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AB 982 PAG REGULATED CAUCUS

September 12, 2003

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

Via Electronic and U.S. Mail

SUBJECT: AB 982 REGULATED CAUCUS COMMENTS REGARDING THE STATE BOARD'S "WATER QUALITY CONTROL POLICY FOR GUIDANCE ON ASSESSING CALIFORNIA SURFACE WATERS (Dated July 1, 2003)

Dear Mr. Baggett:

On behalf of the membership of the Regulated Caucus of the AB 982 Public Advisory Group (PAG), I am pleased to provide our comments regarding the *"Water Quality Control Policy for Guidance on Assessing California Surface Waters"* (draft dated July 1, 2003; hereafter, the "Assessment Policy"). We appreciate the time and effort that you and your staff have dedicated to this important issue.

Before providing our substantive comments on specific aspects of the Assessment Policy, below, we wish to note that the draft Assessment Policy provides a thorough, objective, and legally-defensible approach to assessing California Surface Waters, one that addresses many of the critical issues discussed in our many, many hours of PAG discussions. The draft Assessment Policy provides the groundwork for a workable and sensible approach for listing and de-listing California's surface waters under Clean Water Act Section 303(d).

State Board Chairman Art Baggett has expressed a desire to develop a better way of assessing California's surface waters that will enable the State and Regional Boards, along with watershed groups, dischargers and other interested members of the public to concentrate on ***real*** water quality problems. The draft Assessment Policy is a step in the right direction.

During the last PAG meeting of 2002, the Environmental and Regulated Caucuses of the PAG agreed on one thing; we asked you and your staff to take all of the input and comments provided by our respective Caucuses, in addition to all of the information you received from your many individual meetings with regional board staff and various representatives of the environmental and regulated communities, and we asked that you develop a draft policy that reflects your best technical judgment as to how California's surface waters should be assessed for purposes of Section 303(d). We specifically - - and

collectively - - requested that the State Board staff ***not*** issue a policy that "splits-the-baby" in a way that seeks to satisfy *everyone* in some, limited fashion. We appreciate the fact that the State Board staff heeded that request in issuing the draft Assessment Policy. We also appreciate the fact that the State Board staff incorporated the other suggestion that both Caucuses agreed upon - - requirements for comprehensive fact sheets to explain actions being taken, so that the process is transparent and therefore, easier for all parties to understand and participate in.

When all of the posturing and baseless claims are laid aside, it becomes clear that those opposed to the draft Assessment Policy simply wish to maintain an approach where virtually "anything and everything" gets put on the TMDL list, regardless of the technical or objective merits for doing so. Far from the claims of those who are opposed to the draft Assessment Policy, the Regulated Caucus is ***not*** determined to exclude waters from the TMDL list regardless of water quality impacts. Rather, we are simply opposed to having waters put on the list where there is insufficient justification and where limited resources may be diverted from those waters where TMDLs really are needed.

Perhaps, if we enjoyed economic circumstances where *unlimited* resources could be dedicated to the TMDL program in California, it would be easier to accept a policy that embraces the *status quo* - - where it doesn't take much to qualify a water segment as "limited." But that clearly is not the situation; every week, it seems that we learn of more and more staff cuts at the Regional and State Boards. Every week, it seems that newly released economic figures shows more businesses leaving California, and more jobs following them.

The draft Assessment Policy is not perfect; this letter details a number of recommended revisions that we believe will strengthen and improve the Assessment Policy. Overall, however, the underlying premise of the draft Assessment Policy is the ***best*** approach to address ***real*** water quality issues, while recognizing that there are finite resources available for the TMDL program. We urge the State Board to recognize the incredible efforts of the staff in developing the draft Assessment Policy, and resist the temptation to veer significantly from the current path.

