.”²³ TMDLs are therefore not themselves standards, but mechanisms to implement them. Unlike water quality standards, TMDLs do not designate existing or potential uses. They do not establish new criteria necessary to protect uses, but rather, interpret existing criteria. They do not establish policy guiding the circumstances under which water quality must be protected against degradation. TMDLs merely create an enforceable strategy to attain those standards (with seasonal variations and a margin of safety) that were already established but which are not yet attained in a specific water body.²⁴ TMDLs thus serve as a means to an end. That end is the attainment and maintenance of existing water quality standards.²⁵

III. Water Code Section 13241 Does Not Apply When Establishing the Numeric Targets in a TMDL

Water Code Section 13241 establishes the requirements attendant to the Regional Boards’ adoption of water quality objectives. Because “it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses,” the section requires the Regional Boards to consider a number of factors when establishing objectives. These include:

- a. Past, present, and probable future beneficial uses of water;
- b. Environmental characteristics of the hydrographic unit, including the quality of water available to it;
- c. Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area;
- d. Economic considerations;
- e. The need to develop housing within the region; and

²² 33 U.S.C. § 1313(d).

²³ *Pronsolino v. Nastri* (9th Cir., 2002) --- F.3d ---, 2002 WL 1082428, p. 13.

²⁴ 33 U.S.C. § 1313(d)(1); 40 C.F.R. §§ 130.7(b)(1) and (c)(1).

²⁵ For a detailed analysis of how the process of creating a TMDL is distinct from and incompatible with the process of adopting a water quality standard, see *TMDLs and the Alaska Rule*, *supra* note 14.

f. The need to develop and use recycled water.²⁶

The Clean Water Act similarly provides that water quality standards “shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.”²⁷ Considering these factors is appropriate because assignment of the appropriate level of water quality properly involves a balance between appropriate “designated” or “beneficial” uses of water, numeric or narrative water quality “objectives” or “criteria,” and a host of sometimes-competing policy considerations, including economic and environmental interests.

Since TMDLs are not water quality objectives, the requirements for adopting such objectives do not apply to TMDLs. Nor should they. Numeric targets used by TMDLs to implement standards are not designed to re-balance the policy interests underlying those standards. Although the state must consider a variety of factors in establishing the different elements of a TMDL, considering the economic impact of the required level of water quality, for example, is not among them; that impact was already determined when the standard was adopted. This conclusion is not altered when a TMDL is established to implement a narrative water quality objective. The economic impact associated with maintaining ambient water quality at the level described by the narrative statement was considered when the narrative objective was adopted.²⁸

While policy considerations are important in developing water quality standards, they play a smaller role in the formulation of the TMDLs that implement them. The statutory directive to adopt TMDLs to “implement the applicable water quality standards with seasonal variations and a margin of safety,”²⁹ is not qualified by the predicate “so long as it is economically desirable to do so.” Therefore, not only would an in-depth economic analysis be redundant, it would be inconsistent with federal law.

²⁶ Wat. Code, § 13241, subs. (a)-(f). Notably, section 13241 contains no dictate as to the weight the Regional Board must afford to any particular factor, only that these factors be considered.

²⁷ 33 U.S.C. § 1313(c)(2)(A). See also 40 C.F.R. §§ 131.10-13.

²⁸ That is not to say that no economic analysis is required when adopting a TMDL. Indeed, depending on the specific activity under consideration, different parts of a TMDL may require differing levels of economic considerations. Section 13241 analysis, however, is not among them. For a detailed discussion of economic analysis requirements, see Memorandum to Stefan Lorenzato, TMDL Coordinator, Division of Water Quality, from Sheila K. Vassey, Senior Staff Counsel, Office of Chief Counsel, re: *Economic Considerations in TMDL Development and Basin Planning* (October 27, 1999).

²⁹ 33 U.S.C. § 1313(d)(1)(C).

In short, a water quality standard defines the water quality goals of a water body by designating the use or uses to be made of the water and by setting criteria necessary to protect the uses.³⁰ TMDLs, in contrast, establish numeric targets for pollutants—targets that are designed to achieve water quality standards in impaired waterbodies. TMDLs implement the existing objectives that are designed to protect designated beneficial uses and, therefore, serve as a water quality-based treatment control or strategy that necessarily rests on the established goals and balanced policy considerations embodied by water quality standards. As stated in a recent Ninth Circuit decision:

“TMDLs serve as a link in an implementation chain that includes federally-regulated point source controls, state or local plans for point and nonpoint source pollution reduction, and assessment of the impact of such measures on water quality, all to the end of attaining water quality goals for the nation’s waters.”³¹

IV. Numeric Targets in a TMDL are not Directly Enforceable Against Dischargers

The difference between water quality standards and TMDLs is highlighted in the context of the “citizen suits”, which are authorized by section 505 to enforce the CWA.³² In pertinent part, section 505 authorizes “any person” to commence a “civil action” against any person who has allegedly violated “*an effluent standard or limitation*” or “an order” issued by the EPA or a “State with respect to such a standard or limitation[.]”³³ The Clean Water Act language does not support the notion that third parties can invoke the effluent provision in section 505 to directly enforce TMDL numeric targets against dischargers.

In contrast to the broad definition of “effluent limits” in section 502 of the Clean Water Act, section 505 limits citizen suits specifically to a narrower subset of effluent standards and limitations. Section 505 states, in particular, that “[f]or purposes of this section,” the term “effluent standard or limitation” is limited to seven instances. Citizen suits are permitted to enforce:

- a. An unlawful act, under section 301(a);
- b. An effluent limitation or other limitation, under section 301 or 302;
- c. A “standard of performance” under section 306;
- d. A prohibition, effluent standard or pretreatment standards, under section 307;

³⁰ 40 C.F.R. § 131.2.

³¹ *Pronsolino v. Nastri* (9th Cir., 2002) --- F.3d ---, 2002 WL 1082428, p. 4.

³² 33 U.S.C. § 1365.

³³ 33 U.S.C. § 1365(a)(1) (Italics added).

- e. A certification, under section 401;
- f. A permit or condition thereof, issued under section 402; or
- g. A regulation under section 405(d).³⁴

A TMDL's numeric targets do not fall within any of these provisions. Although the regulations refer to a waste load allocation as a "type of water quality-based effluent limitation,"³⁵ TMDLs are required by section 303(d), not sections 301, 302, or 307. Nor, for that matter, does a TMDL that establishes a total load or waste load allocation of "zero" establish a directly enforceable prohibition, unlawful act, regulation, or performance standard under sections 301, 306, 307, or 405. Again, the target is established under section 303(d). No section 303(d) limit is enumerated in section 505. Accordingly, a plain reading of the effluent limits that may be directly enforced by way of a citizen suit under the Clean Water Act does not include waste load allocations required by section 303(d).

The federal regulations reveal at least one obvious explanation for the exclusion of TMDLs from matters that can be directly enforced against dischargers. Those regulations contemplate flexibility in translating waste load allocations into permit conditions. The NPDES permitting provisions require that water quality-based effluent limits must be "consistent with the assumptions and requirements of any available wasteload allocation."³⁶ The provisions do not require the limit to be "identical to the wasteload allocation." This language leaves open the possibility that the Regional Board could determine that fact-specific circumstances render something other than literal incorporation of the waste load allocation to be consistent with its assumptions and requirements.³⁷ The regulations thus contemplate the additional step of revising applicable NPDES permits to make them "consistent with the assumptions" of the TMDL.³⁸

Thereafter, it is the effluent limit set forth in the permit, and not the TMDL, that provides the potential vehicle for citizen suit enforcement under the Clean Water Act.³⁹ These requirements

³⁴ 33 U.S.C. § 1365(f).

³⁵ 40 C.F.R. § 130.2(h).

³⁶ 40 C.F.R. § 122.44(d)(1)(vii).

³⁷ The rationale for such a finding could include a trade amongst dischargers of portions of their load or waste load allocations, performance of an offset program that is approved by the Regional Board, or any number of other considerations bearing on facts applicable to the circumstances of the specific discharger.

³⁸ Of course, if a permit is already consistent with a newly adopted TMDL, the permit need not be amended to render its terms enforceable. The permit conditions are already enforceable, including by a citizens suit. (33 U.S.C. §§ 1365(a)(1)(B), 1365(f)(6).)

³⁹ *Id.*

are consistent with section 402(k)'s requirement that compliance with an NPDES permit is deemed compliance that bars most enforcement actions and citizen suits.⁴⁰

CONCLUSION

Section 303(c) of the Clean Water Act obligates the State and Regional Boards to establish water quality standards to protect appropriate designated uses of waters. Section 303(d) requires the states to establish TMDLs at levels necessary to implement those water quality standards in waters that are not attaining them. While extensive policy considerations are evaluated when adopting standards, those considerations are generally not relevant when adopting TMDLs, whose purpose is to cause the compromised waters to attain those policy-based standards.

The distinction between water quality standards and TMDLs is significant both for the manner in which they are adopted, and the manner in which they are enforced. First, because TMDLs are not water quality standards, neither federal nor state law obligates the State and Regional Boards to establish and adopt TMDLs as water quality standards. Second, the provisions of a TMDL, including its numeric targets, are not directly enforceable against dischargers by way of a citizen suit under the Clean Water Act. In general, section 505 permits such suits to directly enforce an effluent limit or standard. Because TMDLs are neither water quality standards nor a type of effluent limit addressed in section 505, TMDLs, including the respective waste load allocations, are not directly enforceable under the citizen suit provision of the Clean Water Act. The NPDES permits implementing the TMDL provide the vehicles for enforcement. The TMDL does not.

Should you have any questions about this memorandum, feel free to contact me at (916) 341-5193 or mlevy@swrcb.ca.gov.

cc: Tom Howard, EXEC
Stan Martinson, DWQ
John Ladd, DWQ
David Leland, TMDL Coordinator, RB1
Thomas Mumley, TMDL Coordinator, RB2
Lisa McCann, TMDL Coordinator, RB3
Jonathan Bishop, TMDL Coordinator, RB4
Jerry Bruns, TMDL Coordinator, RB5(S)
Chuck Curtis, TMDL Coordinator, RB6(SLT)
Teresa Newkirk, TMDL Coordinator, RB7
Hope Smythe, TMDL Coordinator, RB8
Deborah Jayne, TMDL Coordinator, RB9
Craig M. Wilson, OCC
Andy Sawyer, OCC
All WQ Attorneys

⁴⁰ 33 U.S.C. § 1342(k).



Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ? FAX (916) 341-5199 ? www.swrcb.ca.gov



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TO: Paul Lillebo
Basin Planning Unit
Division Of Water Quality

FROM: Michael J. Levy
Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: January 28, 2002

SUBJECT: THE EXTENT TO WHICH TMDLS ARE SUBJECT TO THE ALASKA RULE

INTRODUCTION

This memorandum is intended to clarify which items in a Regional Water Quality Control Plan (Basin Plan) amendment that implements a total maximum daily load (TMDL) require prior approval by the United States Environmental Protective Agency (EPA) pursuant to the Alaska Rule. In summary:

- ?? The Alaska Rule requires states to obtain EPA's prior approval before new or amended water quality standards become effective. Water quality standards include beneficial uses, water quality objectives, an antidegradation policy, and certain policies that generally affect the implementation of the aforesaid.
- ?? The Alaska Rule does not apply to other items, even though they may require EPA's approval. TMDLs fall outside the Alaska Rule. TMDLs become effective under California law when promulgated, even if EPA ultimately disapproves them.
- ?? Where a TMDL, however, creates or revises a water quality standard, the standard itself (not the entire TMDL) is subject to the Alaska Rule.
- ?? Non-standards parts of a TMDL are valid and enforceable immediately upon promulgation by California.

DISCUSSION

A. The Alaska Rule Only Applies To Water Quality Standards

Historically, EPA's water quality standards regulations allowed standards to go into effect, for Clean Water Act (CWA) purposes, as soon as they were adopted and effective under state law, and to remain in effect unless and until replaced by another standard. (65 Fed.Reg. 24641, 24642.) On July 8, 1997, the United States District Court held in the matter of *Alaska Clean Water Act Alliance v. Clark* (W.D. Wash.) #C96-1762R, that the plain meaning of the CWA required that new and revised standards were not effective until approved by EPA. (*Id.*) Section 303(c)(3) states in pertinent part:

If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State.¹ (22 U.S.C. § 1313(c)(3) (emphasis added).)

Accordingly, the court found that standards do not become effective until after EPA approves the standard.

Following this decision, the parties agreed to a settlement whereby EPA would amend the federal regulations relating to adoption and revision of water quality standards. This Amendment, dubbed the Alaska Rule, appears at 40 Code of Federal Regulations section 131.21(c) through (f). The Alaska Rule states:

If a State or authorized Tribe adopts a water quality standard that goes into effect under State or Tribal law on or after May 30, 2000[, t]hen once EPA approves that water quality standard, it becomes the applicable water quality standard for purposes of the [Clean Water] Act[, u]nless or until EPA has promulgated a more stringent water quality standard for the State or Tribe that is in effect[, i]n which case the EPA promulgated water quality standard is the applicable water quality

¹ The term "applicable waters of that State" modifies the term "navigable waters", which is defined as "the waters of the United States" in CWA section 502(7). (33 U.S.C. § 1362(7).) The term "waters of the United States" is further defined in 40 CFR section 122.2. Historically, U.S. waters were interpreted quite expansively, and it was not an unfair generalization to refer to them as including most surface waters. In *Solid Waste Agency of Northern Cook County (SWANCC) v. U.S. Army Corps of Engineers* (2001) 531 U.S. 159, 121 S.Ct. 675, however, the Supreme Court cast a question upon the statutory reach of the CWA, especially as it may relate to isolated, non-navigable, intrastate waters. Given this development, a more precise analysis of whether a given surface water is a water of the U.S., is warranted. The CWA does not apply to water quality standards adopted for "waters of the state" (Water Code § 13050(e)) unless they are also waters of the United States.

standard for purposes of the Act until EPA withdraws the Federal water quality standard.² (40 C.F.R. 131.21(c).)

Under its own terms, the Alaska Rule only applies to new or revised water quality standards. The definition of “water quality standards”, therefore, dictates the scope of the Alaska Rule.

The federal regulations define water quality standards in two locations. 40 Code of Federal Regulations sections 131.6(a), (c), and (d) require that water quality standards, in addition to specific supporting material, must include at least the following:

- ?? Use designations (beneficial uses)
- ?? Water quality criteria (water quality objectives)
- ?? An antidegradation policy

To this list, 40 Code of Federal Regulations section 131.13 adds certain policies related to these standards:

States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as mixing zones, low flows, and variances. Such policies are subject to EPA review and approval.

While section 131.13 of the federal regulations does not itself require prior approval of such policies, the regulation does state that such policies would be part of a state’s standards. Accordingly, CWA section 303(c)(3) would apply, as would the Alaska Rule, to any such “policies” that “generally affect” the “application and implementation” of standards. (40 C.F.R § 131.13.) Consistent with the above, EPA, Region IX, recently articulated with respect to the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (2000), that within the gambit of section 131.13 fall policies relating the application and implementation of priority pollutant criteria and objectives, mixing zones and dilution credits, compliance schedules, site-specific objectives, and exceptions (variances). (Letter from Alexis Strauss to Edward Anton, dtd. 5/1/01, pp. 2-3.)

