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CALIFORNIA ASSOCIATION of SANITATION AGENCIES

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February 18, 2004

Via Hand Delivery

Arthur G. Baggett, Jr., Chair
and Members
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

SUBJECT: **COMMENTS REGARDING THE PROPOSED WATER QUALITY CONTROL POLICY FOR DEVELOPING CALIFORNIA'S CLEAN WATER ACT SECTION 303(d) LIST**

Dear Chairman Baggett and Members:

On behalf of the California Association of Sanitation Agencies (CASA), thank you for the opportunity to provide comments regarding the Proposed Water Quality Control Policy For Developing California's Clean Water Act Section 303(d) List (the "Listing Policy.") In general, we believe the draft Listing Policy provides an objective and prudent approach to assessing California surface waters. The draft Listing Policy represents an important step forward in improving the consistency, clarity and technical soundness of California's Section 303(d) list. To ensure a workable listing and de-listing process, several areas of the Listing Policy are in need of improvement. These issues are addressed in the comments submitted on behalf of Tri-TAC, and CASA fully endorses and incorporates by reference Tri-TAC's comments.[1]

Our purpose in writing separately is to address comments made during the public workshops that the draft Listing Policy is unlawful or somehow inconsistent with federal law, and that the data requirements set forth in the Policy constitute an illegal revision of water quality standards. These characterizations are incorrect, as discussed below.

The use of the binomial approach and other minimum data requirements is not an illegal revision of water quality standards.

Some commenters have objected to the use of the binomial approach for listing waters as impaired for toxic pollutants, based on the premise that

[1] Tri-TAC is a technical advisory group jointly sponsored by CASA, the League of California Cities, and the California Water Environment Federation.

requiring a percentage of samples to exceed a numeric criterion is somehow a revision of water quality standards. As we understand the argument, because the California Toxics Rule (CTR) is based on a once in three years allowable exceedance frequency, and the U.S. EPA criteria upon which the CTR objectives are based were derived assuming exposure at that frequency, a listing approach that relies upon a percentage of samples that may allow more than one exceedance is a de facto revision of the water quality criteria.

First of all, the binomial approach has been incorporated into listing guidelines and policies adopted by a number of other states, including Arizona, Florida, Nebraska and Texas. The binomial approach was also cited with approval in the National Academy of Sciences Report (*Assessing the TMDL Approach to Water Quality Management*, National Academy Press, Washington, D.C., 2001, at p. 57.) As applicable standards in these states also employ the "once in three years" approach, the binomial method cannot be legal in other states, but unlawful in California. Significantly, a federal court recently rejected the argument that use of the binomial method is an unlawful revision of water quality standards in a challenge to the State of Florida's listing regulations.

In *Florida Public Interest Research Group Citizen Lobby, Inc. v. United States Environmental Protection Agency*, (Case No. 4:02cv408-WS, (May 29, 2003 N.D. Fla)), a coalition of environmental groups challenged Florida's Impaired Waters Rule (IWR), contending that the use of the binomial method modified the state's water quality standards, which specify that criteria are "not to be exceeded at any time." (Complaint at ¶¶ 29, 30.) The court rejected this argument, finding that the IWR "was intended to do nothing more, and in fact does nothing more, than set forth a section 303(d) listing methodology to be used in the TMDL process." (Decision at p. 11.) The court noted that the listing methodology "cannot possibly have the effect of revising Florida's water quality standards or policies affecting those standards" unless one assumes that the state and U.S. EPA will not comply with the law in adopting and approving the lists. (Id. at p. 12.)

It is important to keep in mind the purpose of the 303(d) list: To identify those waters where a TMDL is needed to bring the water body into compliance with water quality standards. U.S. EPA itself has recognized that sample size is an important element of data quality. (*Consolidated Assessment and Listing Methodology (CALM)—Toward a Compendium of Best Practices*, U.S. EPA, August 2002.) A single marginal criteria excursion (such as a slight excursion over a one hour period for acute standards or over a four day period for chronic) will result in little or no ecological effect and require little to no time for recovery. (Technical Support Document, 1991). Waters should not be listed because of isolated or temporary incidents that may have no adverse impacts, and for which

development and implementation of a TMDL would be meaningless, and perhaps even impossible, given the transitory nature of the excursions.