Technical Comments on the Draft Assessment Policy

Section 3 - Structure of the Integrated Report

In the draft Assessment Policy, several categories of waters, or lists, comprise the overall Integrated Report. The PAG Regulated Caucus agrees that the State needs to have several categories for the appropriate placement of waters, and believes that this

approach is helpful for identifying and tracking water bodies with different situations. We believe it is perfectly appropriate for the SWRCB to track separately those waters impaired by "pollution" rather than "pollutants", to inventory waters where other enforceable programs are in place to attain standards, and to maintain a list of completed (but perhaps not fully implemented) TMDLs. The 303(d) list should only include waters impaired by pollutants for which TMDLs will be developed.

However there is some confusion as to the intended distinction between the lists, particularly the Monitoring List, Planning List and the Standards Partially Attained List. As currently structured, only waters for which no data are available would be placed on the draft Assessment Policy's Monitoring List. The State's 2002 Monitoring List, however, consists of waters for which there are insufficient data to determine whether or not water quality standards are exceeded. Under the current draft Assessment Policy, the guidance for the Planning List states, "waters shall be placed on this list if some data and information are available but are insufficient to determine whether water quality standards are attained." It is not clear how water bodies on the 2002 Monitoring List for which some data already exists will be treated under the draft Assessment Policy. Will these waters be automatically placed on what is now called the Planning List?

The Standards Partially Attained List is described in the Draft Assessment Policy as the appropriate category for waters where "data and information are insufficient to determine if the remaining water quality standards are attained", but that also some waters in this category attain some water quality standards. What is the function of the Standards Partially Attained List, and how can it be distinguished from the Planning List? The difference between the two lists is confusing, because it seems that placement on the Standards Partially Attained List would automatically result in a water segment also being placed on the Planning List, because more information would be required to determine if the remaining water quality standards are attained. At the same time, waters might also be placed on the 303(d) list, since these waters would be deemed to be attaining some standards but not others (some waters might even be placed on the Monitoring List as well, for certain parameters, if no information were available for them). Therefore, to clarify these structural issues, the Regulated Caucus encourages the SWRCB to either eliminate the Standards Partially Attained List, or provide an explanation that more clearly sets forth the rationale for placement of water segments on this list.

Section 4 - California Listing Factors

Numeric Water Quality Objectives, Criteria, or Standards for Toxicants in Water. The REGULATED CAUCUS continues to disagree with the SWRCB's reliance on

drinking water MCLs for listing purposes. MCLs are applicable to treated tap water, and not always applicable to ambient surface waters.

Numeric Water Quality Objectives and Criteria for Conventional Pollutants in Water. The Regulated Caucus believes that exceedances of water quality objectives - - alone - - should be sufficient for placing a water segment on the Planning List, but not the 303(d) List. The presence of a pollutant above a given objective in Ten Percent of samples taken does not necessarily demonstrate impairment, but it *does* demonstrate that the water segment should received heightened scrutiny. Using a "weight of evidence" approach should be required to corroborate impairment. This applies to toxics and especially to conventional pollutants.

For dissolved oxygen, the draft Assessment Policy states that if diel measurements show low dissolved oxygen levels in the morning and sufficient oxygen levels in the afternoon, it will be assumed that nutrients are responsible for the observed dissolved oxygen concentrations. The Regulated Caucus agrees that it would be a good idea to monitor for nutrients in cases where dissolved oxygen levels are below the water quality objective, however it should not be assumed that nutrients are causing impairment. As the SWRCB is aware, some water segments (Cold Creek in the Malibu Creek watershed is an example) may exhibit significant amounts of algae growth, and subsequent diel oxygen fluctuations, even at low nutrient concentrations. Other factors such as riparian cover, substrate composition, and even the particular species of algae, can influence the amount of algae present in a water segment, and therefore influence levels of dissolved oxygen. It should also be recognized that for some water bodies, this diel fluctuation in dissolved oxygen may also be the natural condition of the water body, and would not necessarily indicate an impaired condition.

Beach Postings and Closures. The Regulated Caucus agrees with the SWRCB that postings not backed by water quality data, or postings made in response to a known spill, should not be considered for placement on the Planning List or 303(d) List.