B. TMDLS Are Not Policies As Referenced In Section 131.13

TMDLs are not policies, as referenced in section 131.13. This conclusion is drawn from the principal that while EPA has the authority to define the term “water quality standards,” and to include certain types of policies in that definition, EPA’s regulations implement the CWA and thus cannot be read in a manner inconsistent with the CWA itself. If a TMDL were deemed a policy under section 131.13, an irreconcilable conflict would exist between CWA sections 303(c)(3) and 303(d)(2). The former statute would require the TMDL to be approved

² Notably, EPA has stated that it would not object to an NPDES permit that implements a proposed, but as yet unapproved, more stringent standard, provided the NPDES permit assures compliance with the existing approved water quality standards as well. (65 F.R. at 24644.)

within 60 days (before it could be effective) or disapproved within 90 days. The latter statute, however, requires the TMDL to be approved or disapproved within 30 days:

Each State shall submit to the Administrator. . .for his approval the. . .loads established under [section 303(d)(1)]. The Administrator shall either approve or disapprove such. . .load not later than thirty days after the date of submission. If the Administrator approves such. . .load, such State shall incorporate [it] into its current [water quality control plan]. If the Administrator disapproves such. . .load, he shall not later than thirty days after the date of such disapproval. . .establish such loads for such waters as he determines necessary to implement the [applicable water quality standards] and the State shall incorporate them into its current [water quality control plan]. (33 U.S.C. § 1313(d)(2).)

Since the legislature enacted a separate approval process for TMDLs in section 303(d)(2), EPA's regulations cannot be read to require that TMDLs be approved under the conflicting provisions of section 303(c)(3). Plainly the regulations cannot regard entire TMDLs as policies subject to section 131.13. The Legislature thus did not intend TMDLs to be deemed water quality standards, and EPA's regulations at section 131.13 cannot be interpreted to the contrary.

This same reasoning would prevent dissecting a TMDL's primary elements and deeming one or more of them to individually be standards. A TMDL in its base form is the total load, load (and waste load) allocations, and the margin of safety. Creation of these parts of the TMDL, and EPA's approval authority, emanate from section 303(d)(2), not from section 303(c)(3).

Finally, neither can a TMDL's implementation plan be deemed a water quality standard under 40 Code of Federal Regulations section 131.13. Section 131.13 regards as water quality standards "policies generally affecting" water quality standards' "application and implementation." (40 C.F.R. 131.13.) A TMDL implementation plan, however, does not so qualify, for at least three reasons. First, the implementation plan is not a policy. It is a plan or a program. Second, the implementation plan does not "generally affect" the application or implementation of water quality standards, as do policies relating to mixing zones, low flows, or variances. (See 40 C.F.R. 131.13.) To the contrary, a TMDL implementation plan "specifically affects" the implementation of specific standards in specific water segments. Finally, section 131.13 requires for the policy to be deemed a water quality standard, that the state include the policy as part of its state standards: "States may. . .include in their State standards." (*Id.* (emphasis added).) The TMDL implementation plan, however, is not adopted in as part of California's state standards but as part of its TMDL. Whatever federal law may ultimately require TMDLs to include the implementation plan is a function of California law attendant with the responsibilities imposed by CWA section 303(d). (See Wat. C § 13050(j)(3); Memorandum from William R. Attwater, Chief Counsel, to Gerard Thibeault, dtd. 3/1/99.) The plan is

therefore not a part of California's water quality standards (section 303(c)), but a part of California's TMDLs (section 303(d)).³

C. Notwithstanding The Above, Any Part Of A TMDL That Adopts Or Revises A Water Quality Standard Requires Prior EPA Approval Under The Alaska Rule

Although entire TMDLs, their primary elements, and their implementation plans are not water quality standards, in some instances other parts of a California TMDL may be standards subject to section 303(c)(3), and thus the Alaska Rule. If a TMDL implementation plan adopts a site-specific water quality objective, revises a beneficial use, or creates a mixing zone policy, for instance, clearly any of these provisions would be standards, and require prior approval pursuant to the Alaska Rule.

Other parts of a TMDL, however, plainly are not standards. Of the other standard TMDL elements in California, most are not policies and most do not generally affect the application and implementation of standards. The problem statement, source analysis, and linkage analysis, for example, are analyses and do not implicate section 131.13. Nor, for that matter, does the numeric target. The numeric target is an implementation tool used to translate existing standards (objectives or beneficial uses) and measure progress toward attainment. The numeric target does not amend or create new objectives or uses. Pursuant to the Alaska Rule, EPA already approved the existing objectives or uses when the standard was adopted.

The key inquiry is whether the basin plan amendment adopts or modifies a beneficial use or water quality objective. Furthermore, if the amendment establishes a policy as a part of state standards, that generally affects the application and implementation of the standards, then it too, falls within the purview of the Alaska Rule. However, such policies must be distinguished from plans or programs to attain or implement specific standards in specific water bodies.

D. Lack Of Application Of The Alaska Rule Does Not Deprive EPA Its Authority And Responsibility To Review And Approve Other Matters That Are Not The Adoption Or Revision Of Standards

The fact that the Alaska Rule does not apply to most parts of most TMDLs does not imply that EPA lacks any reviewing authority. The Alaska Rule only respects prior approval by EPA. EPA approval of TMDLs is nonetheless required, but prior approval is not. California's TMDLs (except any parts that revise standards), are immediately valid upon approval under California

³ Considerable consternation across the country continues to plague the federal TMDL program. Not the least of these debates revolves around EPA's legal authority to require implementation plans for TMDLs. The new TMDL rule had required an implementation plan to be submitted with each TMDL. (65 F.R. 43586, 43668 (7/13/2000).) However, EPA postponed implementation of that rule until at least April 30, 2003. (66 F.R. 53043, 53044 (10/18/2001).) In any event, EPA also apparently considers the implementation plan to be part of a TMDL and not part of a water quality standard.

law, and may be implemented immediately. If EPA disapproves a TMDL, section 303(d)(2) requires EPA, within 30 days, to “establish such loads for such waters as [are] necessary to implement the [applicable] water quality standards.” (33 U.S.C. § 1313(d)(2).) The state would thereafter be required to adopt into its applicable basin plan whatever TMDL EPA had promulgated. (*Id.*; 40 C.F.R. 130.7(d)(2).) In this respect, the state’s disapproved TMDL would not be *per se* invalid. It would only be invalid to the extent it was superseded by EPA’s TMDL. (33 U.S.C. § 1370.) The remainder of the TMDL’s requirements would continue to have full force of law, under California’s Porter-Cologne authority.

CONCLUSION

Under the Alaska Rule, EPA must approve water quality standards for waters of the United States before they are effective. While water quality standards can include certain policies generally affecting standards application and implementation, such policies are but a subset of potential state actions relating to standards. While each TMDL must be submitted to EPA for approval, unlike the standards section (CWA section 303(c)(3)) CWA section 303(d)(2) does not require approval of TMDLs as a condition precedent to enforceability. Accordingly, every part of a TMDL, except adoption of a new or revised water quality standard, is enforceable under California law, immediately upon promulgation under California law.

While some TMDLs presented to the State Board have contained a condition establishing the effective date of the TMDL to be the date upon which it is approved by EPA, such a condition is not required as a matter of state or federal law, and should be used only when it is actually the desire of the Regional Water Quality Control Board to do.

Should you have any questions about this memorandum, please contact Staff Counsel Michael J. Levy at (916) 341-5193.

cc: Thomas Mumley, Sr. WRCE
Section Leader, TMDL
San Francisco Bay, RWQCB
1515 Clay Street, Suite 1400
Oakland, CA 94612

Stan Martinson, Chief, DWQ, SWRCB
Ken Harris, TMDL Section,
DWQ, SWRCB
All Water Quality Attorneys, SWRCB



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov



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TO: Arthur G. Baggett, Jr.
Chair

FROM: / s /
Craig M. Wilson
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: October 16, 2001

SUBJECT: LEGAL AUTHORITY FOR OFFSETS, POLLUTANT TRADING, AND
MARKET PROGRAMS TO SUPPLEMENT WATER QUALITY
REGULATION IN CALIFORNIA'S IMPAIRED WATERS

I. Introduction

This memorandum has been prepared to outline the existing legal authority to employ offsets, pollutant trading, and other market programs to supplement water quality regulation in impaired waters. While there is no fixed definition of these terms, "offsets" generally refer to unilateral abatement efforts by a discharger to remove a certain amount of pollutant discharge from existing sources to compensate for the discharger's own discharge. "Pollutant trading" generally refers to an exchange of either permitted discharge levels or required abatement levels between two or more dischargers, either in a formal "commodities" market or banking system, or a less structured exchange.

In sum, the extent to which such mechanisms may be employed varies greatly depending upon whether a TMDL has been adopted for the impaired water, although they may be permissible in either context. The analysis in this memorandum is equally applicable for any market-type mechanism, be it offsets, pollutant trading, or another analogous system that would authorize one discharger to perform (or to encourage another to perform) additional abatement or restoration in lieu of meeting an otherwise applicable or more stringent discharge limitation or prohibition.

This memorandum should not be construed as delineating the universe of possible market-scenarios that may be legal in given circumstances. Each such system must be evaluated in the context of its own circumstance. However, this document is intended to discuss some of the legal issues that will arise in considering such systems. These include at least the anti-

backsliding rule, and the extent to which the regulations authorize new or renewed permits to be issued for discharges into impaired waters.

In considering any of these approaches, Regional Water Quality Control Boards (Regional Boards) should be cognizant of the state's legal obligation to adopt and implement approximately 1400 TMDLs. Accordingly, any market system should only be contemplated under circumstances that will promote (and not forestall) TMDL development or attainment of water quality standards.

II. Irrespective of whether a TMDL exists, federal law requires each point source to be subject to applicable technology based effluent limitations (TBELs) as a floor.

Section 402(b) of the CWA requires that all NPDES permits issued by California contain applicable TBELs. (33 U.S.C. § 1342(b)(1)(A). See also 33 U.S.C. §§ 1311, 1313(e)(3)(A).) Effluent limitations based upon the best available technology are the floor and the minimum that must be required of any NPDES permitted discharge. Thus, no market system can be adopted that would afford relief from TBELs in NPDES permits, for either new or existing sources.

III. When a TMDL is in place, the Clean Water Act (CWA) and California law give wide latitude to develop creative means of achieving compliance with water quality standards (WQS), subject to certain limitations.

A. The water quality based effluent limitations (WQBELs) applicable to new or existing point sources can be adjusted in compliance with a TMDL.

NPDES permits must also incorporate “any requirements in addition to or more stringent than [TBELs] necessary to . . . [a]chieve water quality standards.” (44 C.F.R. § 122.44(d)(1).) See also 33 USC §§ 1342(b), 1311(b)(1)(C).) Unlike TBELs, these water quality based effluent limitations (WQBELs) can be adjusted in contemplation of a TMDL. While the CWA's anti-backsliding provisions would ordinarily prohibit the state from permitting a less stringent effluent limitation, section 402(o) contains an express exception applicable when a TMDL is in place. (33 U.S.C. § 1342(o).) Specifically, if the water is impaired, existing WQBELs may be relaxed if “the cumulative effect of all such revised effluent limitations based on such [TMDL] or waste load allocation will assure attainment of such [WQS].” (33 U.S.C. § 1313(d)(4)(A).)

Federal regulations bolster these provisions. Under the regulations, WQBELs must be “consistent with the assumptions and requirements of any available wasteload allocation” (40 C.F.R. § 122.44(d)(1)(vii)(B).) The regulations do not require WQBELs to be “equivalent to” available waste load allocations. Accordingly, so long as the cumulative effect of all WQBELs assures attainment of WQS, hence the assumptions of the TMDL, WQBELs can be adjusted based upon whatever mechanisms the state determines is appropriate.

This regulatory structure is equally applicable to new sources. A WQBEL that otherwise would be applicable to a new source can also be adjusted based upon a TMDL, whether through the use of offsets or other appropriate measures, that insure attainment of WQS. The CWA's anti-backsliding provisions do not apply to new dischargers.

To avoid a claim that a given NPDES permit is inconsistent with a TMDL, if any such mechanisms are contemplated, it would be appropriate to incorporate pertinent details of the market-based provisions into the TMDL implementation plan. If sufficient details of potential market approaches are not known at the time the implementation plan is adopted, alternatively, Regional Boards can retain flexibility in translating WLAs into effluent limitations by articulating a provision similar to the following in the implementation plan:

“While individual WQBELs shall be consistent with the assumptions and requirements of the available WLAs, LAs, and the TMDL, individual WQBELs need not be equivalent to corresponding allocations so long as the cumulative effect of all WQBELs assures attainment of WQS as quantified by the TMDL. (33 U.S.C. § 1313(d)(4)(A); 40 C.F.R. § 122.44(d)(1)(vii)(B).)”

Although failure to include the above language would not necessarily preclude subsequent flexibility in implementation, the better practice, given the public-participation requirements, would be to minimize surprises by disclosing up front that alternative attainment mechanisms may be employed.

Nonpoint Source Discharges

TMDLs must identify and grant allocations to all sources of pollution, including load allocations to nonpoint sources. The TMDLs therefore may disclose nonpoint sources as likely candidates to be offsets for point sources in addition to or apart from other point-source abatement. In appropriate circumstances, i.e., where load reductions can be calculated and enforceable, offsets may also be applied for the benefit of nonpoint sources as well as point sources.

Since the CWA does not directly regulate nonpoint sources, such discharges are subject to applicable limitations set forth under state law. California's primary mechanism to protect water quality for non-NPDES discharges (be they nonpoint source, or point source discharges to non-navigable waters) is through issuance of waste discharge requirements (WDRs) under Water Code section 13263. The extent to which offsets can be used in this context is derived from the state's authority to issue WDRs generally. Specifically:

The requirements [for waste discharge] shall implement any relevant water quality control plans that have been adopted, and shall take into consideration the beneficial uses to be protected, the water quality objectives reasonably required for that purpose, other waste discharges, the need to prevent nuisance, and the

provisions of Section 13241 [dictating matter to be considered in establishing water quality objectives]. (Water Code § 13263(a).)

Section 13241 in turn requires consideration of, among other things, “[w]ater quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.” (Water Code § 13241(c).)

Since the basin plans protect beneficial uses and articulate water quality objectives, any WDRs issued must be protective of those uses and meet the objectives. Notably, the Regional Boards are authorized (1) to not utilize the full waste assimilation capacities of the receiving waters and (2) to utilize time schedules if they determine them appropriate in their discretion. (Water Code § 13263(b) and (c).) These authorizations may be further elucidated upon or restricted in a region’s applicable basin plan. Moreover, given Section 13241(c) of the Water Code, it would be appropriate in establishing WDRs for a particular discharger to consider the affect that other pollution control measures in the area could have on the water body. So long as such other measures are implemented, and the cumulative effect of such measures and the discharge meet water quality objectives, the level of abatement required in the WDRs could be adjusted accordingly.

Traditionally, California’s nonpoint sources have been regulated through general WDRs or general waivers of WDRs. Waivers of WDRs are subject to the restriction that the waiver not be “against the public interest.” (Water Code § 13269(a).) In its Nonpoint Source Management Plan, the state has committed to controlling nonpoint source pollution through a three-tiered approach, rather than through immediate issuance of individual WDRs. First, it will encourage self-determined pollution abatement measures. Second, it will employ regulatory incentives to achieve the desired results. Third, if the other tiers are unsuccessful, the state will issue WDRs to nonpoint source dischargers or use other direct regulatory mechanisms. (Nonpoint Source Program Strategy and Implementation Plan, 1998-2013 (PROSIP) pp. 54-60.)

The second tier is exceptionally amenable to use of conditional waivers of WDRs. Participation in an offset program that is part of a water quality attainment strategy (such as a TMDL) could be a proper condition upon which WDRs could be waived. Since the offset is part of a water quality attainment strategy, it would presumably not be against the public interest. Notably, the authority to waive WDRs is qualified by the provision that the Regional Boards must “require compliance with the conditions pursuant to which waivers are granted under this section.” (Water Code § 13269(e).) It would also be permissible to incorporate an offset as a requirement in WDRs themselves, for the same purposes as set forth above.

IV. In the absence of a TMDL, offsets must be consistent with the regulations that require all discharge permits to implement WQS.

