



PUBLIC WORKS
DEPARTMENT

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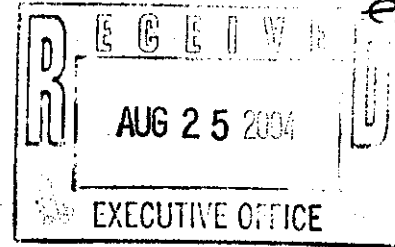
CITY OF BURBANK

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August 24, 2004

Chairman Arthur G. Baggett, Jr.
Members of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

**Re: Comments on the Draft Water Quality Control Policy for
Developing California's Clean Water Act Section 303(d) List
and Draft Functional Equivalent Document**

Dear Chairman Baggett and Members of the Board:

The City of Burbank Public Works Department (Burbank) appreciates the opportunity to comment on the July 22, 2004 draft of the State Water Resources Control Board's (State Board) "Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List" (Draft Listing Policy) and Functional Equivalent Document (FED).

We appreciate the State Board staff's efforts to establish a reasonable and objective approach to assessing California's Surface Waters. We support the use of consistent and scientifically sound criteria and adopted water quality standards to determine impaired waters. However, we do have a number of concerns with this draft that we would like the State Board to change.

1. Placement and Removal of Segment/Pollutant Combinations. (§2.2)

Issue: The content of the "Water Quality Segments Being Addressed" category in the July 2004 Draft Policy is unclear. In the Draft Policy, a water segment with an approved TMDL implementation plan will still be listed in the Water Quality Limited Segments category until all TMDLs for the water segment are completed. (A-3)

Comments: It is not completely clear how segments at various stages of the TMDL process will be handled, or if waters that have met WQS due to a TMDL or other program will have to go through the delisting process. Water segment-pollutant combinations should be listed in the appropriate category, regardless of the status of the other pollutants listed in that segment.

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Recommendations: The Draft Policy should be revised to clarify how a water segment/pollutant combination is removed once WQS are attained due to a TMDL, or it should be clarified that delisting can happen from either category of the list. In addition, the Draft Policy should include a methodology whereby a water segment can be removed from the 303(d) list during the TMDL process, if it is demonstrated during the course of the TMDL that water quality standards are in fact being attained, in accordance with the delisting provisions of section 4 of the Policy.

2. Natural Background Conditions and Physical Alterations. (§3.1)

Issue: Previous drafts of the Policy prohibited listing waters that were impaired solely due to natural background conditions, such as highly saline waters or high pathogen levels due to wildlife or sediment/soil contributions, or physical alterations, such as hydrologic modifications, that could not be controlled. The July 2004 Draft Policy specifically removed this prohibition and therefore would allow listings of water segments regardless of natural background conditions or physical alterations that cannot be controlled.

Comments: The Draft Policy is silent on what mechanism would be used to address these types of "impairments." The 303(d) list is designed to identify waters that require a TMDL. TMDLs are not the appropriate mechanism for addressing waters that are impaired due to natural background conditions or physical alterations that cannot be controlled. Although it is possible that the State Board will propose, in its draft "Water Quality Control Policy for Addressing Impaired Waters: Regulatory Structure and Options" (see www.swrcb.ca.gov/tmdl/docs/impaired_waters_policy.pdf), that the solution for these types of waters is to change the applicable water quality standard, that document has not been approved. Moreover, neither the State nor Regional Boards have committed to address these water quality standards situations in a comprehensive and expedited fashion, and it is inappropriate to allow such listings to occur irrespective of the circumstances, since an effective TMDL cannot be developed. (A-5, A-35)

Recommendation: The Draft Policy should be amended to add the following statement in Section 3.1: "If standards exceedances are associated with physical alteration of the water body that cannot be controlled or by natural background conditions, the water segment shall not be placed on the section 303(d) list. Instead, the Regional Board shall conduct an expedited use

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attainability investigation, and make any appropriate standards changes before the next listing cycle. If it is determined that the standards are appropriate and the water segment is not attaining standards according to the listing factors, then that segment shall be listed as expeditiously as possible."

3. Visual and Semi-Qualitative Assessments. (§3.1)

Issue: Previous drafts of the Listing Policy have allowed listings based on visual and semi-qualitative assessments. The July 2004 Draft Policy continues to allow use of visual and semi-quantitative assessments to list. Although the Draft Policy indicates that numeric water quality data must exceed a guideline, it also allows comparison to a reference condition.

Comments: Burbank continues to object to the use of these types of listing factors for several reasons. First, they are based on anecdotal information and often used when there are no numeric objectives. In addition, listing and delisting decisions will be very difficult to confirm (or deny) with conflicting information. Visual and semi-qualitative assessments are often based on factors that are very subjective, especially for highly modified waters.