Health Advisories. The draft Assessment Policy requires listing water segments for Health Advisories when water-segment specific data are available indicating the evaluation guideline for tissue is exceeded. In this case, the Regulated Caucus believes it is redundant to list the water body for the health advisory itself, and instead the water body should only be listed for the constituent exceeding the tissue guideline, assuming the tissue evaluation guideline has been adopted as an existing, legally-adopted state water quality objective.

Bioaccumulation of Pollutants in Aquatic Life Tissue. The Regulated Caucus disagrees with the SWRCB guidance in the draft Assessment Policy regarding the requirements for placement of waters on the Planning List or 303(d) list due to tissue exceedances of pollutant-specific evaluation guidelines. Aside from the fact that the tissue evaluation guidelines specified in the draft Assessment Policy are not legally adopted water quality objectives (and therefore should not be used for this purpose), the Regulated Caucus disagrees with the minimal number of exceedances required for placement of a water segment on the Planning or 303(d) List. Only 2 tissue exceedances are required for placement on the Planning List, and only 3 exceedances required for placement on the 303(d) list. For water column constituents for sample populations less than 20, 5 or more sample exceedances are required for 303(d) listing. It is not clear why the SWRCB has essentially "lowered the hurdle" for tissue-based listings as compared to water column constituents.

Although theoretically factors such as bioaccumulation, adverse biological response, and degradation of biological populations and communities, may suggest some measure of water segment impairment, the relationship between a pollutant and the impairment is often less clear in these types of measures as compared to exceedances in the water column. In the case of tissue-based exceedances, the relationship between concentrations in the water column and concentrations in fish tissue may be unclear, and therefore a lower exceedance rate for these types of listings is not justified. Listings based on exceedances of tissue evaluation guidelines, if used at all, should require an established relationship between tissue levels and water column concentrations, and the listing should be based on a weight of evidence approach, per the draft Assessment Policy's guidance (*see,* page 37, endnote 6 of the draft Assessment Policy).

The Regulated Caucus supports the requirement that multiple lines of evidence be considered when using listing factors such as bioaccumulation of pollutants in tissue, adverse biological response and degradation of aquatic life populations or communities. These factors are not sufficient by themselves as a basis for listing since these responses may be attributable to factors other than exceedances of water quality objectives (i.e., physical habitat limitations). If exceedances of fish tissue guidelines are used as the basis for listing, additional detail and specificity needs to be provided in the Assessment Policy as to what constitutes a tissue sample. For example, are fish tissue samples taken from two different fish collected at the same site on the same day considered two distinct tissue samples?

This weight of evidence approach should similarly be applied to water column measurements, as well. For instance, as noted above, the mere presence of a pollutant above an objective in Ten Percent of the samples taken does not necessarily demonstrate

impairment. In such cases, the *magnitude* of an exceedance should also be considered, whereby *de minimis* exceedances would not be given as much weight as large exceedances.

Water/Sediment Toxicity. The Regulated Caucus is very concerned about guidelines for the placement of water segments on the 303(d) list for toxicity alone. The Draft Assessment Policy states, "*If the pollutant has not been identified, the water shall also be placed on the Planning List and studies identifying the pollutant causing or contributing to the toxicity shall be completed prior to the development of a TMDL.*" (Draft Assessment Policy at p. 12.)

It is not clear from this statement what the SWRCB hopes to achieve by placing the water segment on both the Planning List and the 303(d) List for toxicity. If there is some doubt that "a" pollutant, or "which" pollutant, is causing toxicity, the water should not be placed on the 303(d) list, since toxicity is a ***condition***, not a pollutant. The function of the SWRCB's Planning List is to address these types of issues. Placement of the water segment on the 303(d) list in addition to the Planning List seems to only serve as a "place-holder" for a TMDL. In order for an appropriate toxicity TMDL to even be feasible, consistent toxicity due to a known pollutant is required, and this relationship should be established before the water body is considered for placement on the 303d List.