A degree of uncertainty exists about the U.S. Environmental Protection Agency's (EPA) position on whether offsets are appropriate in the absence of a TMDL. EPA proposed an offset program that was published in the Federal Register on August 23, 1999. That program would have allowed new discharges in the absence of a TMDL, provided the new discharge and offset together demonstrated "reasonable further progress" toward attainment, and therefore did not violate the antidegradation rules. At least a 1.5 to 1 offset ratio was determined to generally constitute reasonable further progress. On July 13, 2000, however, EPA published its abandonment of the rules that would have implemented the program. Notably, the program was not abandoned for illegality, but because EPA determined its offset requirement, as proposed, was not the best mechanism to achieve progress in impaired waters in the absence of a TMDL, especially given the existing regulations set forth at 40 Code of Federal Regulations (C.F.R.) sections 122.4(d)(1)(vii), and 122.4(i).

EPA's findings were directed to the utility of a nationwide fixed offset policy, and do not necessarily imply that EPA is opposed to offsets in any given or all circumstances. In fact, there are several prominent indications to the contrary. (See e.g., Draft Framework for Watershed-Based Trading, U.S. EPA Office of Water, EPA 800-R-96-001 (May, 1996); EPA Region 9 Draft Guidance for Permitting Discharges into Impaired Waterbodies in Absence of a TMDL (5/9/00).¹) Given that no statutes or regulations directly address market-approaches to water quality regulation, any such programs must be examined within the confines of the existing regulatory structure.

New Sources: An NPDES permit cannot be issued to a new source if it would "cause or contribute" to a violation of WQS. In appropriate circumstances, however, a new discharge, coupled with an offset, might be deemed to not "cause or contribute" if the new discharge is not merely a substitute contributing source of pollution for the offset.

The NPDES regulations prohibit new discharges that would contribute to a violation of WQS:

No permit may be issued ... [¶] to] a new source or a new discharger, if the discharge from its construction or operation will cause or contribute to the violation of water quality standards. (40 C.F.R. § 122.4(i).)²

¹ Note: Since these are draft documents, they should not be relied upon as reliable authority for any position. Their inclusion here is exclusively for illustrative purposes only.

² Notably, this regulation is also qualified when a TMDL is in place, and requires the discharger to undertake a load assessment to demonstrate that additional assimilative capacity exists to allow the discharge. (40 C.F.R. § 122.4(i).)

While this language could be interpreted as prohibiting all new discharges into impaired waters without a TMDL, neither the U.S. Supreme Court nor EPA have adopted that position. (See *Arkansas v. Oklahoma* (1992) 503 U.S. 91, 107-108, but see *In The Matter of: Mayaguez Regional Sewage Treatment Plant Puerto Rico Aqueduct and Sewer Authority* (1993) 4 E.A.D. 772, fn. 21 [limiting *Arkansas* to its facts]. See also 65 Fed.Reg. 23640 col. 3.)³ In fact, it can properly be argued that a new discharge does not “cause or contribute” if coupled with an appropriate offset.

Determining whether a new discharge, coupled with an offset, will “cause or contribute to” the violation of WQS involves a degree of factual analysis, and a degree of interpretation. If a new discharger, for instance, were to propose a one-to-one mass offset from other dischargers (be they existing point or nonpoint sources) for the discharger’s increased waste load, the discharge would involve merely the substitution of one contributing source of impairment for another. A new contributing source that substitutes for an existing contributing source is still a contributing source. As such, a one-for-one offset scenario would probably be prohibited by the federal regulations.

Likewise, offsets in a venue remote to the proposed discharge would not offset the impairment-contribution from a new discharge, as the offset program would not yield benefits to the relevant water quality limited segment. Such a new discharge would merely be an additional contributing source of impairment. Again, this would appear to be prohibited by the same authorities.

On the other hand, if a discharger performs offsets greater than one-to-one, in a venue relevant to the new discharge, it may well properly be deemed to not “cause or contribute” to the impairment. In such circumstances, the net result is actually to improve water quality.

Given the regulatory prohibition against contributing to excursions above objectives, in the absence of a TMDL benchmark, the safest offsets would involve projects whose relevance to attainment of WQS should be apparent. Accordingly, if a new discharger were to instigate, for example, a legacy-abatement program, especially if such a program was probably necessary to attainment but would not readily be accomplished were it not for the efforts of the new discharger, a good argument would be apparent that the offset is not merely a substitute for an existing contributing source. If the legacy abatement efforts created significant quantifiable mass abatement above and beyond the new discharge, the cumulative effect of the discharge and offset can properly be viewed as improving water quality. Likewise, if a new source cannot meet concentration-based effluent limitations, an offset that achieved a sufficient reduction in background levels might fall within this category as it could provide room for dilution that might not otherwise be available.

³ Though not relevant to the subject of this memorandum, an obvious flaw in the no-discharge position is the fact that discharges meeting criteria end-of-pipe necessarily do not contribute to excursions above criteria.

The variable in the above analysis, however, is the lack of knowledge of the relevance of the offset to the water's impaired status. Without such knowledge, it may often be difficult to determine whether the improvement from the offset will be sufficient to defensibly reach the conclusion that the discharge is not merely a substitute cause of impairment. Any offset program in the absence of a TMDL will therefore be subject to significant scrutiny, and its defensibility in the absence of knowledge of the TMDL benchmark values, will be fact-specific, and will include an evaluation of numerous factors. These will no doubt include at least an evaluation of the substantiality of the offset achieved in exchange for the discharge (offset-ratio), as well the level of certainty that the offset program will abate a sum-certain of contributing pollutants. The inquiry may properly also include a consideration of the likelihood that the source to be offset would or could be abated through other means (the less likely the source is to be abated through other means, the more compelling the need to find alternative incentives to abate it) and whether the offset generates a permanent or temporal abatement. In any event, where a definitive improvement in water quality can be shown, such offsets ought to be encouraged.

The key legal point is that since federal law prohibits new discharges that cause or contribute to violations of water quality standards, to be defensible, any offset program must do more than substitute one contributing source for another. The program should significantly drive the watershed toward attainment or otherwise toward development of a TMDL. The key practical point is that an offset program in the absence of a TMDL should be chosen carefully to maximize the chances that a reviewing court (one that may be ideologically opposed to offsets) will find the facts compelling enough to sustain despite any skepticism.

Legacy-abatement and watershed-restoration efforts, for example, seem particularly amenable to pre-TMDL circumstances for the reasons set forth above. Such efforts may yield permanent benefits to the watershed in exchange for a temporal discharge. These offsets do not merely substitute one source for another, but create assimilative capacity through improvements to the overall environmental health of the watershed. In many cases, such efforts may ultimately need to be undertaken as part of a TMDL implementation plan in any event. Accordingly, rather than forestalling TMDL development and implementation, offsets of this nature may promote the state's performance of its TMDL obligations, and may do so in advance of formal TMDL implementation.

Existing Sources: Whether offsets can be used to allow relief from an otherwise applicable WQBEL, without a TMDL, depends upon whether the anti-backsliding rules apply, and if not, whether the discharge is protective of WQS.

1. Anti-backsliding

A key distinction between new and existing sources is the anti-backsliding rule. The anti-backsliding rule provides that, unless certain exceptions are met:

[A] permit may not be renewed, reissued, or modified . . . subsequent to the original issuance of such permit, to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) of this title. (33 U.S.C. § 1342(o).)

Since an offset program by definition provides a discharger with an avenue to obtain flexibility in lieu of the application of an otherwise stringent effluent limitation, the extent to which the anti-backsliding rule applies could have significant consequences in terms of the permissibility of offsets. However, there are many circumstances in which the anti-backsliding rule does not apply.⁴ The most notable of these is the limitation that the rule only applies to the “comparable effluent limitations in the previous permit.” (*Id.*)

In SWRCB Order WQ 2001-06 (The Tosco Order), the State Water Resources Control Board (State Board) addressed the question of whether effluent limitations in interim permits—permits reissued prior to the adoption of a TMDL—are “comparable effluent limitations” to those in the previous permit. The Tosco Order held that the discharger’s interim performance-based effluent limitation, in a compliance schedule, was not a comparable effluent limitation to that set forth in its final limit from the previous permit. The State Board reached this result for two reasons. First, the interim limit at issue was a performance-based effluent limitation, which was issued pursuant to a compliance schedule that was authorized under the applicable Regional Water Quality Control Plan. Such interim limits, the State Board held, are not designed to attain water quality, but to preserve the status quo during the term of the compliance schedule. Furthermore, if the anti-backsliding rule were deemed to apply to such limits, it would effectively prohibit compliance schedules. (Order WQ 2001-06, pp. 51-52.) Since the previously permitted final effluent limitation was a WQBEL, and the interim limitation was performance based, the two effluent limitations were not “comparable” as they were not derived with the same considerations in mind. Instead, the “comparable limit,” the State Board held, would be the alternative final (water quality based) limit, not the interim (performance based) limit. Since the two effluent limits were not comparable, the fact that the interim limit was less stringent than the previous final effluent limit did not violate the anti-backsliding rule.⁵

⁴ 33 U.S.C. section 1342(o)(2) contains five exceptions to the anti-backsliding rule, that may render it inapplicable to a given discharge. While these are not discussed separately in this memorandum, if any of these exceptions apply, the analysis that follows would also apply.

⁵ This theory would apply whenever a compliance schedule may authorize an interim discharge in excess of limits established in a prior permit. Other authorities provide for compliance schedules in appropriate, instances, most notably, EPA’s California Toxics Rule (CTR) and the state’s policy that implements it, authorizes a compliance schedule as to CTR criteria pollutants when a discharger shows that immediate compliance with criteria is infeasible, and the discharger had committed to support and expedite development of a TMDL. (Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California § 2.1.1 (2000).)

This finding has been challenged by a writ petition to the superior court. In that proceeding, the petitioner contends the term “comparable limit” refers to the permitted levels of pollutant discharge, not to the way the levels were derived. If the petitioners prevail, there will be far less permitting flexibility for interim permitting of existing facilities. Assuming the State Board’s finding is affirmed, however, those regions whose applicable water quality control plans authorize compliance schedules may, if they choose, adopt offset requirements in conjunction with an interim permittee’s compliance schedule. In cases where the interim limit is deemed comparable to the previous limit (be it on the basis of the Tosco reasoning or a subsequent judicial interpretation), section 402(o) may be an impediment to relaxing the effluent limitation to accommodate an offset in the absence of a TMDL.

2. Potential situations where the anti-backsliding rule may not apply

a. Bubbling of NPDES permitted sources

In the 1970s, the U.S. EPA endorsed permit “bubbling” for stationary sources subject to the federal Clean Air Act. Bubbling entailed treating multiple sources as though they were a single source, with an aggregate emissions limit. Since there was a total limit based on the bubble output, the individual sources within a given bubble could allocate the emissions amongst themselves, provided the sum of all emissions did not exceed the bubble limitation. This concept is similar to the mechanisms employed by the Grassland Bypass Project, which controls selenium in nonpoint source agricultural discharges to levels sufficiently protective that the San Luis Drain could be reopened. The San Luis Drain is treated as one outfall for purposes of the Project. As long as the Drain output attains standards, the dischargers may determine for themselves who may discharge what amount.

As noted, anti-backsliding applies only to “comparable effluent limitations in the previous permit.” Nothing in the Clean Water Act prohibits issuing a single NPDES permit that regulates several sources. Certainly the limitations set forth in such a super-permit are not “comparable” to prior limitations imposed on individual sources now subject to the super-permit. At most all that could be said is that the super-permit is comparable to the totality of all the super-permittees’ individual permits. Thus while such a super-permit could not properly expand the universe of what was individually permissible by the collective, individuals should not be deemed to backslide if the total output of the bubble does not exceed the cumulative total of the individuals. Of course, when using any bubbling mechanism, care must be taken to insure criteria are attained at all points within the bubble. A market system cannot authorize participants to discharge in a manner that would cause or contribute to excursions above criteria. (40 C.F.R. § 122.4(i); 40 C.F.R. § 122.44(d)(1)(vii)(A).)

b. Mini- or Partial TMDL

Although a TMDL may not have been created, often the major sources of impairment are well known. Frequently, abatement of these sources may be regarded as essential to any TMDL implementation plan even though such a plan is not yet being developed. Under such circumstances, it may be possible to create a mini- or partial TMDL that assigns preliminary LAs or WLAs to dischargers who undertake or participate in abatement of these sources in advance of the final TMDL. Since these LAs or WLAs would be assigned in exchange for abatement necessary to the success of the ultimate TMDL, they are plainly either “based on a [TMDL] or other waste load allocation.” (33 USC § 1313(d)(4)(A).) The CWA, which thus contemplates that WLAs can be created apart from a final TMDL, supports this interpretation. Note that, as above, even with a TMDL, local excursions above criteria must be prevented.

3. Similar to new permits, existing permits must insure compliance with WQS.

Irrespective of anti-backsliding, interim permits must protect applicable WQS. 40 C.F.R. section 122.44(d) requires that NPDES permits contain any more stringent requirements necessary to achieve water quality standards. Specifically, when WQBELs are developed, the permitting authority “shall ensure that:”

The level of water quality to be achieved by limits on point sources established under this paragraph *is derived from, and complies with all applicable water quality standards.* (40 C.F.R. § 122.44(d)(1)(vii)(A) (emphasis added).)

Moreover, permits shall incorporate “any more stringent limitation, including those necessary to meet water quality standards” or those “required to implement any applicable water quality standard established pursuant to this chapter.” (33 U.S.C. § 1311(b)(1)(C). See also 40 C.F.R. § 122.44(d)(5).)

The extent to which the above language authorizes or prohibits offsets in the absence of a TMDL is not clear. While it appears to be somewhat less proscriptive than the companion “cause or contribute” requirement applicable to new sources (see 40 C.F.R. § 122.4(i), supra), in practice they appear to have the same effect. (See e.g. 40 C.F.R. § 122.44(d)(1)(i).) Accordingly, the analysis set forth in section IV.A., supra, would be equally applicable here.

Variances

Similar to compliance schedules, which grant extensions of time to comply with criteria, the federal regulations authorize the use of variances in the State’s discretion, subject to EPA’s approval. (40 CFR § 131.13.) Where variances are authorized, Regional Boards may grant such variances in consideration of, or condition them upon, the performance of an appropriate offset which helps guarantee that protection of beneficial uses will not be compromised or that the

public interest will be served. (See Water Code § 13269.) Variances are authorized in certain circumstances, e.g., in section III.I of the California Ocean Plan (2000), as well as in the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California at section 5.3, for categorical and case-by-case exceptions to CTR criteria for resource and pest management, and for drinking water. Individual Regional Water Quality Control Plans may also authorize variances for conventional pollutants as well. Notably, Water Quality Order No. 2001-12-DWQ, the recent statewide general NPDES permit for the discharge of aquatic pesticides, grants such a categorical exception.

V. Conclusion

The use of offsets, pollutant trading, or other market-based mechanisms to supplement water quality regulation in impaired waters is clearly appropriate when implemented in the context of a TMDL, in which case, substantial flexibility exists to achieve WQS. For impaired waters for which no TMDL has yet been created, the anti-backsliding rules must be considered. However, when considered in the context of regulating multiple sources with a single NPDES permit (bubbling), staged TMDL efforts, or other scenarios, the anti-backsliding rules may not be a restraint on the use of market-based regulation.

For new and existing sources, the federal regulations provide that new discharges may not “cause or contribute” to violations of WQS, and that existing discharges must be “derived from and comply with” all applicable WQS. However, significant legacy abatement programs or another large-scale offsets, may well meet regulatory scrutiny depending upon fact-specific circumstances that lead the Regional Board to conclude that, even in the absence of a TMDL, the offset coupled with the discharge, creates a watershed-based improvement of a magnitude that justifies a finding that the discharge does not contribute to impairment, and is consistent with WQS. As noted above, even in the absence of a final TMDL there may nonetheless be significant flexibility in certain circumstances, which must be evaluated within the context of the facts presented.

