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February 17, 2004

PETER W. MCGAW  
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**Via Facsimile (916) 341-5550  
and U.S. Mail**

Craig J. Wilson  
TMDL Listing Unit, Division of Water Quality  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Re: WATER QUALITY CONTROL POLICY FOR DEVELOPING CALIFORNIA'S CLEAN  
WATER ACT SECTION 303(D) LIST

Dear Mr. Wilson:

On behalf of the Turlock Irrigation District (TID), we would like to thank the Board for this opportunity to comment on the proposed Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List ("Listing Policy"). The 303(d) List is an important regulatory precursor to developing TMDLs and it will be a significant step forward for the State to have a consistent, workable policy for adding and removing water bodies from the 303(d) list. We commend the Board and its staff for all of their hard work developing the proposed Listing Policy. TID's specific comments follow.

**Statistically Defensible Data Requirement.**

TID supports many of the proposals that have been incorporated in the current draft of the Listing Policy, particularly the emphasis on sound, statistically defensible scientific data to make listing decisions. We urge you to preserve these provisions as the Listing Policy goes through further revision.

**Re-evaluation of Impaired Water Bodies.**

TID also commends the Board for providing a mechanism for re-evaluation of water bodies identified on previous 303(d) lists using the Listing Policy. TID does have a concern, however, regarding the proposed Policy's provisions for reviewing previous listings. As currently proposed, the Listing Policy would require the party contesting the inclusion of a water body on the 303(d) list to produce new data or information demonstrating that the listing is improper (Section 6.1).

This provision conflicts with the many statements made publicly during the adoption of the 2002 303(d) list. On multiple occasions, the staff and the Board itself reassured the public that all listings on the 2002 303(d) list would be reviewed to see that they fit with the new Listing Policy. As a gesture of reciprocal good faith, many parties contemplating challenges to the 2002 List, including TID, refrained from bringing those challenges based on their understanding that the controversial listings on that List would be given a full, fresh review the next time around.

At least for the next 303(d) list, reevaluation should not be limited to solely those instances where new data or information are available. Many listings included on previous 303(d) lists are inappropriate because of inadequate data quantity or quality, evidence that natural sources have caused or contributed to the impairment, and/or water quality standards upon which listings were based are inappropriate. TID does not suggest that *every* listing cycle must begin the evaluation process anew, but, to ensure that TMDLs are conducted only where necessary and appropriate, the Listing Policy should clearly require a re-evaluation of water bodies identified on the 2002 303(d) list even if just based on existing information, at least when requested to in writing. To conserve staff resources, it would be appropriate for the Policy to require the requesting party to make a *prima facie* case that the listing would not be made if considered under the new policy. (A "*prima facie* case" is "one that will prevail in the absence of contrary evidence.")

This recommendation is consistent with the July 2003 Draft Policy and will assist in prioritizing scarce state resources. It is also appropriate, given that the 2002 303(d) list was developed without any consistent standards in place and at least some of those listings do not meet the requirement for listing under the proposed Policy. At least for the first round under the new policy, the Regional Board should be required to look at contested 2002 listings and affirmatively determine that the information for listing meets the requirements of the new policy, as if it were a new listing decision.

There is a paragraph near the end of section 6.1 that suggests the foregoing may in fact be what the Listing Policy intends to accomplish. If so, the paragraph, which starts, "An interested party may request an existing listing be reassessed . . ." should be clarified. First, it should be put into a separate section. Section 6.1 should address situations where a Regional Board obtains new, relevant information and conducts a review of a listing on its own initiative. A separate section (e.g., a new section 6.2) should address the situation where an interested party requests a review of an existing listing. The paragraph now located at the end of Section 6.1 should be moved to a new section and modified as follows:

6.2 An interested party may request an existing listing be reassessed under the provisions of the Policy. In requesting the reevaluation, the interested party must describe the reason(s) the listing is inappropriate, state the reason the Policy would lead to a different outcome, and provide the any new data and information

~~necessary to enable that would assist the RWQCB and SWRCB to in conducting the review.~~

Finally, the last sentence of the present section 6.1 states, "The most recently completed section 303(d) list shall form the basis for any subsequent lists." This sentence is misplaced and confusing in its current location at the end of the "Evaluating Existing Listings" section. Because it is a general statement of the foundation for each subsequent listing process, it seems to belong at the beginning of section 4, "California Delisting Factors." The opening paragraph of section 4 would then read:

The most recently completed section 303(d) list shall form the basis for any subsequent lists. This section provides the methodology for removing waters from the section 303(d) list (including the water quality limited segments category, enforceable program category, and TMDLs completed category).