Nuisance. The Regulated Caucus disagrees with the draft Assessment Policy's reliance on "nuisance conditions" as a basis for listing. We believe that use of a vague concept such as nuisance will allow circumvention of the data quality and quantity standards, narrative translators and other requirements set forth in the draft Assessment Policy. Further, a major shortcoming of relying on "nuisance" factor is that the relevant evidence (*e.g.,* odor, visual) is not always associated with a particular pollutant, and therefore not amenable to a TMDL approach. Use of this listing factor will contribute to additional listings that are not based on credible, verifiable information, or that are based on a clear understanding of what designated uses and objectives are not attained.

Furthermore, we do not support the use of qualitative visual assessments, photographic monitoring or other anecdotal information as a basis for listing, particularly if there are no numeric objectives for the parameters being observed and the assessment of that information will be solely a matter of staff judgment. The problem with relying on such photographic or anecdotal information is best illustrated by the mirror situation, where someone seeks to de-list a water based on photographic or anecdotal information. In other words, relying on such information to make de-listing decisions would enable a party to take photographs or present anecdotal information contrary to the initial information, and a regional board would have to consider and weigh equally such

information. We believe sound science dictates that only objective and verifiable information be used to make these important decisions. In addition, the determination of "significant nuisance condition when compared to reference conditions" is problematic not only in the subjective determination of "significant nuisance condition", but also in the subjective determination of the appropriate reference condition to be used in the comparison. This is a particular problem with regard to the State's many highly-modified waters, such as those that have been channelized for flood control purposes.

Adverse Biological Response and Degradation of Biological Populations and Communities. The Regulated Caucus does not support the use of these factors for placement of a water segment on the 303(d) list, although they may be useful in identifying areas where additional monitoring and study are needed to determine the pollutant or stressor causing the observed conditions. As mentioned earlier with regards to fish tissue listings, multiple lines of evidence should be considered, since these biological responses may be attributed to factors other than exceedances of water quality objectives (*e.g.*, physical habitat limitations, overfishing, disease, or invasive exotic species, none of which are conducive to a TMDL solution).

If adverse biological response or degradation of a biological population is shown, it should be demonstrated that these responses are in fact due to a pollutant, or if not, they should be appropriately placed on the Pollution List, or on the Planning List if there is insufficient information to determine impairment/attainment. Placing a water segment on the 303(d) list using these factors, as currently outlined in the draft Assessment Policy, is also problematic due to the reliance on comparison of the response or community structure to that of a reference condition. The selection of an appropriate reference condition, particularly for highly impacted urban watersheds, would obviously be critical to the determination of impairment. In some watersheds, minimally impacted or reference conditions may not exist, and therefore a determination would have to be made as to the best attainable or "desired" condition for comparison, before an evaluation of impairment or attainment status could be made.

Also, comparison to reference conditions may be difficult because ecologically one would expect to find more and more differences between the water segment and the reference location as the sample size increases. As more information is collected, differences between the water body in question and the reference site may be due to factors that are not accounted for, such as temperature, soil conditions, integrity of the physical habitat, etc. In other words, the reference site may be changing independently from the test site, due to factors other than water quality, however it may appear that the test site is impaired due to differences between it and the reference site.

Trends in Water Quality. The Regulated Caucus continues to disagree with the use of this factor for listing. Relying on "trends in water quality" to dictate TMDL listing and development decisions is indicative of the mindset that has evolved wherein the 303(d) list must include every conceivable water quality issue and every existing piece of water quality information. 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. In addition, the draft Assessment Policy does not specify the amount of data (other than to use "data collected over 3 years") that should be used to evaluate the declining trend, or specify how much data is required to establish the baseline condition. Three years of data may be insufficient to determine the influence of seasonal effects and interannual effects, and to separate out the occurrence of adverse biological response or degradation of biological populations from within-site variability for those factors.