In any event, given the scope of California’s obligations under CWA section 303(d), specifically the roughly 1400 TMDLs that must be adopted, as a practical matter, care should be taken that creative mechanisms, in advance of a TMDL, should be promotive of TMDL development or attainment of criteria generally.

Should you have any questions about this memorandum, please contact me at 341-5150, or Staff Counsel Michael Levy at 341-5193 or mlevy@exec.swrcb.ca.gov.

cc: See next page

cc: Celeste Cantú, Exec.
Tom Howard, Exec.
Stan Martinson, DWQ
Thomas Mumley, San Francisco RWQCB
Ted Cobb, OCC
Phil Wyels, OCC
WQ Attorneys



Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ? FAX (916) 341-5199 ? www.swrcb.ca.gov



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TO: Valerie Connor
Division of Water Quality

/S/

FROM: Michael J. Levy
Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: August 2, 2001

SUBJECT: REGULATORY AND STATUTORY TIME LIMITS IMPLICATED IN
DEVELOPING CALIFORNIA'S 303(d) LISTING AND DELISTING POLICY

I. INTRODUCTION

This summary is developed in response to your request for an identification of timelines of relevant activities implicated in developing a policy to guide the process of generating and maintaining California's 303(d) List, and developing California's periodic submittal to the United State Environmental Protection Agency under Title 33 United States Code section 1313(d). Pertinent abstracts from relevant statutes and regulations follow, as does a chart outlining the respective deadlines. Per your request, the chart is organized in reverse order, from latest to earliest. Please note that to the extent requirements overlap, they can be consolidated by applying the broadest requirement.

II. ABSTRACT OF PERTINENT AUTHORITIES

Prior to adoption of any state policy for water quality control, the State Water Resources Control Board (State Board) must hold a public hearing respecting the adoption of the policy. Notice of the hearing must be given to the affected regional boards 60 days before the hearing unless the Regional Water Quality Control Boards (Regional Boards) waive notice. Notice shall be published within the affected region pursuant to Government Code section 6061. Regional Boards shall submit written recommendations to the State Board at least 20 days before the hearing. (Wat. Code § 13147.)

Notice under Government Code section 6061 requires publication once in a newspaper of general circulation. The notice need not include a copy of the regulation. (Gov. Code § 6060 - 61; 63 Ops.Cal.Atty.Gen. 474, June 4, 1980.)

California Environmental Protection Agency

40 Code of Federal Regulations section 25.5, regarding public hearings, requires notice prior to the hearing, that is “well publicized” and “mailed to appropriate portions of the list of interested and affected parties” 45 days prior to the hearing. The notice “shall include or be accompanied by” a discussion of the agency’s tentative decision. (40 C.F.R. § 25.5(b).)

A Responsiveness Summary (identifying public participation activities, the matters on which the public was consulted, summarizing the public’s views, comments, criticisms, and suggestions, and setting forth the agency’s specific responses) shall be published as part of the preamble to interim and final regulations. (40 C.F.R. § 25.10.)

The Office of Administrative Law (OAL) shall approve or disapprove a policy or regulation within 30 working days of submittal, otherwise it will be deemed approved. (Gov. Code § 11349.3. See also Gov. Code § 11353(b) for details of what must be submitted to OAL.)

Government Code section 11353(d) requires that any revision of a policy or guideline shall be made available for inspection by the public within 30 days of its effective date.

III. APPLICABILITY OF CEQA

We are of the opinion that the California Environmental Quality Act (CEQA) (Pub. Res. Code § 21000 et seq.) does not apply to adoption of this policy because it appears that the policy cannot “have the potential for causing a significant effect on the environment.” (Cal. Code Regs., tit. 14, § 15061(b)(3).) A “significant effect on the environment” is defined as “a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected.” (Cal. Code Regs., tit. 14, § 15382.) This conclusion is based on at least the following:

?? Improving water quality is not an “adverse change;”

?? Developing a list of impaired waters as required by Title 33 United States Code section 303(d), does not affect any change in physical conditions in any area affected.

Moreover, even if the policy could constitute a “significant effect on the environment,” it would fall within at least two categorical exemptions, specifically, those pertaining to regulatory actions to protect natural resources (Cal. Code Regs., tit. 14, § 15307), and regulatory actions to protect the environment (Cal. Code Regs., tit. 14, § 15308). Accordingly, we would want to consider filing a Notice of Exemption (NOE) after the policy is approved by OAL. (Cal. Code Regs., tit. 14, § 15062(a).) The NOE would start running a 35-day statute of limitations within which to challenge the determination that the project is CEQA exempt. (Cal. Code Regs., tit. 14, § 15062(d).)

Notwithstanding the above conclusion, the State Board’s regulations at Chapter 27, Article 6, relating to Exempt Regulatory Programs (Cal. Code Regs., tit. 23 § 3775 et seq.), require that

certain actions that are deemed “functionally equivalent” to CEQA be undertaken whenever “[a]ny standard, rule, regulation, or plan [is] proposed for board approval or adoption.” (Cal. Code Regs., tit. 23, § 3777(a).) Section 3777(a), perhaps inadvertently, does not contain an exception for actions that should fall outside of the applicable scope of CEQA. While it could properly be argued that Article 6 does not apply unless CEQA would otherwise be implicated, the most cautious approach would be to nonetheless employ the procedures set forth in Article 6. Although this approach will require the State Board to perform additional tasks in connection with the policy, in large measure these tasks would be required in any event. Notably, assuming there are no significant effects, the end result would still be the functional equivalent of either an NOE or Negative Declaration, not an Environmental Impact Report. Please note that the conclusion of no significant effects is preliminary. If the contents of the policy subsequently dictate a contrary conclusion, a further examination of which procedures to follow would be appropriate.

Article 6 requires that the policy be accompanied by a completed Environmental Checklist, an outdated copy of which is set forth at Appendix A, following the Article. The Office of Planning and Research has developed a more up-to-date form. A written report must also be prepared, containing the following:

- ?? A brief description of the proposed activity;
- ?? Reasonable alternatives to the proposed activity; and
- ?? Mitigation measures to minimize any significant adverse environmental impacts from the activity.

(Cal. Code Regs., tit. 23, § 3777(a).) After completion of the written report, the State Board is required to provide a Notice of Filing (NOF) of the report to the public and to any person who in writing requests such notice. (Cal. Code Regs., tit. 23, § 3777(b).) An example of the NOF is contained at Appendix C, following the Article, but it should be modified as appropriate. The State Board must provide the NOF at least 45 days prior to the date of the hearing. (*Id.*) This report may also satisfy the parts of OAL’s regulations that require a summary of the regulatory provisions that are proposed and a summary of the necessity for the regulatory provisions. The report should be drafted with those provisions in mind. (See Gov. Code § 11353(b).)

Upon completion of the written report, the State Board is required to consult with other public agencies that have jurisdiction over the proposed activity, and persons having special expertise with regard to any potential environmental effects. (Cal. Code Regs., tit. 23, § 3778.) This can be accomplished by transmitting of copy of the written report, or by any other appropriate means. (*Id.*)

Article 6 requires the State Board to prepare responses to comments received 15 days or more before the hearing, and such responses shall be available at the hearing for any person to review. (Cal. Code Regs., tit. 23, § 3779(a).) Any comments received less than 15 days before the hearing should responded to in writing to the extent feasible, and if not, they must be addressed

orally at the hearing. (Cal. Code Regs., tit. 23, § 3779(b).) Responses to comments shall become part of the administrative record. (*Id.*) The State Board is prohibited from approving a project if there are feasible alternatives or feasible mitigation measures available that would substantially lessen any significant adverse impact on the environment from the project. (Cal. Code Regs., tit. 23, § 3780.)

The final requirement from Article 6 prescribes that the State Board shall file a Notice of Decision (NOD) with the Secretary for Resources, who will post the NOD for public inspection for at least 30 days. The NOD must be filed with the Secretary after the project is adopted or approved. (23 Cal. Code Regs., § 3781.) A sample NOD is located at Appendix B following Article 6.

IV. SUMMARY OF APPLICABLE TIMELINES

Action	Day (minimum time)	Authority
Policy must be made available for inspection by the public within 30 days of its effective date.	30 days before effective date of policy	(Gov. Code § 11353(d))
File CEQA Notice of Exemption.	After policy approved (starts 35-day limit to challenge NOE)	(Cal. Code Regs., tit. 14, § 15062.)
File NOD with the Secretary of Resources	After policy approved by OAL	(Cal. Code Regs., tit. 23, § 3781.)
OAL Approval or disapproval.	30 days after submit to OAL	(Gov. Code § 11349.3)
Hearing	Day 0	
Compile written responses to comments received 15 or more days before the hearing; responses must be available for public review at hearing. To extent possible compile responses for remaining comments, or at least insure responses are made orally.	-15	(Cal. Code Regs., tit. 23, § 3779.)

Regional Boards submit written recommendations to State Board.	-20	(Wat. Code § 13147)
Reports, documents, and data relevant to the discussion shall be made available to the public.	-30 (or earlier if needed to allow time to assimilate comments)	(40 C.F.R. § 25.5(b), 25.4(c).)
Mail notice to interested and affected parties, with a discussion of the tentative decision and information on where to acquire relevant materials.	-45 (state law requires 10 days notice)	(40 C.F.R. § 25.5(b), 25.4(c), 25.4(b)(5); Gov. Code § 11125.)
Provide Notice of Filing (of environmental checklist and report) to public; and consult with relevant agencies and persons with special expertise.	-45	(Cal. Code Regs., tit. 23, § 3777(b). 3778.)
Notice of Hearing to RBs	-60	(Wat. Code § 13147)
Publish Notice in affected regions in newspaper of general circulation.	-60	(Gov. Code § 6060, 6061)

Should you have any questions, please feel free to contact me at 341-5193 or mlevy@exec.swrcb.ca.gov.

cc: Stan Martinson, DWQ
Stefan Lorenzato, DWQ
Tom Mumley, San Francisco Bay RWQCB
TMDL Team



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Office of Chief Counsel

1001 I Street, 22nd Floor, Sacramento, California 95814
P.O. Box 100, Sacramento, California 95812-0100
(916) 341-5161 ♦ FAX (916) 341-5199 ♦ www.swrcb.ca.gov



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TO: Teresa Newkirk
Unit Chief, TMDL Development
Colorado River Basin RWQCB

FROM: Lori T. Okun /s/
Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: 7/10/01

SUBJECT: TIMING REQUIREMENTS FOR REGIONAL BOARD AGENDA ITEMS

This memorandum discusses the various deadlines that govern submitting total maximum daily loads (TMDL) to the Regional Water Quality Control Board (Regional Board). Procedurally, the Regional Board adopts a TMDL by amending the Basin Plan to incorporate the TMDL. The Clean Water Act, CEQA, and the Bagley-Keene Open Meeting Act (and related regulations) all include relevant timelines. In general, staff must complete the TMDL report and Basin Plan amendment, provide the Notice of Filing, and notify interested parties of its tentative decision at least **45 days before the Regional Board meeting**. Written responses to public comments must be complete **before the meeting**. Because staff needs time to prepare written comments, staff should provide the 45-day notice well in advance of the deadline for controversial items. The written responses need not be available to the public until the hearing. The Regional Board needs time to review the comment responses in advance of the hearing. Region 7's policy is to provide materials to the Board **seven to ten days before the meeting** where possible.

Thus, in order to ensure that staff has time to prepare comment responses and provide them to the Board in a timely manner, staff should issue provide the Notice of Filing at least 60 days before the meeting. Staff should also start working on comment responses well in advance of the meeting.

DISCUSSION

State Water Resources Control Board (State Water Board) regulations require the Regional Board to make the TMDL report (the CEQA "substitute document") available for public comment for at least 45 days. The 45-day period commences with the Notice of Filing and ends

on or before the Regional Board hearing (*i.e.*, the Board meeting) on the amendment. (Cal. Code Regs., tit. 23, § 3777.)¹

Clean Water Act regulations require the Regional Board to mail notice of the amendment to all interested parties at least 45 days before the hearing.² (40 C.F.R. § 25.5(b).) Interested parties are those “persons and organizations who have expressed an interest in or may, by the nature of their purposes, activities or members, be affected by or have an interest in any covered activity.” (40 C.F.R. § 25.4(b)(5).) In addition, where possible, interested parties include “among others, representatives of consumer, environmental, and minority associations; trade, industrial, agricultural, and labor organizations; public health, scientific, and professional societies; civic associations; public officials; and governmental and educational associations.” (*Id.*; 40 C.F.R. § 25.3(a).) The Clean Water Act notice must include the Regional Board’s tentative decision, if any, and information regarding how to obtain copies of relevant documents.

The Regional Board must provide written responses to significant public comments before adopting a TMDL or Basin Plan amendment. (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 133; *Friends of the Old Trees v. Dept. of Forestry and Fire Protection* (1997) 52 Cal.App.4th 1383, 1403; Cal. Code Regs., tit. 23, § 3779.) The comments must be available to the public at the Regional Board hearing. (Cal. Code Regs., tit. 23, § 3779.) The Regional Board must provide written responses to all significant comments that the Board receives 15 or more days before the hearing. The Regional Board should respond in writing to later comments if feasible. When written responses to later comments are not feasible or when oral comments are presented at the hearing, the Regional Board must respond orally to the comments at the hearing. (Cal. Code Regs., tit. 23, § 3779.)

As a practical matter, staff prepares the written response on behalf of the Regional Board. Region 7’s policy is to provide meeting materials to Board members seven to ten days before each meeting. Responses to comments must be fairly detailed,³ which will affect staff’s planning for meeting these timelines. When calendaring the date for providing the CEQA Notice of Filing and Clean Water Act notice, staff should allow time to prepare the written comments.

The resolution adopting the Basin Plan amendment must be on the Regional Board’s agenda. The agenda must describe the resolution in sufficient detail to inform the public about the issues the Board will consider. (Gov. Code § 11125; 67 Ops.Cal.Atty.Gen. 84 (1984); Cal. Code Regs., tit. 23, § 647.2.) The Regional Board must provide the agenda at least 10 days before the hearing to anyone who has requested notice (Cal. Code Regs., tit. 23, § 647.2.), and to all cities and

¹ The Clean Water Act also has a 45-day notice period for hearings, and a 30-day requirement for comments. (40 C.F.R. Part 25.) CEQA only requires a 30-day comment period (*Ultramar, Inc. v. SCAQMD* (1993) 17 Cal.App.4th 689, 698-700; Pub Resources Code § 21080.5, subd. (d)(3)), but the longer periods in the CWA and SWRCB regulations control.

² The notice requirement may be reduced to 30 days for workshops, if there is good reason why the Board cannot provide longer notice. (40 C.F.R. § 25.6.)

³ See my memorandum to you dated June 14, 2001.

counties, and certain newspapers, within the region. (Gov. Code § 11125.9.) These notice requirements probably will not affect staff's planning deadlines.

After the Regional Board adopts the TMDL and Basin Plan amendment, the Regional Board must submit the Basin Plan amendment and administrative record to the State Board. (Wat. Code §§ 13245.5, 13246; Gov. Code § 11347.3, subd. (c).) (The State Board must include copy of the rulemaking file when it submits the amendment to the Office of Administrative Law (OAL).) There is no statutory deadline for the Regional Board's submission. Once the Regional Board submits the amendment, the State Board must provide 45 days public notice before acting on it (Gov. Code § 11346.4), but must act within 60 days (Wat. Code § 13246).⁴ (See also, *State Water Resources Control Board v. Office of Administrative Law* (1993) 12 Cal.App.4th 697, 701-706.) The State Board then sends the amendment to OAL and, after OAL approval, to the U.S. EPA. The Regional Board files a Notice of Decision with the Secretary for Resources after final approval of the TMDL.

