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DIRECTOR OF WASTEWATER

February 18, 2004

Via Electronic and U.S. Mail

Arthur G. Baggett, Jr., Chair
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812

**RE: COMMENTS REGARDING THE STATE BOARD'S "WATER QUALITY
CONTROL POLICY FOR DEVELOPING CALIFORNIA'S CLEAN
WATER ACT SECTION 303(d) LIST AND DRAFT FUNCTIONAL
DOCUMENT"
(Dated December 2003)**

Dear Mr. Baggett:

East Bay Municipal Utility District (EBMUD), located in Oakland, California, is pleased to provide our comments regarding the *"Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List and Draft Functional Document"* (draft dated December 2003; hereafter, the "Draft Listing Policy"). We appreciate the time and effort that you and your staff have dedicated to this important issue.

We strongly support the State Board's goal of establishing a standardized approach for assigning water bodies to the State's 303(d) list. The Draft Listing Policy overall represents a consistent, scientifically and legally defensible approach to developing California's 303(d) list. Many aspects of the Draft Listing Policy, for example data quality and quantity requirements, requirements for consistent and statistically valid data evaluations, and implementation provisions, provide a solid framework for listing and de-listing California's surface waters under Clean Water Act Section 303(d).

The following are specific comments that EBMUD has on: the proposed structure of the 303(d) list; the review of the existing Section 303(d) list; data quality/quantity requirements; de-listing factors; and the issue of aggregation of data by reach/area.

Structure of the 303(d) List

EBMUD is concerned that the draft policy reflects the SWRCB's movement away from an "integrated" water quality assessment report format as was proposed in the July 2003 *Draft Policy for Guidance on Assessing California Surface Waters*, towards the revised "single list" structure proposed in the December 2003 Draft Listing Policy. Under the new Draft Listing Policy, there is no Monitoring, Planning, Pollution, Standards Fully Attained or Standards Partially Attained Lists, and no list separate from the 303(d) List for TMDLs Completed or Enforceable Programs. Under the current Draft Listing Policy, waters placed in the Enforceable Programs category will be assigned a low priority and will not be scheduled for TMDL development, but will still appear on the 303(d) list.

We believe that the SWRCB should go back to including on the 303(d) list only those waters that do not attain water quality standards due to pollutants, and for which a TMDL is required. Other categories of waters, such as those with TMDLs already completed or with enforceable programs in place to bring the water into attainment, should be placed on separate lists, and not on the 303(d) list.

EBMUD also strongly supports the establishment of an official "planning/monitoring" list, separate from the 303(d) list. The Draft Listing Policy does not include the concept of a "planning/monitoring" list, which was established during the 2002 listing cycle, and included as part of the July 2003 Draft Policy. A planning list is important for cases where the cause of impairments are undetermined (e.g., unknown toxicity), cases where impairments are due to "pollution" rather than "pollutants", cases where data are insufficient to determine if impairment exists, and cases where water quality standards may be inappropriate. All water bodies on the planning/monitoring list would need to be further studied before being placed on the 303(d) list if impaired or de-listed if not impaired. 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 unwise use of resources.

Review of the Existing Section 303(d) List

We recommend that the Board provide a mechanism for reevaluation of water bodies identified on previous 303(d) lists using the Listing Policy once it is finalized. Many listings included on previous 303(d) lists may be 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. The SWRCB should reevaluate all requested existing listings, whether or not new data and information are available because even waters that have not been monitored since the initial listing may fail to meet the data quantity and data quality requirements under the new Draft Listing Policy. We feel that if a water body could

not be listed under the provisions of the new Listing Policy, the listing does not belong on the 303(d) list.

Data Quality/Quantity Requirements

We are concerned that the section of the Draft Listing Policy allows a water segment to be listed based on any listing factor that shows a trend of declining water quality standards attainment, and is therefore projected to exceed water quality standards at some point in the future, even though water quality objectives do not need to actually be exceeded to satisfy this listing factor. Although the SWRCB requires the use of data collected for at least three years, the Draft Listing Policy does not specify the amount of data that must be collected to evaluate the declining trend, or how much data is required to establish the baseline condition the trend will be compared to. Three years of data may be insufficient to determine the influence of seasonal effects and inter-annual effects, and to separate out the occurrence of adverse biological response or degradation of biological populations from within-site variability for those factors. Trends in water quality may be linked to hydrologic conditions (e.g., drought) rather than increases in pollutant loading or degradation of water quality conditions.