Alternate Data Evaluation. The Regulated Caucus is concerned that this listing factor could be misused in circumstances where credible, objective data and other information might not otherwise justify placing a water segment on the 303(d) list. While the Regulated Caucus certainly agrees that some waters may need to receive heightened scrutiny to determine if they are meeting water quality standards or not, we believe these types of waters are better placed on the Monitoring or Planning Lists.

Section 7- Policy Implementation

Reassessment of the 2002 Section 303(d) List. The Regulated Caucus strongly supports the proposed requirement that each water body and pollutant combination identified on the 2002 section 303(d) List be reevaluated using the provisions of the Assessment Policy. As we noted in our comments on the Listing Concepts, such a reassessment is appropriate, as the State has never before employed a consistent listing policy subject to public review and comment. The 2002 list will include waters that have been "grandfathered" in over time and that were never subject to any structured or meaningful review. The National Research Council has endorsed a reassessment approach to existing listings.

We recognize, however, that reassessing all the listings presents a significant burden on the SWRCB, at a time when resources are very limited. In addition, we are concerned that conducting the review in phases, linked to TMDL priority, may not be the best way to ensure that those listings most in need of reevaluation will be considered in a timely manner. For these reasons, the Regulated Caucus proposes an alternative approach to reassessment of the 2002 List.

We recommend that the SWRCB establish an application process, whereby an interested party can request that an existing listing be reassessed under the provisions of the Assessment Policy. In order to trigger the reassessment, the requestor would have to describe the reason(s) they believe that the listing is inappropriate, state why application of the draft Assessment Policy would lead to a different outcome, and provide the data and information necessary to enable the regional boards and SWRCB to conduct the review. This alternative approach would provide a mechanism for reevaluating questionable listings that have an impact on an interested party, without creating unnecessary work for the regional board and SWRCB staff.

Definition of Readily Available Data and Information. The Regulated Caucus supports the inclusion of receiving water monitoring data from discharger monitoring reports as readily available data and information to be reviewed by the RWQCBs.

RWQCB Fact Sheet Preparation. The Regulated Caucus supports the State Board staff's recommendation that "fact sheets" be prepared for each listed water that includes substantial information about the water segment. In addition, we recommend that the draft Assessment Policy also include a clear mechanism for the public to obtain the underlying raw data that is summarized in the individual fact sheets. This will enable interested parties to better understand the bases of individual listing recommendations, and add further transparency to the process.

Evaluation Guideline Selection Process. The draft Assessment Policy states that numeric evaluation guidelines "are not water quality objectives and should only be used for the purpose of developing the section 303(d) list and the other lists associated with the California Integrated Water Quality Report." The Regulated Caucus continues to maintain that narrative objectives or evaluation guidelines may not be used as a substitute for, or to implement new, numeric objectives without first adopting those numeric objectives in accordance with Sections 13241 and 13242 of the Water Code. Any numeric values which are used as the basis for 303(d) listing are being used in exactly the same manner that adopted numeric water quality objectives would be used. Therefore, the Assessment Policy should require that numeric "guidelines" used as the basis for 303(d) listing as an interpretation of a narrative objective either be adopted as water quality objectives under the Water Code procedures or that the numeric guidelines be adopted as part of the 303(e) continuing planning process subject to notice and comment.

In addition, the SWRCB should recognize in the draft Assessment Policy that sediment guidelines such as ERMs and PELs are used to indicate potential effects, and do not measure actual beneficial use impairment. These sediment guidelines are merely a predictive tool, and do not indicate whether a sediment pollutant is bioavailable or not. It

should be further emphasized in the draft Assessment Policy that evaluation guidelines such as these should only be used as part of a weight of evidence approach.

Spatial and Temporal Representation. The draft Assessment Policy specifies that samples should be representative of spatial and temporal characteristics of the water body, and in general, that samples from two or more seasons, or two or more events be evaluated. The requirement for a minimum of two events is probably not sufficient to determine temporally representative conditions. In addition, if the frequency of a violation is not regular, this should be accounted for in the draft Assessment Policy.