Please contact me if you have further questions or if you need information about what the administrative record should contain.

cc: Regional Board Attorneys, OCC
Michael J. Levy, OCC

⁴ These time periods are concurrent; *i.e.*, if the State Board provided public notice on Day 1, the Board could act on the amendment between Day 46 and Day 60.

Teresa Newkirk

- 4 -

bc: Phil Wyels, OCC
Lori Okun, OCC
Debbie Matulis, OCC

LTOkun/sehosmann

7/10/01

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Winston H. Hickox
*Secretary for
Environmental
Protection*

State Water Resources Control Board

Office of Chief Counsel

1001 I Street • Sacramento, California 95814 • (916) 341-5161
Mailing Address: P.O. Box 100 • Sacramento, California 95812-0100
FAX (916) 341-5199 • Internet Address: <http://www.swrcb.ca.gov>



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TO: Stefan Lorenzato
TMDL Coordinator
Division of Water Quality

/ s /

FROM: Michael J. Levy
Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: January 26, 2001

SUBJECT: GUIDANCE REGARDING THE EXTENT TO WHICH EFFLUENT LIMITATIONS
SET FORTH IN NPDES PERMITS CAN BE RELAXED IN CONJUNCTION WITH A
TMDL

This memorandum is intended to address whether and to what extent effluent limitations in existing NPDES permits can be conditionally relaxed¹ to accommodate a TMDL implementation program. The inquiry concerns the extent to which point sources can be offered incentives to participate in some sort of watershed restoration effort, or other broad-based program designed to bring the watershed into compliance with the state water-quality standards.²

I. Whether effluent limitations in an NPDES permit can be relaxed depends upon which effluent limitations are under consideration

A. Technology-based effluent limitations cannot be relaxed

The Code of Federal Regulations (CFR) dictates that the technology-based effluent limitations (TBELs) shall be the floor to controls that are permissible under the Clean Water Act.

“Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a

¹ The term “conditional waiver” describes procedures under California Water Code § 13269 whereby state Waste Discharge Requirements (“WDRs”) may be waived subject to certain conditions that guarantee that the waiver is not against the public interest. Unlike state WDRs, NPDES permits cannot be waived. (33 USC § 1311(a).) Since the term “conditional waiver” is a term-of-art, peculiar to state law, and may carry with it unintended connotations, its use is avoided in this memorandum and should be avoided when discussing NPDES permits or other requirements of federal law.

² As used in this memorandum, the term “water quality standards” is as defined in Section 303 of the Clean Water Act (33 USC § 1313) and the pertinent regulations. (40 CFR § 130.3.) The term, as applied to California, refers to the water quality control plans (Water Code § 13240), water quality objectives (Water Code § 13241), the anti-degradation policy (Water Code § 13000), and all other water quality requirements of the State.

permit issued under section 402 of the Act.” (40 CFR § 125.3.)
Furthermore, the regulations proscribe:

“In no event may a [NPDES] permit ...be renewed, reissued, or modified to contain an effluent limitation which is less stringent than required by effluent guidelines [technology-based limits pursuant to Section 304(b)] in effect at the time the permit is renewed reissued, or modified.” (40 CFR §122.44(l)(2)(ii). See also 33 USC §1313(e)(3)(A).) Thus, the TBELs set forth in a NPDES permit cannot be relaxed under any circumstance relevant in this memorandum.³”

B. Water-quality based effluent limitations may be tightened or relaxed so long as the ultimate NPDES permit is consistent with assumptions and requirements of the TMDL

While the CFR dictates that the TBELs are the floor to discharges allowed in NPDES permits, the only floor to water-quality based effluent limitations (WQBELs) prescribed for impaired waters is the water-quality standards themselves.

“In no event may such a permit to discharge into waters be renewed, issued, or modified to contain a less stringent effluent limitation if the implementation of such limitation would result in a violation of a water quality standard under section 303 applicable to such waters. (40 CFR § 122.44(l)(2)(ii) (emphasis added.)

When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that: [¶] (A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and [¶] (B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7. ” (40 CFR § 122.44(d)(1)(vii) (emphasis added).)

Although the federal anti-backsliding stature would ordinarily preclude the relaxation of a WQBEL, a specific exception exists when such relaxation is in the context of a TMDL:

“[A] permit may not be renewed, reissued, or modified to contain effluent limitations which are less stringent than the comparable effluent limitations in the previous permit except in compliance with section 1313(d)(4) [303(d)(4)] of this title. (33 USC § 1342(o)(1).)”

³ The only exceptions to this rule are set forth in 40 CFR § 122.44(l)(2)(i), and relate largely to technical or legal mistakes, necessity, or changes to the facility.

While the EPA might have required QBELs to be identical to a discharger's wasteload allocation, it did not do so. The EPA instead opted to provide the states the latitude to determine how to achieve the end results dictated by the TMDL. Accordingly, the regulations require that the QBELs be "consistent with the assumptions and requirements of" rather than "identical to" or "not less stringent than" wasteload allocations. The regulations thus do allow the permitting authority to craft creative solutions that may include incentives to point source dischargers to assist in non-point source abatement through programs that include relaxation of the otherwise applicable level of QBELs. These alternative requirements in lieu of application of the most restrictive QBELs are permissible only if they are "consistent with the assumptions and requirements" of the TMDL, and will not result in violation of the water quality standards. Moreover, given the code's requirement that loads be established considering seasonal variations and a margin of safety which takes into account any lack of knowledge (33 USC § 1313(d)(1)(C)), the permitting authority should take care to consider the scientific uncertainty attendant to any alternative plans to be sure that such a plan will not result in a violation of the water quality standards.

Such requirements or incentives should not be mistaken for waivers of QBELs. The NPDES permit will still contain a QBEL, which is not and cannot be waived. However, the level of the QBEL may be less restrictive, or significantly less restrictive than set forth in the previous NPDES permit so long as the relaxed QBEL is conditioned upon the other requirements which collectively "are consistent with the assumptions" of the TMDL and "will not result in violation" of the water-quality standards. The above analysis is entirely consistent with the EPA's concept of the functions of a wasteload allocation, which the regulations define as "a type of water quality-based effluent limitation." (40 CFR § 130.2(h).) Hence,

"[i]f Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs. (40 CFR § 130.2(i). See also 33 USC § 1313(d)(4)(A) [effluent limitations may be revised if the cumulative effect of all such revisions will assure attainment of the water quality standards].)"

The foregoing discussion should not be interpreted to imply that an offset program is required to relax a QBEL. Again, the QBEL only needs to be consistent with the assumptions and requirements of the TMDL and will not result in a violation of water quality standards. Accordingly, a QBEL can be implemented that is substantially less stringent than the existing limitation, if for instance, the increased share of the wasteload allocated to the point source is accommodated by more stringent effluent limitations elsewhere, or by other appropriate assumptions of the TMDL that are designed to achieve water quality standards. In this respect, a relaxed QBEL need not even be conditioned upon participation in other pollutant-abatement programs.

II. Requirements that impose conditions on relaxed WQBELs must be set forth in the NPDES permit and be directly enforceable.

Any additional requirements issued in lieu of a stringent WQBEL must be memorialized in the body of the NPDES permit:

“In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(d) Water quality standards and state requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines ... necessary to: [¶] (1) Achieve water quality standards established under section 303....” (44 CFR § 122.44(d)(1).) Notably, any such requirements that are contained in the NPDES permit will be enforceable with civil or criminal penalties, or injunctive relief under Water Code sections 13385(a)(2), 13386, and 13387(a)(2), as well as 13350(a).”

III. Conclusion

A NPDES permit for an impaired water body must contain both technology-based and water quality-based effluent limitations. The WQBELs may not be relaxed in contemplation of a TMDL implementation program, but significant latitude is available when crafting the WQBELs. The limits of that latitude, however, are twofold. 1) The WQBELs must not result in a violation of water quality standards; and 2) the WQBELs must be consistent with the assumptions of the TMDL, which, of course, is designed to achieve the water quality standards. Any alternatives that are instituted as a condition of a relaxed WQBEL must be memorialized in the discharger's NPDES permit.

cc: Craig Wilson, OCC
Ted Cobb, OCC
Phil Wyels, OCC
Sheryl Freeman, OCC
Jennifer Soloway, OCC
Jorge León, OCC
Frances McChesney, OCC
Tim Regan, OCC
Steven H. Blum, OCC
Karen O'Haire, OCC
John Richards, OCC
Betsy Jennings, OCC
Erik K. Spiess, OCC
Sheila Vassey, OCC
Yuri Won, OCC
Marleigh Wood, OCC



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Office of Chief Counsel

1001 I Street • Sacramento, California 95814 • (916) 341-5161
Mailing Address: P.O. Box 100 • Sacramento, California 95812-0100
FAX (916) 341-5199 • Internet Address: <http://www.swrcb.ca.gov>



Gray Davis
Governor

TO: Jim Kassel, DWQ
John Ladd, DWQ
Stan Martinson, DWQ

FROM: / s /
Michael J. Levy
Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: December 21 2000

SUBJECT: GUIDANCE REGARDING SECTION 303(D) LIST FOR THE 2002
SUBMISSION

This memorandum is in response to an options memorandum from Stefan Lorenzato that outlines several ways in which the State Water Board might address the Section 303(d) List for the year 2002, given that no listing policy is currently in place. The memorandum is intended to provide legal guidance on the level of involvement the State Water Board should have in developing the 303(d) list for the 2002 submission, and what actions must be undertaken to avoid the risk of litigation premised upon allegations of “underground regulations.”

I. The State Water Board may exercise as much or as little control over the development of the 303(d) list as it deems appropriate, but in the absence of a regulation on point, it should exercise the ultimate discretion over the composition of the list

Section 303(d) of the Clean Water Act requires that “*each state shall identify those waters...*” for which effluent limitations are not stringent enough to achieve water quality standards. (33 USC § 1313(d) (emphasis added).) Article 4 of Chapter 3 of the Porter-Cologne Water Quality Control Act, addressing the powers and duties of the State Water Board, sets forth that:

The state board is designated as the state water pollution control agency for all purposes stated in the Federal Water Pollution Control Act ..., and is ...
(b) authorized to exercise any powers delegated to the state by the [Clean Water Act]. (Water Code § 13160.)

While at first glance section 13160 might be deemed a charge solely to the State Water Board, nothing in that section precludes delegation of some or all of that authority to the Regional Water Boards. In fact while subdivision (a) of 13160 assigns certification processes (e.g., under

section 401 of the Clean Water Act) to the State Water Board, the State Water Board delegated the primary responsibility of certifications to the Regional Water Boards. (See 23 Cal. Code. Regs. § 3830 et seq.)

Given the fact that no such regulations have been promulgated relative to the 303(d) listing process, however, it would appear that the State Water Board should exercise the ultimate discretion over the composition of the list. Notably, by retaining the ultimate discretion over the List, any litigation about the contents of the List or the processes used would necessarily be consolidated at the State Water Board level, rather than incrementally in the various regions.

II. To minimize the risk of “underground regulation” litigation, the State Water Board should ensure the TMDL listing policy that has not yet been developed is not applied to dictate the manner in which the 2002 List is developed

The Administrative Procedures Act (Govt. Code § 11370 et seq. hereinafter “APA”) governs the manner in which agencies are permitted to promulgate regulations. The term “underground regulations” has been coined to describe informal rules or regulations that have not been adopted in accordance with the APA.

The APA is partly designed to eliminate the use of "underground" regulations; rules which only the government knows about. If a policy or procedure falls within the definition of a "regulation" within the meaning of the APA, the promulgating agency must comply with the procedures for formalizing such regulation, which include public notice and approval by the Office of Administrative Law (OAL). Failure to comply with the APA nullifies the rule. (*Kings Rehabilitation Center, Inc. v. Premo* (1999) 69 Cal.App.4th 215, 217, 81 Cal.Rptr.2d 406, 407, citing *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204, 149 Cal.Rptr. 1, 583 P.2d 744. See also *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 59 Cal.Rptr.2d 186.)

Although due to time constraints, the 303(d) List for the year 2002 will necessarily be in the process of development at the same time that the State Water Board is developing its listing policy, the fact that both processes occur simultaneously does not give rise to a violation of the APA, provided the developing policy is not enforced upon those developing the List. Accordingly, though the State Water Board may assign the primary role of developing draft lists for each region to the Regional Water Boards, it would only violate the APA if direction were provided as to how the State Water Board interprets the authorities and expects them to be implemented, in the absence of a formal rule or policy. This is not to suggest that Regional Water Boards (or the State Water Board), in exercising their discretion when promulgating the list, cannot make use of any and all available information, including matters of which they are aware from the development of the policy. It does mean that the developing policy cannot be used to define the State and Regional Water Boards' interpretation of their obligations.

III. Conclusion

The State Water Board may choose whichever of the options described in the options memorandum that it determines is appropriate; however, the ultimate discretion about the composition of the 2002 List should be exercised by the State Water Board, in the absence of a regulation formally delegating those functions to the Regional Water Boards. Moreover, ensuring that the final List is the work-product of the State Water Board rather than the Regional Water Boards will necessarily consolidate any litigation about the composition of the List or the processes employed in its development, at the State level. Finally, to avoid the risk of litigation premised upon violations of the APA, the developing listing policy should not be used to define the State and Regional Water Boards' interpretation of their obligations in creating the 2002 List.

cc: Stefan Lorenzato
TMDL Coordinator
Division of Water Quality

Jim Kassel, et al.

- 4 -

December 21, 2000

bc: Ted Cobb, OCC

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California Environmental Protection Agency





Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Office of Chief Counsel

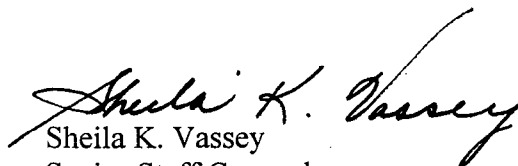
901 P Street • Sacramento, California 95814 • (916) 657-2154
Mailing Address: P.O. Box 100 • Sacramento, California 95812-0100
FAX (916) 653-0428 • Internet Address: <http://www.swrcb.ca.gov>



Gray Davis
Governor

TO: Stefan Lorenzato
TMDL Coordinator
Division of Water Quality

FROM:


Sheila K. Vassey
Senior Staff Counsel

OFFICE OF CHIEF COUNSEL

DATE: OCT 27 1999

SUBJECT: ECONOMIC CONSIDERATIONS IN TMDL DEVELOPMENT AND
BASIN PLANNING

ISSUE

When are the Regional Water Quality Control Boards (Regional Water Boards or Boards) legally required to consider economics in Total Maximum Daily Load (TMDL)¹ development and water quality control planning (basin planning)?²

CONCLUSION

The Regional Water Boards, in general, adopt TMDLs as basin plan amendments. Under state law, there are three triggers for Regional Water Board consideration of economics or costs in basin planning. These are:

- The Regional Water Boards must estimate costs and identify potential financing sources in the basin plan before implementing any agricultural water quality control program.
- The Boards must consider economics in establishing water quality objectives that ensure the reasonable protection of beneficial uses.

¹ See 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7.

² See Wat. Code §§ 13240-13247.

- The Boards must comply with the California Environmental Quality Control Act (CEQA)³ when they amend their basin plans. CEQA requires that the Boards analyze the reasonably foreseeable methods of compliance with proposed performance standards and treatment requirements. This analysis must include economic factors.

Economic factors come into play under federal law when the Regional Water Boards designate uses. Specifically, the Boards can decide not to designate, dedesignate, or establish a subcategory of, a potential use where achieving the use would cause substantial and widespread economic and social impact.

DISCUSSION

I. STATE LAW

Under federal and state law, the Regional Water Boards are required to include TMDLs in their basin plans.⁴ There are three statutory triggers for an economic or cost analysis in basin planning. These triggers are:

- adoption of an agricultural water quality control program;
- adoption of water quality objectives; and
- adoption of a treatment requirement or performance standard (CEQA).

Each category is briefly discussed below.