Burbank advocates that listings should be scientifically based on objective and verifiable information. Because some listing factors are based on comparison with a reference condition (rather than comparison to an adopted numeric standard), this infers that the assessments do not have to be quantitative in nature. For adverse biological response, qualitative visual assessments or other semi-qualitative assessments may be used as secondary lines of assessments. Degradation of biological populations and communities requires at least two lines of evidence. Therefore, our concerns with reliance on visual and semi-qualitative assessments in the listing context remain.

Recommendations: At minimum, visual and semi-qualitative assessments for listing factors such as nuisance, adverse biological response, and degradation of biological populations and communities should only be used as ancillary lines of evidence, consistent with the general statement outlined on A-5 of the draft policy (Section 3.1 states that "Visual assessments or other semi-quantitative assessments shall also be considered as ancillary lines of evidence to support a section 303(d) listing"). (A-6 thru A-11)

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4. Use of Data Collected During Spill or Other Violation. (§3.1)

Issue: Prior drafts of the Policy excluded data collected during a known spill or violation. The Draft Policy now allows data collected during a known spill or violation of an effluent limit in a permit or WDR to be used in conjunction with other data to demonstrate there is an exceedance of a water quality standard.

Comments: Burbank objects to the use of data collected during a known spill or violation of an effluent limit to be used in the listing process, because these conditions are generally anomalous, episodic events that are not representative of typical conditions in the water segment. Furthermore, the purpose of the 303(d) list is to identify impaired waters that cannot be brought into compliance with water quality standards by other measures. Other measures are available to address exceedances related to spills or other violations, such as permit provisions and enforcement orders. Therefore listings based on this data are inappropriate. (A-5)

Further, the language in Section 3.1 is ambiguous as it relates to spills in that it does not define how much "non-spill" related data is necessary. As written, for a toxic constituent, Regional Boards could use two positive samples taken during a spill or know violation and one positive sample taken at another time to list a water segment. This would not necessarily reflect the condition of the water segment and its appropriateness to develop a TMDL.

Recommendations: Burbank advocates that language removed from the previous draft of the policy be re-instated, so that data and information collected from a known spill is not used in the assessment process (i.e., the revised section 3.1 should read "Data and information collected during a known spill or violation of an effluent limit in a permit or waste discharge requirement (WDR) shall not be used in the assessment of objectives and beneficial use attainment as required by this Policy."). Alternatively, the Final Policy should be clarified to provide that, "Data and information collected during a known spill or violation of an effluent limit in a permit or waste discharge requirement (WDR) may be used ~~in conjunction with other data~~ as ancillary lines of evidence to demonstrate there is an exceedance." Another alternative would provide that data collected during these events but not directly related to the violation, could be used for 303(d) listing purposes. This could be achieved with the following language: "Data and information collected during a known spill or violation of an

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effluent limitation that is indicative of the waterbody condition and not necessarily related to the spill may be used in conjunction...

5. Use of the binomial distribution using the null hypothesis. (§§3.1, 3.2, 4.1 through 4.9, Tables 3.1 and 3.2 and 4.1 and 4.2)

Issue: Previous Drafts of the Listing Policy relied on statistical evaluation to determine if listing was warranted. This was based on a minimum of 10% of the samples exceeding the objective with a confidence level of 80%. The hypothesis was that a water segment was clean unless shown otherwise. There were significant comments from the environmental advocacy community that this methodology was biased in favor of not listing a water segment that was actually impaired. (A so-called "Type 2 error.") They also strongly advocated that the starting hypothesis should be that waters are impaired unless otherwise shown.

For listing purposes, the July 2004 Draft Policy continues to use the hypothesis that waters are not impaired unless otherwise shown. The Draft Policy has changed the statistical approach to list and delist water segments. The Draft Policy contains a new type of approach called the "Acceptance Sampling by Attributes Approach." This approach balances Type I (listing a water that is not impaired) and Type II (not listing a water that is impaired) errors. (A-12 thru A-23)

Comment: Burbank supports the binomial distribution using the null hypothesis approach. We believe this statistical approach is the best available method of providing much-needed objectivity to the listing (and delisting) process.

Recommendations: Burbank urges the State Board to adopt the proposed statistical approach as currently included in the July 2004 Draft Policy.

6. Nuisance Listings and Delisting. (§3.1.7)

Issue: In the December 2003 Draft of the Policy, a water segment could be listed for nuisances such as odor, taste, excessive algae growth, foam, turbidity, oil, trash and color after a qualitative visual assessment or other semi-quantitative assessment showed that an evaluation guideline associated with numeric data was exceeded. The exceedance rate was subject to the binomial

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distribution; however for non-nutrient related guidelines, a segment could be placed on the list if "there is a significant nuisance compared to reference conditions." The current draft removes the "visual" requirement and the semi-quantitative language. Waters can be placed on the Section 303(d) list for both nutrient related and other types of nuisances when a "significant nuisance condition exists as compared to reference conditions, or when nutrient concentrations cause or contribute to excessive algae growth". (Section 3.1.7.1).