Minimum Number of Samples. Specific minimum sample sizes are required to de-list a water body, however the draft Assessment Policy allows for less than 10 samples to list a water body under certain conditions (i.e., for some biological factors and on a case-by-case basis "if standards are exceeded frequently"). The SWRCB should provide additional detail in the draft Assessment Policy on the requirements to list a water body when sample sizes are less than 10 (Planning List) or 20 (303(d) List) samples. If a dataset for a water segment contains less than the recommended minimum sample size to list, other factors should be required to be considered before that water segment is added to the list. Other factors should include the temporal representativeness of the dataset, the magnitude of the exceedances, and evidence of actual beneficial use impairment. Existing listings on the 2002 303(d) list should also be re-evaluated to determine if these water bodies meet the minimum sample sizes required under the draft Assessment Policy.

RWQCB & SWRCB Approval. The Regulated Caucus agrees that the listing and de-listing of water segments should be approved at *both* the Regional and State Board levels. This process provides maximum opportunity for public input and comment. Nevertheless, we believe that the processes described in Sections 7.3 and 7.4 of the draft Assessment Policy should be clarified.

For instance, it is unclear from Section 7.3 whether the Regional Board's "approval" of a specific recommendation is the final, administrative act upon which the U.S. EPA would make a decision, or whether the Regional Board "approval" is simply transmitted to the State Board as a formal recommendation. Further, it is unclear whether Regional Boards are to "approve" staff recommendations *via* a recorded vote, or by way of delegation to the Executive Officer for administrative transmittal to the State Board. We would recommend that Regional Boards vote on the proposed listing recommendations. Finally, Section 7.3 should include the same "advance notice and opportunity to comment" language that Section 7.4 contains.

Moreover, Section 7.4 should be clarified to confirm that the State Board shall consider the recommendation and full administrative record from the Regional Boards, but that final authority to make a decision on any given water segment is a ***discretionary*** one that lies completely in the hands of the State Board.

Finally, we urge the State Board to remove the sentence, "Comments shall be limited to the issues raised before the RWQCBs" in section 7.4. As was the case in the 2002 Listing Process, the State Board staff frequently modified recommendations originally made at the Regional Board level, and it is not uncommon for new information to be presented *after* the Regional Board hearing and approval on the listing recommendations. For this reason, it is unreasonable and unfair to limit public comment to those issues that were raised at the Regional Board level.

Legal Support for the Draft Assessment Policy

The Environmental Caucus has raised questions in the past regarding whether certain provisions of the proposed Assessment Policy are consistent with the requirements of the Clean Water Act. We believe that the Assessment Policy is sound from the legal, as well as the technical and public policy perspectives. The proposed Assessment Policy is similar to policies and regulations in place in several other states; a legal challenge to the Florida listing regulations on Clean Water Act grounds was recently rejected. (*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).) For the State Board's consideration, the Regulated Caucus offers the following analysis of the legal bases for the proposed Assessment Policy.

The Proposed Assessment 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. In its 2002 Integrated Water Quality Monitoring and Assessment Report Guidance, U.S. EPA encourages 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._.

Minimum data quality assurances requirements have been utilized in other states. Both Florida and Arizona have adopted listing regulations with credible data 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 Assessment Policy, California would not be breaking new ground—the reasonableness of minimum data requirements is well established.

The use of the binomial approach and other minimum data requirements is not an illegal revision of water quality standards. We anticipate objections to the use of the binomial approach for listing waters as impaired for toxic pollutants, based on the premise that 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 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 criterion. A federal court recently rejected a similar argument in the 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.)[1]

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." (CALM Guidance at p.__) 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. (TSD, 1991). Waters should not be listed because of isolated or temporary incidents that are not conducive to the development and implementation of a TMDL.