A. Agricultural Water Quality Control Program

Agricultural activities are significant sources of nonpoint source pollution. Many waterbodies in the state are impaired due to one or more agricultural operations. As a result, the Regional Water Boards will be faced with developing programs to control agricultural activities, as part of TMDL development.

Under the Porter-Cologne Water Quality Control Act (Porter-Cologne),⁵ before a Regional Water Board implements an agricultural water quality control program, the Board must identify

³ Pub. Resources Code § 21000 et seq.

⁴ See 33 U.S.C. § 1313(d); 40 C.F.R. § 130.7(d)(2) (TMDLs must be incorporated into the state's water quality management plan. In California the basin plans are part of the state's water quality management plan.); Wat. Code §§ 13050(j), 13242.

⁵ Wat. Code § 13000 et seq.

the total cost of the program and potential sources of financing.⁶ This information must be included in the basin plan.

The statute does not define "agricultural" programs. The Legislature has, however, defined agricultural activities elsewhere to mean activities that generate "horticultural, viticultural, forestry, dairy, livestock, poultry, bee, or farm product[s]."⁷ Because "agricultural" programs under Porter-Cologne are not restricted to particular activities, presumably, the Legislature intended that the term be interpreted broadly. Thus, the Regional Water Boards should identify costs and financing sources for agricultural water quality control programs" covering not only typical farming activities but also silviculture, horticulture, dairy, and the other listed activities.

The statute focuses only on costs and financing sources. The statute does not require the Regional Water Boards to do, for example, a cost-benefit analysis or an economic analysis.

B. Water Quality Objectives

Porter-Cologne requires that the Regional Water Boards take "economic considerations", among other factors, into account when they establish water quality objectives.⁸ The objectives must ensure the reasonable protection of beneficial uses and the prevention of nuisance.⁹

Attached to this memorandum is a 1994 memorandum containing guidance on the consideration of economics in the adoption of water quality objectives.¹⁰ The key points of this guidance are:

- The Boards have an affirmative duty to consider economics when adopting water quality objectives.
- At a minimum, the Boards must analyze: (1) whether a proposed objective is currently being attained; (2) if not, what methods are available to achieve compliance with the objective; and (3) the costs of those methods.

⁶ *Id.* § 13141.

⁷ Food & Agr. Code §§ 564(a), 54004.

⁸ Wat. Code § 13241. The other factors include the past, present, and probable future beneficial uses of water; environmental characteristics of the hydrographic unit under consideration; water quality conditions that could reasonably be achieved through the coordinated control of all factors affecting water quality in the area, the need for developing housing, and the need to develop and use recycled water.

⁹ *Ibid.*

¹⁰ Memorandum, dated January 4, 1994, from William R. Attwater, Chief Counsel, to Regional Water Board Executive Officers and Attorneys, entitled "Guidance on Consideration of Economics in the Adoption of Water Quality Objectives".

- If the economic consequences of adoption of a proposed objective are potentially significant, the Boards must state on the record why adoption of the objective is necessary to ensure the reasonable protection of beneficial uses or the prevention of nuisance.
- The Regional Water Boards can adopt objectives despite significant economic consequences.
- The Boards are not required to do a formal cost-benefit analysis.

C. CEQA

The Regional Water Boards must comply with CEQA when they amend their basin plans.¹¹ The State Resources Agency has certified the basin-planning program as exempt from the requirement to prepare environmental documents under CEQA.¹² In lieu of preparing an environmental impact report or negative declaration, the Boards must comply with the State Water Resources Control Board's regulations on exempt regulatory programs when they amend their basin plans.¹³ These regulations require the Boards to prepare a written report that analyzes the environmental impacts of proposed basin plan amendments.¹⁴ In general, CEQA requires the Regional Water Boards to consider economic factors only in relation to physical changes in the environment.¹⁵

CEQA also has specific provisions governing the Regional Water Boards' adoption of regulations, such as the regulatory provisions of basin plans that establish performance standards or treatment requirements. The Boards must do an environmental analysis of the reasonably foreseeable methods of compliance with those standards or requirements.¹⁶ They must consider economic factors in this analysis.

CEQA does not define "performance standard"; however, the term is defined in the rulemaking provisions of the Administrative Procedure Act.¹⁷ A "performance standard" is a regulation that describes an objective with the criteria stated for achieving the objective.¹⁸

¹¹ See Pub. Resources Code § 21080.

¹² See Cal. Code Regs., tit. 14, § 15251(g).

¹³ See Cal. Code Regs., tit. 23, §§ 3775-3782.

¹⁴ *Id.* § 3777.

¹⁵ See Cal. Code Regs., tit. 14, § 15064(e).

¹⁶ Pub. Resources Code § 21159.

¹⁷ Gov. Code §§ 11340-11359.

¹⁸ *Id.* § 11342(d).

TMDLs will typically include performance standards. TMDLs normally contain a quantifiable target that interprets the applicable water quality standard. They also include wasteload¹⁹ allocations for point sources, and load allocations²⁰ for nonpoint sources and natural background to achieve the target.²¹ The quantifiable target together with the allocations may be considered a performance standard. Thus, the Regional Water Board must identify the reasonably foreseeable methods of compliance with the wasteload and load allocations and consider economic factors for those methods. This economic analysis is similar to the analysis for water quality objectives discussed above. That is, the Regional Water Board should determine: (1) whether the allocations are being attained; (2) if not, what methods of compliance are reasonably foreseeable to attain the allocations; and (3) what are the costs of these methods.

II. FEDERAL LAW

Under federal law, economics can be considered in designating potential beneficial uses. Specifically, the federal water quality standards regulations allow a state to dedesignate, to decide not to designate, or to establish a subcategory of a potential beneficial use on economic grounds. To rely on this basis, the state must demonstrate that attaining the use is infeasible because the controls necessary to attain the use "would result in substantial and widespread economic and social impact."²²

The states can take this action only for potential uses. These are uses that do not meet the definition of an "existing use". Existing uses are those uses actually attained in the water body on or after November 28, 1975.²³

Attachment

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¹⁹ See 40 C.F.R. § 130.2(g). A wasteload allocation is the portion of the receiving water's loading capacity that is allocated to one of its existing or future point sources of pollution.

²⁰ See *id.* § 130.2(g). A load allocation is the portion of the receiving water's loading capacity that is attributed either to one of its existing or future nonpoint sources of pollution or to natural background sources.

²¹ See *id.* § 130.2(i). A TMDL is the sum of the individual wasteload and load allocations.

²² See *id.* § 131.10(g)(6).

²³ *Id.* § 131.3(e).

Cheon

State of California

Memorandum

To : Regional Water Board
Executive Officers

Date: JAN - 4 1994

Regional Water Board Attorneys

William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL
STATE WATER RESOURCES CONTROL BOARD
901 P Street, Sacramento, CA 95814
Mail Code: G-8

From :

Subject:

GUIDANCE ON CONSIDERATION OF ECONOMICS IN THE ADOPTION OF WATER QUALITY OBJECTIVES

ISSUE

What is required of a Regional Water Quality Control Board (Regional Water Board) in order to fulfill its statutory duty to consider economics when adopting water quality objectives in water quality control plans or in waste discharge requirements?

CONCLUSION

A Regional Water Board is under an affirmative duty to consider economics when adopting water quality objectives in water quality control plans or, in the absence of applicable objectives in a water quality control plan, when adopting objectives on a case-by-case basis in waste discharge requirements. To fulfill this duty, the Regional Water Board should assess the costs of the proposed adoption of a water quality objective. This assessment will generally require the Regional Water Board to review available information to determine the following: (1) whether the objective is currently being attained; (2) what methods are available to achieve compliance with the objective, if it is not currently being attained; and (3) the costs of those methods. The Regional Water Board should also consider any information on economic impacts provided by the regulated community and other interested parties.

If the potential economic impacts of the proposed adoption of a water quality objective appear to be significant, the Regional Water Board must articulate why adoption of the objective is necessary to assure the reasonable protection of beneficial uses of state waters, despite the potential adverse economic consequences. For water quality control plan amendments, this

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discussion could be included in the staff report or resolution for the proposed amendment. For waste discharge requirements, the rationale must be reflected in the findings.

DISCUSSION

A. Legal Analysis

1. Porter-Cologne Water Quality Control Act

Under the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq. (Porter-Cologne Act or Act), the State Water Resources Control Board (State Water Board) and the Regional Water Boards are the principal state agencies charged with responsibility for water quality protection. The State and Regional Water Boards (Boards) exercise this responsibility primarily through the adoption of water quality control plans and the regulation of waste discharges which could affect water quality. See Water Code Secs. 13170, 13170.2, 13240, 13263, 13377, 13391.

Water quality control plans contain water quality objectives, as well as beneficial uses for the waters designated for protection and a program of implementation to achieve the objectives. Id. Sec. 13050(j). In the absence of applicable water quality objectives in a water quality control plan, the Regional Water Board may also develop objectives on a case-by-case basis in waste discharge requirements. See id. Sec. 13263(a).¹

When adopting objectives either in a water quality control plan or in waste discharge requirements, the Boards are required to exercise their judgment to "ensure the reasonable protection of beneficial uses and the prevention of nuisance". Id. Secs. 13241, 13263; see id. Sec. 13170. The Porter-Cologne Act recognizes that water quality may change to some degree without

¹ The focus of this memorandum is limited to an analysis of the Boards' obligation to consider economics when adopting water quality objectives either in water quality control plans or, on a case-by-case basis, in waste discharge requirements. This memorandum does not discuss the extent to which the Boards' are required to consider the factors specified in Water Code Section 13241 in other situations. Specifically, this memorandum does not discuss the applicability of Section 13241 to the development of numeric effluent limitations, implementing narrative objectives contained in a water quality control plan. Further guidance on the latter topic will be developed at a later date.

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causing an unreasonable effect on beneficial uses. Id. The Act, therefore, identifies factors which the Boards must consider in determining what level of protection is reasonable. Id.² These factors include economic considerations. Id.³

The legislative history of the Porter-Cologne Act indicates that "[c]onservatism in the direction of high quality should guide the establishment of objectives both in water quality control plans and in waste discharge requirements". Recommended Changes in Water Quality Control, Final Report of the Study Panel to the [State Water Board], Study Project--Water Quality Control Program, p. 15 (1969) (Final Report). Objectives should "be tailored on the high quality side of needs of the present and future beneficial uses". Id. at 12. Nevertheless, objectives must be reasonable, and economic considerations are a necessary part of the determination of reasonableness. "The regional boards must balance environmental characteristics, past, present and future beneficial uses, and economic considerations (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality which is reasonable." Id. at 13.

2. Senate Bill 919

The Boards are under an additional mandate to consider economics when adopting objectives as a result of the recent enactment of Senate Bill 919. 1993 Cal. Stats., Chap. 1131, Sec. 8, to be codified at Pub. Res. Code, Div. 13, Ch. 4.5, Art. 4. The legislation, which is

2 Other factors which must be considered include:

- (a) Past, present, and probable future beneficial uses of water;
- (b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto;
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area;
- (d) The need for developing housing within the region;
- (e) The need to develop and use recycled water.

³ See also Water Code Section 13000 which mandates that activities and factors which may affect water quality "shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible" (emphasis added).

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effective January 1, 1994, amended the California Environmental Quality Control Act, Public Resources Code Section 21000 et seq. (CEQA), to require that, whenever the Boards adopt rules requiring the installation of pollution control equipment or establishing a performance standard or treatment requirement, the Boards must conduct an environmental analysis of the reasonably foreseeable methods of compliance. This analysis must take into account a reasonable range of factors, including economics. For the reasons explained above, the latter requirement is duplicative of existing requirements under the Porter-Cologne Act regarding consideration of economics.

B. Recommendation

The meaning of the mandate to "consider economics" in the Porter-Cologne Act is not entirely clear. It is clear that the Porter-Cologne Act does not specify the weight which must be given to economic considerations. Consequently, the Boards may adopt water quality objectives even though adoption may result in significant economic consequences to the regulated community. The Porter-Cologne Act also does not require the Boards to do a formal cost-benefit analysis.

The Porter-Cologne Act does impose an affirmative duty on the Boards to consider economics when adopting water quality objectives. The Boards probably cannot fulfill this duty simply by responding to economic information supplied by the regulated community. Rather, the Boards should assess the costs of adoption of a proposed water quality objective. This assessment will normally entail three steps. First, the Boards should review any available information on receiving water and effluent quality to determine whether the proposed objective is currently being attained or can be attained. If the proposed objective is not currently attainable, the Boards should identify the methods which are presently available for complying with the objective. Finally, the Boards should consider any available information on the costs associated with the treatment technologies or other methods which they have identified for complying with a proposed objective.⁴

⁴ See, for example, Managing Wastewater In Coastal Urban Areas, National Research Council (1993). This text provides data on ten technically feasible wastewater treatment technologies, which can be used to make comparative judgments about performance and to estimate the approximate costs of meeting various effluent discharge standards, including standards for toxic organics and metals.

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In making their assessment of the cost impacts of a proposed objective, the Boards are not required to engage in speculation. Rather, the Boards should review currently available information. In addition, the Boards should consider, and respond on the record, to any information provided by dischargers or other interested persons regarding the potential cost implications of adoption of a proposed objective.

If the economic consequences of adoption of a proposed water quality objective are potentially significant, the Boards must articulate why adoption of the objective is necessary to ensure reasonable protection of beneficial uses. If the objective is later subjected to a legal challenge, the courts will consider whether the Boards adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purposes of the Porter-Cologne Act. See California Hotel & Motel Assn. v. Industrial Welfare Com., 25 Cal.3d 200, 212, 157 Cal.Rptr. 840, 599 P.2d 31 (1979).

Reasons for adopting a water quality objective, despite adverse economic consequences, could include the sensitivity of the receiving waterbody and its beneficial uses, the toxicity of the regulated substance, the reliability of economic or attainability data provided by the regulated community, public health implications of adopting a less stringent objective, or other appropriate factors. These factors may also include the legislative directive that a "margin of safety [] be maintained to assure the protection of all beneficial uses." Final Report, p. 15 and App. A, p. 59.

If objectives are proposed for surface waters and adverse economic consequences stemming from adoption of the objectives could be avoided only if beneficial uses were downgraded, the Boards should address whether dedesignation would be feasible under the applicable requirements of the Clean Water Act and implementing regulations. See 40 C.F.R. Sec. 131.10. Dedesignation is feasible only for potential, rather than existing, uses. See *id.* Sec. 131.10(g). If dedesignation of potential beneficial uses is infeasible, the Boards should explain why, e.g., that there is a lack of data supporting dedesignation.⁵

⁵ It should also be noted that, even if dedesignation of potential beneficial uses is feasible, in the great majority of cases it will not have any significant effect on the selection of a proposed objective. This is so because the proposed objective will be necessary to protect existing beneficial uses, which cannot be dedesignated.

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The State or Regional Water Board's rationale for determining that adoption of a proposed objective is necessary to protect water quality, despite adverse economic consequences, must be discernible from the record. This reasoning could be included in the staff report or in the resolution adopting a proposed water quality control plan amendment. When objectives are established on a case-by-case basis in waste discharge requirements, the rationale must be included in the findings.

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dhery220/VASSEY/econ.cons.01



Winston H. Hickox
Secretary for
Environmental
Protection

State Water Resources Control Board

Office of Chief Counsel

901 P Street • Sacramento, California 95814 • (916) 657-2154
Mailing Address: P.O. Box 100 • Sacramento, California 95812-0100
FAX (916) 653-0428 • Web Site Address: <http://www.swrcb.ca.gov>



Gray Davis
Governor

TO: Gerard J. Thibeault
Executive Officer
Santa Ana Regional Water Quality Control Board

FROM: William R. Attwater
Chief Counsel
OFFICE OF CHIEF COUNSEL

DATE: March 1, 1999

SUBJECT: Do TMDLs Have to Include Implementation Plans?