Comments: There is no guidance contained in the July 2004 Draft Policy to assess what "significant" nuisance conditions are, or how it should be determined if nutrients are causing or contributing to the observed effect. The comparison of "significant" nuisance conditions and reference conditions may be highly subjective, especially absent numeric data and measurable requirements (*i.e.*, the binomial distribution) to show there is a real problem. All nuisance-related impairments should be tested against the binomial distribution method, including those where the nuisance is compared to background conditions. Absent this requirement, a water segment can be listed due to one time event if the water segment conditions differ from the chosen reference condition.

In addition, the Draft Policy provides no guidance regarding the methodology that should be employed to determine appropriate reference conditions for a particular water segment. The delisting criteria for nuisance requires that "The water segment no longer satisfies the conditions for a nuisance listing..." (Section 4.7), however since nuisance listings can be highly subjective, delisting based on these conditions will be problematic. How similar to a reference condition does the water segment need to be in order for it to be no longer considered impaired?

Recommendations: Due to the highly subjective manner in which these types of listings are to be made under the July 2004 Draft of the Policy, Burbank recommends that the SWRCB remove this listing factor from the Policy. As mentioned earlier, as the Policy is currently written, it is not clear whether water segments evaluated by this factor would then be listed for the factor itself (*i.e.*, the water segment would be listed for "nuisance"), which would be considered "pollution" and not a "pollutant", or whether the water segment could only be listed for the nutrient or other pollutant causing the nuisance. Burbank concurs with the stated intent of the Draft Policy in Section 2 to focus the 303(d) List on instances where standard non-attainment is due to a pollutant or pollutants, and in order to maintain that focus, we recommend that this listing factor be eliminated.

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7. Public Input on State Board Initiated Changes to the Proposed List (§6.3)

Issue: The July 2004 Draft Policy restricts input at the State Board level to issues brought up to the Regional Boards. However, the State Board, on its own motion, can change a listing decision. There currently is no avenue for comment on these changes unless they have been addressed at the Regional Board level. (A-38)

Comment: Public comment should be allowed at the State Board level when the State Board decides, on its own motion, to change a listing decision. By the terms of such a procedure, if the State Board takes up such a listing decision on its own motion, the public will not have had an opportunity to provide comments. Additionally, commenters should be able to raise issues or provide information that was not available at the time the Regional Board considered the listing decision, if the issue or information is germane to the listing decision and could not have been made or provided to the Regional Board.

Recommendations: The Draft Policy should be revised to allow public comments (both written and at any public hearing before the State Board) on proposed listing or delisting decisions where the State Board takes up its own motion in either case. Further the Draft Policy should be revised to allow comments that might not have been provided at the Regional Board hearing on a proposed listing or delisting decision where such comments raise issues or provide information that was not reasonably available at the time the Regional Board considered the listing or delisting decision.

8. Listing of Water Segments Due to Trends in Water Quality

We disagree that "trends in water quality" should be used as a criterion to list water segments that would not otherwise meet the conditions in the Draft Listing Policy. This criterion allows inclusion of water segments on the 303(d) list in absence of information that water quality standards are exceeded or that beneficial uses are impaired. That is not the purpose of the 303(d) list, which is to set forth those waters that do not meet water quality standards and for which TMDLs are to be completed.

As stated in the FED, there are currently no widely accepted approaches for documenting trends and the data is often difficult to interpret. (See, FED at p. 150.) The Draft Listing Policy describes six very general guidelines for determining the trends, but these guidelines are ambiguous and lack the specific

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requirements for consistent and statistically valid data evaluations, requirements for data quality and quantity, and other similar provisions in the other listing factors.

The Draft Listing Policy also does not provide a standard threshold amount to assess when a decline would trigger a listing (i.e. increase in a pollutant concentration of 25% in five years, exceedances of at least five percent of the samples, etc.). The Draft Listing Policy does not provide delisting guidelines if a water segment is listed by this criterion, leaving water segments without water quality impairments on the 303(d) list unless it can be shown that the data was faulty. Because this criterion of the Draft Listing Policy does not require an exceedance of a water quality standard, we are uncertain how a water segment listed under this criterion would be affected by revised water quality standards.

Because this criterion is so subjective, we believe this criterion is inappropriate for listing purposes and will lead to inconsistent interpretation of antidegradation requirements because each Regional Board would develop its own set of criterion.

Thank you for this opportunity to provide these comments. Should you wish any further information about either of these issues, please contact Rodney Andersen at (818) 238-3931.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Rodney Andersen', with a long horizontal flourish extending to the right.

Rodney Andersen
Principal Civil Engineer

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