The State is not obligated to list all waters that do not meet standards—without regard to the reason for the exceedance. The Environmental Caucus has questioned the legality of the multi-part list proposed in the draft Assessment Policy. For example, they maintain that the Alternative Enforceable Programs List and the TMDLs Completed List are illegal. Their position cannot be squared with either the language of the Clean Water Act nor U.S. EPA regulations and guidance.

Clean Water Act section 303(d) requires that the state list all waters for which point source controls are not stringent enough to implement applicable water quality standards. (33 U.S.C. § 1313 (d)(1)(A).) The Act requires the establishment of TMDLs for those pollutants the U.S. EPA administrator has determined are suitable for calculation. (33 U.S.C. § 1313 (d)(1)(C).) Thus, the section 303(d) list is intended to encompass a subset of the state's waters. If a water segment does not meet standards due to pollution, or a TMDL is not necessary to bring the water body into compliance with standards, the water is not to be included on the 303(d) list but addressed through other mechanisms.

To interpret section 303(d) to require listing of all waters that do not meet standards, for whatever reason, would require one to ignore other sections of the Act, as well as U.S. EPA regulations and guidance. The Act provides for several other "lists" of waters that do not meet water quality standards for one reason or another. For example, section 304(l) requires listing waters that do not meet standards due to point source discharges of toxic pollutants; section 314 requires the identification of publicly-owned lakes suffering from eutrophication and other water quality problems; section 305(b)

[1] The binomial approach was also cited with approval in the National Academy of Sciences Report (see p. 57) and has been adopted in several other states, including Arizona, Florida, Nebraska and Texas.

requires states to inventory waters where designated uses are not attained. Reading the Act as a whole, it seems clear that section 303(d) is intended to address a subset of impaired waters—those impaired by pollutants for which a TMDL is required to attain standards.

U.S. EPA has made clear that not all waters where standards are not attained must be listed. Federal regulations expressly provide that a water segment need not be listed if there are enforceable control mechanisms in place that will bring the water body into compliance with the applicable water quality standard. (40 C.F.R. § 130.7(b).) U.S. EPA's 2004 Listing Guidance recommends the use of a multi-part list, similar to the approach set forth in the Proposed Policy. Guidance for 2004 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d) and 305(b) of the Clean Water Act (July 21, 2003). The Guidance states that impaired waters may be placed in Category 4 (a list separate from the section 303(d) list subject to U.S. EPA approval) for any of the following reasons:

- A TMDL has been completed for the water-pollutant combination;
- The impairment is not caused by a pollutant;
- Alternative required control measures are expected to result in attainment of standards within a reasonable period of time.

Thus, the state is on firm legal ground in proposing a multi-part list and limiting the section 303(d) list to those waters impaired due to a pollutant and establishment of a TMDL is needed.

The State does not have to list threatened waters. There is no clear federal authority requiring states to list threatened waters. The Clean Water Act says nothing about threatened waters. Current federal regulations are ambiguous; some provisions do seem to require consideration of waters that may not attain water quality standards in the future. (*See, e.g.*, 40 C.F.R. § 130.7(b)(5)(ii).) It seems that U.S. EPA may be moving away from the position that threatened waters should be listed—the 2000 TMDL Rule (since rescinded) did not require listing of threatened waters. (*See*, 65 Fed. Reg. at 43605-06 for explanation of decision not to require listing of threatened waters.)

In light of the ambiguity in the regulations, the state is well within its authority to choose not to list threatened waters. The appropriate place for these waters is the Planning List. Texas and Arizona have both chosen this approach to threatened waters.

In sum, we believe the State Board staff has made substantial progress in developing an assessment policy that is workable, reasonable, objective, and predicated on protecting water quality. We appreciate the difficult task that you and your staff have undertaken, as well as the results of your work. Finally, we appreciate the opportunity to provide you, as well as Members of the State Board, our comments on the draft Assessment Policy.

Sincerely,

AB 982 Regulated Caucus, by

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