It is a perfectly valid policy choice, and legally permissible, for the State Board to decide that it wishes to use a listing methodology that ensures a specified level of confidence in the decision to list (or not to list). CASA supports the policy direction being provided through the draft Listing Policy to narrow the scope of the list slightly, given the enormity of the task already confronting the State and Regional Boards, and the fiscal reality facing the Boards in light of the severe State budget crisis.

Moreover, the draft Listing Policy expressly provides that regional boards may list waters using an alternative exceedance frequency, if justified. (Draft Listing Policy Sections 3.1.11 and 6.2.5.5 (Appendix-7, 21).) The "alternative data evaluation" listing factor ensures that waters that are truly impaired will not be excluded solely on the basis of sample size. On the other hand, the requirement that the regional board explain the technical basis for its decision guards against the placement of waters on the list for which there is not sufficient evidence that the water quality standard is exceeded. Furthermore, the provision specifying the minimum number of samples provides a general rule, but also allows flexibility by providing that "Fewer samples may be used on a case-by-case basis if standards are exceeded frequently as described in the California Listing Factors." (Draft Listing Policy Section 6.2.5.5 (Appendix-21).) As noted in the Tri-TAC letter, we do have concerns that these provisions may prove to be a catch-all that will allow regional boards to circumvent the data quality and quantity requirements of the Policy. Despite our reservations about the appropriateness of these provisions, we believe their inclusion renders the objections to the binomial method as inconsistent with water quality standards moot.

The Draft Listing Policy does not violate the requirement that the State consider "all readily available data and information" under 40 C.F.R. § 130.7(b).

Federal regulations require states to "assemble *and evaluate* all existing and readily available water quality and information" to develop their 303(d) lists. (40 C.F.R. § 170.7(b)(5) (emphasis added).) The regulations do not require states to *apply* all data and information, regardless of credibility, quality or representativeness. Nothing in the regulation suggests that states are deprived of the ability to exercise judgment in their evaluations of the available data. Indeed, the language addressing the assembly and evaluation of data in 40 CFR 130.7(b)(5) would be meaningless if states were not able to reject data after evaluation. In its 2002 Integrated Water Quality Monitoring and Assessment

Report Guidance, U.S. EPA encouraged states to evaluate data quality and quantity when making listing decisions. Similarly, the Consolidated Assessment and Listing Methodology Guidance provides:

> "EPA encourages states, territories, interstate commissions, and authorized tribes to use the data quality objectives process to define minimum quality data requirements. This includes information on appropriate sample size and monitoring design, sample collection and handling protocols, analytical methods and detection limits, quality control procedures, and data management." (Section 3.2.1, p. 3-9.)

U.S. EPA's guidance not only allows, but encourages, states to develop methodologies establishing minimum requirements concerning data quality and quantity. The National Academy of Sciences has also endorsed "statistical approaches to defining all waters, proper monitoring design, data analysis and impairment assessment." *Assessing the TMDL Approach to Water Quality Management* at p. 43.

Minimum data quality assurance requirements have been utilized in other states. Both Florida and Arizona have adopted listing regulations with credible data quality requirements. Colorado specifies that data used in listing decisions must be "demonstrably credible;" Texas, Nebraska and North Carolina all have similar minimum data requirements. In adopting the proposed Listing Policy, California would not be breaking new ground—the reasonableness of minimum data requirements has already been well established and has survived judicial scrutiny. We urge the Board to adopt this rational and technically sound approach to assessing impaired waters.

Thank you for the opportunity to provide our comments. Please contact me at (916) 446-7979 if you have any questions.

Sincerely,

Roberta L. Larson

RLL/jlp

cc: Celeste Cantu, Executive Director (via electronic mail)
Craig J. Wilson, Chief, TMDL Listing Unit, Division of Water Quality (via electronic mail)
Craig Johns, Chair, AB 982 Regulated Caucus (via electronic mail)
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Sharon Green, Chair, Tri-TAC (via electronic mail)