We encourage the State Board to carefully address these concerns and develop a policy that consistently requires the use of objective methods to evaluate impairments based on actual, not projected, exceedances of water quality standards, combined with a demonstration that the beneficial uses of the water body are also being impacted. Therefore, we recommend that the SWRCB adopt an alternative not proposed in the Draft FED; that trends in water quality should not be used as a factor for listing.

De-listing Factors

Section 4 of the Draft Listing Policy states that "all listings of water segments shall be reevaluated if the listing was based on faulty data. Faulty data include, but are not limited to, typographical errors, improper quality assurance/quality control procedures, or limitations related to the analytical methods that would lead to improper conclusions regarding the water quality status of the segment." (Draft Listing Policy, pg. 10) We request that this section be expanded to include specific language to allow the de-listing of a water body if the data quality and data quantity requirements under the new policy are not met by existing listing. Existing listings that do not meet the Draft Listing Policy's data quality or data quantity requirements should be de-listed if interested party requests a reevaluation of the listing and it is shown through the reevaluation that the listing was based on insufficient or poor quality data. For example, existing listings based solely on visual assessments or other semi-quantitative assessments should be removed from the 303(d) list because these listings were originally based on insufficient data, and would therefore fail to meet the listing requirements under the current Draft Listing Policy.

As discussed previously, we strongly encourage the SWRCB to reevaluate all requested existing listings, whether or not new data and information are available because even waters that have not been monitored since the initial listing may fail to meet the data quantity and data quality requirements under the new Draft Listing Policy. We feel that if a water body could not be listed under the provisions of the current Draft Listing Policy, the listing does not belong on the 303(d) list. This approach is consistent with Section 6.1 of the Draft Listing Policy, which states that, "In performing the reassessment the RWQCB's shall use the California Listing Factors (i.e., waters shall be assessed as if they had never been listed before) to assess each water segment-pollutant combination." (Draft Listing Policy, pg. 14)

Aggregation of Data by Reach/Area

We disagree with the SWRCB's recommendations for aggregation of data under Section 6.2.5.6 of the Draft Listing Policy. The Draft Listing Policy states, that "Data must be measured at one or more sites in the water segment in order to place a water segment on the section 303(d) list. Data related to the same pollutant from two or more adjoining segments shall be combined provided that there is at least one measurement above the applicable water quality objective in each segment of the water body. The pooled data shall be analyzed together." (Draft Listing Policy, pg. 22) This could be interpreted to mean that a single exceedance in one water segment could lead to placement of that entire segment on the 303(d) list. This approach seems to be in conflict with the SWRCB's requirement to list waters using data that is spatially representative of the reach, per Section 6.2.5.3 of the Draft Listing Policy. Regarding spatial representation, the Draft Listing Policy states, that "Samples shall be collected to be representative of spatial characteristics of the water segment. To the extent possible, all samples should be collected to statistically represent the segment of the water body or collected in a consistent targeted manner that represents the segment of the water body." (Draft Listing Policy, pg. 21) For example, if an upstream reach is determined to be impaired based on several samples that exceed the water quality objective, and the downstream reach has one exceedance above the water quality objective from a sample taken at the top of the reach, the entire downstream segment could potentially be listed using the pooled data, even if samples taken further downstream in the downstream reach show that the segment attains the water quality objective. Also, if one reach is more frequently monitored than the other, the pooled data from the two segments will be biased. We encourage the SWRCB to eliminate the language regarding the pooling of data from adjoining reaches. Each reach should be evaluated separately, and special attention should be given to proper weighting of data in instances where one part of a water segment may be more frequently monitored.

Conclusion

In closing, we would like to commend the SWRCB for their hard work towards developing a reasonable, credible, scientifically-based approach toward assigning water bodies to the state's 303(d) list. We support the SWRCB moving forward with this policy, and hope that the SWRCB will incorporate the revisions to the draft policy that we have outlined above. We also support the SWRCB in their goal to have the policy in place before the next update of the 303(d) list is completed. Development of the next 303(d) list under the provisions of the policy will help focus the 303(d) list on real water quality problems.

Sincerely,



David R. Williams
Director of Wastewater

DRW:MAB:mab

cc: Members, State Water Resources Control Board
Celeste Cantu, Executive Director
Linda Sheehan, Co-Chair, AB 982 Public Advisory Group
Craig J. Wilson, Chief, TMDL Listing Unit, SWRCB