In this way, the Listing Policy would be clear that the prior 303(d) list is the starting point, not the end of the analysis.

#### **"Planning/Monitoring" List.**

A water body that does not meet the requirements of the Policy but which nonetheless raises some water quality concerns should be placed on a separate "planning/monitoring" list, as was proposed in the July 2003 Draft Policy for Guidance on Assessing California Surface Waters and which the Listing Policy should restore. This could be the result of a water body on the 2002 list being removed due to inadequate data quality, or as a result of identifying a disturbing water quality trend. Use of a planning list has been strongly recommended by the National Academy of Sciences (NAS) in its report to Congress and would avoid inappropriate listings, unnecessary TMDLs, and misdirection of resources.

#### **Reliance on Health Advisories.**

Section 3.1.4 is confusing. It is unclear from this section as it is now written whether the existence of a health advisory, alone, is sufficient to justify listing a water body. Health advisories against the consumption of edible organisms or a shellfish harvesting ban are just that: *advisory*. They are based on entirely different standards than are incorporated in every other section of the proposed Listing Policy. If the *data* that lead to the issuance of the health advisory meets the data quality and statistical significance requirements of the Listing Policy, then the water body should be added to the 303(d) list. If the data resulting in the issuance of the health advisory do *not* meet the Listing Policy's requirements, then the health advisory alone should not override this inadequate data and act as a separate, sufficient basis for adding the waterbody to the 303(d) list. As presently drafted, it is not clear whether the Listing Policy would allow this anomalous result.

It may be that the final sentence this section 3.1.4 is meant to address this issue and require that the *data* support the listing, not just the existence of a health advisory. If so, the sentence needs to be clarified. It states, "In addition, water segment-specific data are available indicating the evaluation guideline for tissue is exceeded." Does this mean that, in addition to a health advisory these additional data *must* exist in order to list a waterbody under this section, or are these data, if they exist, simply additional evidence that may be considered?

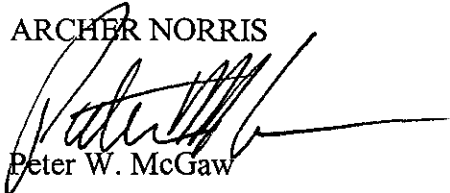
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Again, TID appreciates this opportunity to comment on the proposed Listing Policy. With the simple changes identified above, this Policy will represent dramatic progress toward protecting and restoring California's waterways in a transparent and scientifically defensible fashion.

Very truly yours,

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PWM:sea

cc: Robert Nees, Assistant General Manager, TID  
Debra Liebersbach, Senior Civil Engineer, TID  
Dr. Cynthia Paulson, Brown & Caldwell



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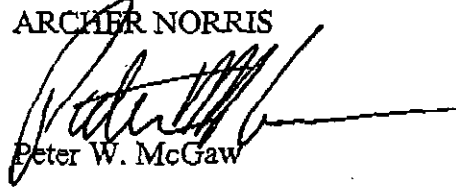
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## FACSIMILE TRANSMISSION

**DATE:** February 17, 2004

**To:**

NAME	FAX NO.	PHONE NO.
Craig J. Wilson State Water Resources Control Board	(916) 341-5550	(916) 341-5560

**FROM:** Peter W. McGaw                      **PHONE:** (925) 930-6600

**RE:** Water Quality Control Policy for Developing California's Clean Water Act  
 Section 303(d) List

<b>FILE NUMBER:</b>	T0106-001
<b>NUMBER OF PAGES, INCLUDING COVER PAGE:</b> 5	<b>ORIGINAL WILL FOLLOW BY MAIL</b>

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