You have asked a series of questions regarding whether or not TMDLs (total maximum daily loads) have to include implementation plans. This memorandum first looks at whether implementation plans are required under federal law and, second, whether they are required under state law. The memorandum concludes that while it is federal policy that TMDLs should include implementation plans, they are not currently required under federal law. Implementation plans are required under state law. Your questions and brief responses follow.

I. Federal Law

Must TMDLs include implementation plans under federal law? The short answer is no, not at present. It is likely, however, that implementation plans will be required in the future, either as a result of a federal rule promulgation or, possibly, as an outcome of litigation.

A. Clean Water Act and Regulations

When Congress overhauled the Clean Water Act¹ in 1972, Congress decided to focus water pollution control on nationwide technology controls for point sources of pollution.² At the states' insistence, however, the federal Act retained a water quality-based strategy to address

¹ 33 U.S.C. § 1251 et seq.

² See, e.g., *id.* § 1311(b)(1)(A), (b)(2), & (b)(3).

surface waters that did not meet water quality standards.³ This approach is contained in section 303(d)⁴ of the Clean Water Act.

Section 303(d) of the Clean Water Act requires that the states identify and establish a priority ranking for waters that do not meet water quality standards after application of technology-based controls.⁵ Water quality standards are the designated uses of a waterbody, together with criteria⁶ to protect those uses, and an antidegradation policy.⁷

The states must then develop TMDLs to restore these waters. A TMDL establishes the allowable loadings or other quantifiable parameters for a waterbody. It is the sum of the loadings from point sources⁸ (waste load allocations), best estimates of loadings from nonpoint sources and background (load allocations), and a margin of safety.⁹

Once a state adopts a TMDL, the state must submit it to the United States Environmental Protection Agency (EPA) for approval. If approved, the state must then incorporate the TMDL into its water quality management plan.¹⁰ The state's water quality management plan consists of plans developed under section 208 of the Clean Water Act,¹¹ governing areawide waste treatment management, and plans developed as part of the state's continuing planning process under section 303(e).¹² If EPA disapproves the TMDL, EPA is required to step in and prepare the TMDL.

Section 303(d) stops at listing and TMDL development. It is silent regarding implementation. Section 303(e) goes on to require that the states have a "continuing planning process" with plans that include, among other things, TMDLs and adequate implementation for revised or new

³ See discussion in Houck, *TMDLs: The Resurrection of Water Quality Standards-Based Regulation Under the Clean Water Act*, 27 *Env'tl. L. Rep.* 10,329 (1997).

⁴ *Id.* § 1313(d).

⁵ *Ibid.*

⁶ State-adopted water quality objectives are synonymous with the federal term "criteria" under section 303(c) of the Clean Water Act. Compare 40 C.F.R. § 131.3(b) with Water Code § 13050(h).

⁷ *Id.* § 1313(c)(2)(A); 40 C.F.R. §§ 130.2(d), 130.7(b)(3).

⁸ "Point sources" are "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

⁹ 40 C.F.R. §§ 130.2(I), 130.7(c)(1).

¹⁰ 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2).

¹¹ 33 U.S.C. § 1288.

¹² *Id.* § 1313(e); see 40 C.F.R. § 130.6(a).

standards.¹³ EPA can approve or disapprove the "process" but has no authority under this section to actually implement TMDLs.

Like the statute, EPA regulations implementing section 303(d) do not directly address implementation.¹⁴ And, while a 1991 EPA guidance document discussed the need for implementation,¹⁵ past EPA practice has not required that state TMDL submissions include an implementation plan.¹⁶

For point sources, implementation plans are not so critical. EPA regulations require that National Pollutant Discharge Elimination System (NPDES) permits¹⁷ issued to regulate discharges to an impaired waterbody be consistent with any waste load allocations in an EPA-approved TMDL.¹⁸ Through its oversight authority, EPA can ensure that state-issued permits are, in fact, consistent.¹⁹ Nonpoint sources, however, are another matter. EPA has no direct authority under the Clean Water Act to implement or enforce nonpoint source controls.²⁰ Here, EPA is forced to rely on the good faith of the states and other measures, e.g. withholding grant funding, to persuade the states to implement TMDL load allocations for nonpoint sources.

B. Litigation

In recent years, EPA has faced a deluge of litigation throughout the nation over the states' and EPA's failure to comply with section 303(d).²¹ The lawsuits initially focussed on the states' failure to list and, then, their failure to develop TMDLs for listed waterbodies. This focus is

¹³ 33 U.S.C. § 1313(e)(3)(C) and (F). The reference to standards would be to those adopted or revised after enactment of the Clean Water Act on October 18, 1972.

¹⁴ See 40 C.F.R. § 130.7.

¹⁵ Guidance for Water Quality-based Decisions: The TMDL Process, EPA 440/4-91-001 (April 1991), pp. 15-16, 23-24.

¹⁶ Report of the Federal Advisory Committee on the Total Maximum Daily Load (TMDL) Program, the National Advisory Council for Environmental Policy and Technology (NACEPT), EPA 100-R-98-006 (July 1998) (hereinafter FACA Report), p. 36.

¹⁷ The Clean Water Act established the NPDES permit program. Under the Act, the point source discharge of pollutants to surface waters must be regulated under an NPDES permit. EPA or states with approved programs issue these permits. See 33 U.S.C. §§ 1311, 1342.

¹⁸ 40 C.F.R. § 122.44(d)(1)(vii)(B).

¹⁹ See 33 U.S.C. § 1342(c).

²⁰ See discussion in Conway, *TMDL Litigation: So Now What?*, 17 Va. Env'tl. L. J. 83 (Fall 1997).

²¹ See TMDL Lawsuit Information (February 3, 1999) <<http://www.epa.gov/OWOW/tmdl/lawsuit1.html>>.

changing.²² Several recent cases question the content of TMDLs and some specifically seek not only TMDL development but also implementation.²³

A recent consent decree in Washington state requires that TMDL schedules include plans for their implementation.²⁴ To date, however, there are no published court opinions that answer the question whether TMDLs must include implementation plans. It appears likely that, if asked to rule on the issue, a court would conclude that implementation plans can be required, either under section 303(d) or section 303(e). To rule otherwise would mean that significant federal and state resources are being wasted on what is purely a planning exercise. Even more significantly, it would unquestionably thwart the will of Congress "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."²⁵

C. EPA's Response

In response to the rising tide of litigation, EPA launched several initiatives. EPA issued TMDL guidance in 1997 establishing two significant policies.²⁶ The first set a deadline for completion of all TMDLs of from 8 to 13 years. The second directed that the states prepare implementation plans for TMDLs addressing waters impaired solely or primarily by nonpoint sources. The plans should include "reasonable assurances" that the TMDL's nonpoint source load allocations would be achieved. The plans could be submitted as water quality management plan revisions under section 303(e), coupled with a draft TMDL, or as part of an equivalent planning process. The policy also directed EPA regional administrators to take additional measures against states that did not develop implementation plans.²⁷

In addition, EPA convened a Federal Advisory Committee Act (FACA) committee to advise EPA on new policy and regulatory directions for the program. The committee released its final

²² See discussion in Houck, *TMDLs III: A New Framework for the Clean Water Act's Ambient Standards Program*, 28 *Env'tl. L. Rep.* 10415 (August, 1998).

²³ See, e.g., *The Neuse River Foundation, Inc. v. Browner*, No. 4:96-CV-188-BO(3) (E.D.N.C.), filed December 31, 1996 (plaintiffs seek an order directing EPA to establish TMDLs and to "implement and enforce" all TMDLs); *Kingman Park Civic Assn. v. U.S. Environmental Protection Agency*, No. 1:98CV00758 (D.D.C.), filed March 25, 1998 (plaintiffs seek an order requiring EPA to establish TMDLs and to ensure that they are implemented).

²⁴ Consent Decree, *Northwest Env'tl. Advocates v. Browner*, No. 91427R (W.D. Wash.), January 20, 1998.

²⁵ 33 U.S.C. § 1251(a).

²⁶ FACA Report, fn. 16, *supra*.

²⁷ These included, for example, requiring a state to update its water quality management plan or to incorporate into the plan additional implementation measures on a statewide or specific watershed basis; or denying or revoking a state's enhanced benefits status under new Clean Water Act section 319 nonpoint source guidance and reverting to a more intense, project-by-project oversight process on annual section 319 grants.

report in July 1998.²⁸ The committee addressed TMDL implementation, as well as other issues, and reached consensus on several points. Overall, there was broad agreement that implementing TMDLs is the key to program success.²⁹ The committee agreed that section 303 of the Clean Water Act authorizes EPA to require implementation plans.³⁰ They also agreed that EPA should issue regulations requiring that the states prepare and submit an implementation plan and schedule concurrently with each TMDL.³¹

While the committee agreed that section 303 provides EPA sufficient authority to require implementation plans, the committee disagreed on whether these plans should be submitted under subsection (d) or (e).³² The issue is significant because EPA is statutorily required to complete TMDLs if the states fail to do so. If implementation plans are a required part of a TMDL under section 303(d), EPA could ultimately be forced to complete a state's implementation plans. On the other hand, it is unclear whether, if TMDL implementation plans are required under section 303(e), EPA would be similarly required to establish the plans in the event of a state's failure to do so.

D. Current Status

Whether the United States Environmental Protection Agency (EPA) should require that TMDLs include implementation plans and, if so, under what authority are the \$64,000 questions currently facing EPA. The FACA committee's recommendations are expected to significantly impact the TMDL program. EPA has drafted a proposed rule revising the existing TMDL regulations and is scheduled to publish the rule this summer.³³ The agency is expected to, among other things, require states to have implementation plans for TMDLs.³⁴ In addition to revising the TMDL regulations, EPA may also change the regulations under section 303(e), governing the continuing planning process.

II. State Law

Does state law require that TMDLs include implementation plans? Yes. The Regional Water Quality Control Boards (Regional Water Boards) are required to incorporate TMDLs in their

²⁸ Report of the Federal Advisory Committee on the Total Maximum Daily Load (TMDL) Program, the National Advisory Council for Environmental Policy and Technology (NACEPT), EPA 100-R-98-006 (July 1998) (hereinafter FACA Report).

²⁹ *Id.* at 5-6.

³⁰ *Id.* at 36 and H-2.

³¹ *Id.* at 36-41 and App. H.

³² *Ibid.*

³³ Inside EPA's Water Policy Report, vol. 8, no. 4 (February 17, 1999) at 18.

³⁴ *Ibid.*

water quality control plans (basin plans). Implementation plans are a required component of basin plans.

In general, Regional Water Boards base listing decisions under section 303(d) on the water quality standards in their basin plans. They list waterbodies for which technology-based effluent limitations and other pollution control requirements are not stringent enough to achieve designated beneficial uses or water quality objectives.³⁵ The Regional Water Boards then develop TMDLs, the goal of which is to attain the standard.

TMDLs adopted by the Regional Water Boards have certain common components. Typically, they contain a problem statement that identifies the waterbody, the standard that is not being achieved, and the pollutant or stressor that is causing the impairment; numeric targets, describing specific instream goals that reflect attainment of the standard; source identification; loading allocations; and an implementation plan.

The numeric target, in particular, is essentially an interpretation of an existing standard. It can be expressed in terms of mass per time (e.g., daily loading), toxicity, habitat indicators, or other appropriate measure that, if met, will achieve the standard. For waterbodies listed because of failure to meet a narrative water quality objective, the numeric target will be a quantitative interpretation of the narrative objective. For example, if a waterbody fails to achieve a narrative objective for settleable solids, the TMDL could include targets for annual mass sediment loading.

Federal law requires that TMDLs, upon EPA approval, be incorporated into the state's water quality management plan. California's water quality management plan consists of the Regional Water Boards' basin plans³⁶ and statewide water quality control plans.³⁷ State law, in turn, requires that basin plans have a program of implementation to achieve water quality objectives.³⁸ The implementation program must include a description of actions that are necessary to achieve the objectives, a time schedule for these actions, and a description of surveillance to determine compliance with the objectives.³⁹

³⁵ Some federal criteria, adopted by EPA pursuant to Clean Water Act section 303(c), also apply to California waters. See the National Toxics Rule, 40 C.F.R. § 131.36. Waterbodies can also be listed because they do not meet antidegradation requirements. Typically, however, water are listed for failure to achieve water quality objectives or beneficial uses.

³⁶ See Water Code §§ 13240-13247.

³⁷ See State of California Continuing Planning Process Document, State Water Resources Control Board, Division of Water Quality (September 1991).

³⁸ Water Code § 13050(j). Basin plans include three elements: beneficial use designations, water quality objectives to protect those uses, and a program of implementation to achieve objectives.

³⁹ *Id.* § 13242.

State law would require that a TMDL include an implementation plan because the TMDL normally is, in essence, an interpretation or refinement of an existing water quality objective. The TMDL has to be incorporated into the basin plan. And, because the TMDL supplements, interprets, or refines an existing objective, state law requires a program of implementation.⁴⁰ Therefore, the Regional Water Board will have to review the basin plan's existing implementation chapter to determine whether it adequately implements the objective, as newly interpreted.

For a TMDL whose goal is to achieve a standard based primarily on nonattainment of a designated beneficial use, for which there are no applicable objectives, a numeric target is established for each pollutant or stressor that interferes with attaining the use. Establishing a numeric target in these instances is analogous to establishing water quality objectives to protect a use. Thus, the Regional Water Board would again have to review its existing implementation program to determine its adequacy to implement the numeric targets.

Even if the Regional Water Boards did not have to develop implementation plans for TMDLs, they would still have to comply with the California Environmental Quality Act (CEQA).⁴¹ CEQA compliance, in the absence of a defined implementation plan, could potentially be more difficult than it would be with one. Under CEQA, the Regional Water Board would have to identify the reasonably foreseeable methods of compliance with any TMDL provisions that established performance standards or treatment requirements.⁴² The numeric targets and load allocations would probably fall into the category of performance standards. After identifying the reasonably foreseeable compliance methods, the Regional Water Board would have to analyze their reasonably foreseeable environmental impacts, taking into account a reasonable range of environmental, economic, and technical factors.⁴³

A defined implementation plan may allow the Regional Water Board to more narrowly focus its CEQA analysis. Without one, the CEQA analysis could potentially be broader and more burdensome.

III. Questions and Answers

1. Question: *"When the Regional Board adopts a TMDL as a Basin Plan amendment, what are the Board's responsibilities with respect to adopting an implementation plan for the TMDL? What are the timing requirements?"*

⁴⁰ See § 13050(j).

⁴¹ Pub. Resources Code § 21000 et seq.

⁴² *Id.* § 21159.

⁴³ *Ibid.*

Answer: Neither section 303(d) of the Clean Water Act nor regulations implementing the section currently require that TMDLs include an implementation plan. There are no published judicial decisions that address the question. It is current EPA policy that the states develop implementation plans for TMDLs, although the timing of these plans is unclear.

Under state law, the Regional Board must adopt an implementation plan for the TMDL. The plan should be adopted concurrently with the other TMDL components, if practicable, or within a short time frame thereafter. If it is not, the TMDL would not be effective until the implementation plan is adopted. For the reasons explained in the response to Question 3, it may not be advisable to adopt the TMDL in phases.

2. Question: *"If USEPA adopts the TMDL instead of the Regional Board, what are the Board's responsibilities to adopt and implement that TMDL? Must the Board prepare and adopt an implementation plan for a USEPA-adopted TMDL? What are the timing requirements?"*

Answer: Section 303(d) provides that if EPA adopts a TMDL, the state must incorporate it into its water quality management plan.⁴⁴ Although the statute appears to restrict the state to adopting EPA's TMDL, EPA Region 9 has taken the position that if the state were to adopt an acceptable TMDL, EPA would withdraw its TMDL, upon EPA approval of the state TMDL.

Generally speaking, if the Regional Water Board decided to incorporate EPA's TMDL into its basin plan, the Regional Water Board would have to develop an implementation plan. Although federal law does not currently require an implementation plan, this is likely to change in the future. Under state law, an implementation plan would be required. There is one possible exception to this general rule. For a waterbody impacted by only point source discharges, the argument could be made that the TMDL is self-implementing. Federal regulations already require that NPDES permits implement any waste load allocations in an applicable TMDL, and the Regional Water Boards must comply with these regulations.⁴⁵

Neither section 303(d) nor the implementing regulations currently address the timing of the state's action. The best that can be said is that the state should act within a reasonable time period. What is reasonable will depend on the circumstances. The state's progress in implementing section 303(d), the amount of resources allotted by the state to this program,

⁴⁴ 33 U.S.C. § 1313(d)(2); see 40 C.F.R. § 130.7(d)(2).

⁴⁵ 40 C.F.R. § 122.44(d)(1)(vii)(B); Cal. Code Regs., tit. 23, § 2235.2. But see the FACA Report, fn. 16, *supra*, recommending that an implementation plan for waterbodies impaired solely or primarily by point sources include specific timetables and commitments to issue or review permits with fixed compliance schedules, monitoring and enforcement commitment, ambient monitoring to assess the effectiveness of the waste load allocations in achieving standards, and a feedback loop. FACA Report at G-9.

and the relative ease or degree of difficulty involved in the effort are probably all factors which would bear on reasonableness.

3. Question: *"Can a TMDL be adopted by the Regional Board and incorporated into the Basin Plan with an understanding that an implementation [plan] would be adopted at some later specified or unspecified date?"*

Answer: Theoretically speaking, a Regional Water Board could probably adopt a TMDL in two phases. That is, the Regional Water Board could first adopt the TMDL without an implementation plan, followed by adoption of an implementation plan at some later date.

Although this is theoretically possible, it wouldn't make much sense for several reasons. First, under state law, an implementation plan is required. Consequently, the first basin plan amendment wouldn't be complete, and could not be implemented, until the later adoption of an implementation plan. Second, to the extent that the TMDL is not complete under state law, query whether this would meet the requirements of section 303(d). Third, for the reasons explained previously, CEQA compliance would probably be more difficult because the Regional Water Board would have to identify and analyze all reasonably foreseeable methods of compliance with the TMDL in the first phase. Fourth, adopting the TMDL in phases would require the Regional Water Board to use its resources for two public adoption processes, rather than one. Finally, adopting a TMDL without an implementation plan may raise "clarity" issues for the Office of Administrative Law (OAL).⁴⁶ OAL may determine that the TMDL cannot be approved under the rulemaking provisions of the Administrative Procedure Act⁴⁷ because its impact on the regulated community is unclear, without an implementation plan. In any event, any lengthy delay in adopting an implementation plan is unsupportable.

4. Question: *"TMDLs do not include compliance schedules, which are generally provided in TMDL implementation plans. If an implementation plan, with schedules, is not adopted when a TMDL is adopted by the State (i.e. approved by the Regional Board, State Board and the Office of Administrative Law) does the TMDL take effect immediately, and must it be enforced immediately? Some Regional Board Basin Plans include generic compliance schedule provisions, while others do not (the Region 8 Basin Plan does not include such provisions). Where these compliance schedule provisions exist in Basin Plans, can they be used to establish TMDL implementation schedules?"*

⁴⁶ See Gov. Code §§ 11349.1, 11353(b)(4). "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." *Id.* § 11349(c).

⁴⁷ See *id.* §§ 11340-11359.

Answer: A time schedule for implementing a TMDL has to be part of an implementation program under state law. In general, state law would require that a TMDL include an implementation program. With the possible exception of a TMDL affecting only or primarily point source dischargers (see response to Question 3, above), a TMDL would not be effective, and could not be implemented, until an implementation program was adopted. Of course, the program could consist of the Regional Water Board's existing implementation program if: (1) that program is adequate to achieve the water quality standard in question and (2) the implementation program contains the required elements, e.g. a description of necessary actions to achieve the objective, a time schedule for those actions, and a description of surveillance to determine compliance with the objective.

All of the Regional Water Boards currently are authorized to include compliance schedules in waste discharge requirements for discharges not subject to regulation under an NPDES permit.⁴⁸ Two of the Regional Water Boards⁴⁹ have included specific compliance schedule provisions in their basin plans that apply only to NPDES permits. The fact that the Regional Water Boards can include compliance schedules in individual waste discharge requirements, or in limited circumstances in NPDES permits, would not obviate the need for an implementation program with a time schedule to achieve compliance with the applicable standard.

cc: Ted Cobb, OCC
Stan Martinson, DWQ
Stefan Lorenzato, DWQ

bc: All WQ attorneys

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⁴⁸ See Water Code § 13263(c); Cal. Code Regs., tit. 23, § 2231.

⁴⁹ These are the Central Valley and San Francisco Bay Regional Water Boards.



State Water Resources Control Board

Office of Chief Counsel

901 P Street • Sacramento, California 95814 • (916) 657-2154
Mailing Address: P.O. Box 100 • Sacramento, California 95812-0100
FAX (916) 653-0428 • Web Site Address: <http://www.swrcb.ca.gov>



Winston H. Hickox
Secretary for
California Environmental
Protection Agency

TO: William R. Attwater
Chief Counsel

FROM: Sheila K. Vassey
Senior Staff Counsel
OFFICE OF CHIEF COUNSEL

DATE: January 7, 1999

SUBJECT: TMDL QUESTIONS

By way of background, both the Clean Water Act and implementing regulations require that the states establish a priority ranking for listed waterbodies.

1. Have we or U.S. EPA ever been sued over not working on a TMDL ranked as a medium or low priority for TMDL development?

RESPONSE: Yes. U.S. EPA has been sued over the state's failure to do any TMDLs, regardless of ranking. For example, environmental groups sued U.S. EPA over the state's failure to do TMDLs for all listed waters in the North Coast and Los Angeles regions. These included low and medium-ranked waterbodies.

I am not aware of any lawsuits which have focused on the propriety of a particular priority ranking. The lawsuits, in general, have focused on the state's alleged failure to do any TMDLs.

2. Does a ranking of medium or low "preclude" a lawsuit if there are still highs on the list for any given Regional Board?

RESPONSE: No. As explained above, U.S. EPA is being sued for the state's failure to do any TMDLs. If the state could demonstrate that it was diligently developing TMDLs for listed waterbodies in accordance with its priority ranking system, the state might prevail in a lawsuit challenging the state's failure to do TMDLs for medium or low-ranked waters.

California Environmental Protection Agency

3. If we, or U.S. EPA, are vulnerable to lawsuits for mediums or lows, what is the value of the ranking system in terms of trying to prioritize our resources to work on the more important chemicals or substances?

RESPONSE: Priority ranking satisfies several objectives. First, it is legally required. Second, it allows the Regional Water Board to allocate resources in a rational manner. Waterbody rankings are not based solely on threat to water quality and beneficial uses. The Regional Boards consider other factors, such as how a TMDL fits with related activities in the watershed and the potential for beneficial use recovery.

cc: Stan Martinson, DWQ
Stefan Lorenzato, DWQ

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State of California

M e m o r a n d u m

To : Regional Water Board
Executive Officers

Date: SAN - 4 1994

Regional Water Board Attorneys



William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL

From : STATE WATER RESOURCES CONTROL BOARD
901 P Street, Sacramento, CA 95814
Mail Code: G-8

Subject: GUIDANCE ON CONSIDERATION OF ECONOMICS IN THE ADOPTION OF WATER QUALITY OBJECTIVES

ISSUE

What is required of a Regional Water Quality Control Board (Regional Water Board). in order to fulfill its statutory duty to consider economics when adopting water quality objectives in water quality control plans or in waste discharge requirements?

CONCLUSION

A Regional Water Board is under an affirmative duty to consider economics when adopting water quality objectives in water quality control plans or, in the absence of applicable objectives in a water quality control plan, when adopting objectives on a case-by-case basis in waste discharge requirements. To fulfill this duty, the Regional Water Board should assess the costs of the proposed adoption of a water quality objective. This assessment will generally require the Regional Water Board to review available information to determine the following: (1) whether the objective is currently being attained; (2) what methods are available to achieve compliance with the objective, if it is not currently being attained; and (3) the costs of those methods. The Regional Water Board should also consider any information on economic impacts provided by the regulated community and other interested parties.

If the potential economic impacts of the proposed adoption of a water quality objective appear to be significant, the Regional Water Board must articulate why adoption of the objective is necessary to assure the reasonable protection of beneficial uses of state waters, despite the potential adverse economic consequences. For water quality control plan amendments, this

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discussion could be included in the staff report or resolution for the proposed amendment. For waste discharge requirements, the rationale must be reflected in the findings.

DISCUSSION

A. Legal Analysis

1. Porter-Cologne Water Quality Control Act

Under the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq. (Porter-Cologne Act or Act), the State Water Resources Control Board (State Water Board) and the Regional Water Boards are the principal state agencies charged with responsibility for water quality protection. The State and Regional Water Boards (Boards) exercise this responsibility primarily through the adoption of water quality control plans and the regulation of waste discharges which could affect water quality. See Water Code **Secs.** 1317.0, 13170.2, 13240, 13263, 13377, 13391.

Water quality control plans contain water quality objectives, **as** well as beneficial uses for the waters designated for protection and a program of implementation to achieve the objectives. Id. Sec. 13050(j). In the absence of applicable water quality objectives in a water quality **control plan**, the Regional Water Board may also develop objectives on a **case-by-case** basis in waste discharge requirements. See id. **Sec. 13263(a).**¹

When adopting objectives either in a water quality control plan or in waste discharge requirements, the Boards are required to exercise their judgment to "ensure the reasonable protection of beneficial uses and the prevention of nuisance". Id. Se-cs. 13241, 13263; see id. Sec. 13170. The Porter-Cologne Act recognizes that water quality may change to some degree without

¹ The focus of this memorandum is limited to an analysis of the Boards' obligation to consider economics when adopting water quality objectives either in water quality control plans or, on a case-by-case basis, in waste discharge requirements. This memorandum does not discuss the extent to which the Boards' are required to consider the factors specified in Water Code Section 13241 in other situations. Specifically, this memorandum does not discuss the applicability of **Section 13241** to the development of numeric effluent limitations, implementing narrative objectives contained in a water quality control plan. Further guidance on the latter topic will be developed at a later date.

causing an unreasonable effect on beneficial uses. Id. The Act, therefore, identifies factors which the Boards must consider in **determining what** level of protection is reasonable. **Id.**² These factors include economic considerations. Id.³

The legislative history of the Porter-Cologne Act indicates that "[c]onservatism in the direction of high quality should guide the establishment of objectives both in water quality control plans and in waste discharge requirements". Recommended Changes in Water Quality Control, Final Report of the Study Panel to the [State Water Board], Study Project--Water Quality Control Program, p. 15 (1969) (Final Report).

Objectives should "be tailored on the high quality side of needs of the present and future beneficial uses". Id. at 12. Nevertheless, objectives must be reasonable, and economic considerations are a necessary part of the determination of reasonableness. "The regional boards must balance environmental characteristics, past, present and future beneficial uses, and economic considerations (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality which is reasonable." Id. at 13.

2. Senate Bill 919

The Boards are under an additional mandate to consider economics when adopting objectives as a result of the recent enactment of Senate Bill 919. 1993 Cal. Stats., Chap. 1131, Sec. 8, to be codified at Pub. Res. Code, Div. 13, Ch. 4.5, Art. 4. The legislation, which is

2 Other factors which must be considered include:

- (a) Past, present, and probable future beneficial uses of water;
- (b) Environmental characteristics of the hydrographic **unit** under consideration, including the quality of water available thereto;
- (c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area;
- (d) The need for developing housing within the region;
- (e) The need to develop and use recycled water.

3 See also Water Code Section 13000 which mandates that activities and factors which may affect water quality "shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible" (emphasis added).

effective January 1, 1994, amended the California Environmental Quality Control Act, Public Resources Code Section 21000 et seq. (CEQA), to require that, whenever the Boards adopt rules requiring the installation of pollution control equipment or establishing a performance standard or treatment requirement, the Boards must conduct an environmental analysis of the reasonably foreseeable methods of compliance. This analysis must take into account a reasonable range of factors, including economics. For the reasons explained above, the latter requirement is duplicative of existing requirements under the Porter-Cologne Act regarding consideration of economics.

B. Recommendation

The meaning of the mandate to "consider economics" in the Porter-Cologne Act is not entirely clear. It is clear that the Porter-Cologne Act does not specify the weight which must be given to economic considerations. Consequently, the Boards may adopt water quality objectives even though adoption may result in significant economic consequences to the regulated community. The Porter-Cologne Act also does not require the Boards to do a formal cost-benefit analysis.

The Porter-Cologne Act does impose an affirmative duty on the Boards to consider economics when adopting water quality objectives. The Boards probably cannot fulfill this duty simply by responding to economic information supplied by the regulated community. Rather, the Boards should assess the costs of adoption of a proposed water quality objective. This assessment will normally entail three steps. First, the Boards should review any available information on receiving water and effluent quality to determine whether the proposed objective is currently being attained or can be attained. If the proposed objective is not currently attainable, the Boards should identify the methods which are presently available for complying with the objective. Finally, the Boards should consider any available information on the costs associated with the treatment technologies or other methods which they have identified for complying with a proposed objective.⁴

⁴ See, for example, *Managing Wastewater In Coastal Urban Areas*, National Research Council (1993). This text provides data on ten technically feasible wastewater treatment technologies, which can be used to make comparative judgments about performance and to estimate the approximate costs of meeting various effluent discharge standards, including standards for toxic **organics** and metals.

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In making their assessment of the cost impacts of a proposed objective, the Boards are not required to engage in speculation. Rather, the Boards should review currently available information. In addition, the Boards should consider, and respond on the record, to any information provided by dischargers or other interested persons regarding the potential cost implications of adoption of a proposed objective.

If the economic consequences of adoption of a proposed water quality objective are potentially significant, the Boards must articulate why adoption of the objective is necessary to ensure reasonable protection of beneficial uses. If the objective is later subjected to a legal challenge, the courts will consider whether the Boards adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purposes of the Porter-Cologne Act. See California Hotel & Motel Assn. v. Industrial Welfare Com., 25 Cal.3d 200, 212, 157 Cal.Rptr. 840, 599 P.2d 31 (1979).

Reasons for adopting a water quality objective, despite adverse economic consequences, could include the sensitivity of the receiving waterbody and its beneficial uses, the toxicity of the regulated substance, the reliability of economic or attainability data provided by the regulated community, public health implications of adopting a less stringent objective, or other appropriate factors. These factors may also include the legislative directive that a "margin of safety [] be maintained to assure the protection of all beneficial uses." Final Report, p. 15 and App. A, p. 59.

If objectives are proposed for surface waters and adverse economic consequences stemming from adoption of the objectives could be avoided only if beneficial uses were downgraded, the Boards should address whether dedesignation would be feasible under the applicable requirements of the Clean Water Act and implementing regulations. See 40 C.F.R. Sec. 131.10. Dedesignation is feasible only for potential, rather than existing, uses. See *id.* Sec. 131.10(g). If dedesignation of potential beneficial uses is infeasible, the Boards should explain why, e.g., that there is a lack of data supporting dedesignation.⁵

⁵ It should also be noted that, even if dedesignation of potential beneficial uses is feasible, in the great majority of cases it will not have any significant effect on the selection of a proposed objective. This is so because the proposed objective will be necessary to protect existing beneficial uses, which cannot be dedesignated.

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The State or Regional Water Board's rationale for determining that adoption of a proposed objective is necessary to protect water quality, despite adverse economic consequences, must be discernible from the record. This reasoning could be included in the staff report or in the resolution adopting a proposed water quality control plan amendment. When objectives are established on a **case-by-case** basis in waste discharge requirements, the rationale must be included in the findings.

bbarrera

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