



American Rivers
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February 5, 2015



Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Sent Via Electronic Mail c/o Ms. Jeanine Townsend at commentletters@waterboards.ca.gov

RE: Comment Letter—303(d) List portion of the 2012 California Integrated Report

Dear Chair Marcus and Board Members:

Thank you for the opportunity to provide these comments for your consideration. On behalf of American Rivers, the leading national organization standing up for healthy rivers, I submit the following comments regarding issues related to the proposed federal Clean Water Act (CWA) Section 303(d) list portion of the 2012 California Integrated Report (Integrated Report).

The State Water Resources Control Board (SWRCB) is required to develop the Integrated Report in order to meet the State's reporting obligations to the U.S. Environmental Protection Agency (EPA) in accordance with the CWA.¹ The Integrated Report acts as an important resource for achieving a broad-scaled inventory of water quality conditions. In addition to providing the current status of water quality conditions among all waters in the state², the inventory informs laws, policies, and practices intended to prevent further degradation of water bodies at the local, state, and national levels. As such, it is imperative that the Integrated Report fully document all water quality criteria of applicable waterbodies. Sufficient flow is a parameter that is essential to protecting the physical, chemical, and biological quality as well as many of the designated uses of the waterbodies and has been recognized by the U.S. Environmental Protection Agency (EPA) as a non-pollutant cause of impairment. Flow alteration plays a significant role in the degradation of water quality conditions and failure to support designated beneficial uses such as cold freshwater habitat in waterbodies throughout California, thus warranting inclusion of the formal identification of flow alteration as a cause of impairment under Category 4c in the Integrated Report.³

¹ Pursuant to Clean Water Act Sections 303(d) and 305(b) (33U.S.C.§1313(d), 1315(b)), states are required to report to the U.S. Environmental Protection Agency on the overall quality of the waters of the United States within their state.

² "Waters of the United States" as defined in 40 CFR 122.2.

³ The U.S. Supreme Court specifically addressed the Clean Water Act's authority to regulate both water quality and quantity in PUD No. 1 of Jefferson County v. Washington Department of Ecology ("PUD"), 511 U.S. 700 (1994).

The U.S. EPA's Guidance on Category Reporting for Impaired Water Body Segments

American Rivers respectfully disagrees with the SWRCB's interpretation of the EPA's 2006 Guidance for 2006 Assessment, Listing and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act (EPA Guidance)⁴ specific to the categorization of waters in multiple categories for the same waterbody segment. The Integrated Report refers to an excerpt from page 56 of the EPA Guidance that includes the statement: "*Examples of circumstances where an impaired segment may be placed in Category 4c include segments impaired solely due to lack of adequate flow or to stream channelization.*" The SWRCB relies on this statement to make the determination that "*In accordance with that guidance, the State Water Board has not placed waters in category 4c for pollution when other impairments by pollutants are identified for the same waterbody segment.*" The SWRCB misinterprets EPA Guidance by asserting that the example provided by the EPA is the only situation in which an impaired segment may be placed in Category 4c. In this portion of the EPA Guidance, the EPA is merely providing an example and is not implying that segments that are impaired solely due to lack of adequate flow or to stream channelization are the only conditions in which an impaired segment may be placed in Category 4c. EPA Guidance clearly states that waterbody segments not only can, but should, be included in more than one reporting category. This is exemplified in the statement that: "*States should assign all of their surface water segments to **one or more** (emphasis added) of the five reporting categories presented in Section V of this guidance.*"⁵ For example, if a water body is impaired by a pollutant (e.g., temperature) and pollution (e.g., flow alteration), then the water body would be listed in Category 5 for temperature and Category 4c for flow alteration. States such as Idaho, Montana, Washington, Texas, Oregon, New Mexico specifically follow this approach for conditions in which flow alteration is pollution within a waterbody segment that is listed as impaired by a pollutant.

Data and Methodology Needs for Including Flow Information in Category 4c

The Integrated Report suggests that the lack of data and methodology inhibit the SWRCB's ability to include any flow information in Category 4c of the California Integrated Report and recommend development of "*a statewide approach to evaluate flow alteration impairment through the Integrated Report process to ensure consistency and objectivity.*" American Rivers agrees with and supports the interest in formally developing flow impairment criteria that can be applied broadly; however, this does not prevent the SWRCB from utilizing site-specific criteria and weigh-of-evidence approaches to identifying water quality impairments in lieu of statewide criteria. There are multiple circumstances in which waterbodies can, and should, be identified as impaired by flow alteration immediately utilizing existing information to develop site-specific criteria. These circumstances include specific waterbody segments that already have the necessary information available to make a clear determination that flow alterations are a causal factor of a pollutant impairment or are the source of non-pollutant impairment of a designated beneficial use.

⁴ U.S. Environmental Protection Agency (2006). Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Section 303(d), 305(b), and 314 of the Clean Water Act. (<http://www.epa.gov/owow/tmdl/2006IRG/report/2006irg-report.pdf>)

⁵ Id. pp. 19

The SWRCB Integrated Report states that “[l]ack of flow is treated as pollution and a causative factor related to pollutant impairments including increased water temperature and sedimentation.”⁶ Presumably, the determination of flow as a causative factor in listing temperature and sedimentation impairments would require the SWRCB to have enough information to make this determination. As such, flow conditions which have been identified as a causative factor to pollutant impairments listed in Category 5, should be acknowledged within Category 4c. This approach is important for information purposes and is directed by the EPA in their Guidance.⁷

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Other circumstances where an impaired segment may be placed in Category 4c include conditions in which waterbodies are impaired solely due to lack of adequate flow or to stream channelization.⁸ The CWA requires states to adopt water quality criteria protective of each designated use.⁹ Flow limitations which either limit physical habitat have been, and continue to be, a key factor limiting the beneficial use of water by salmonids and other aquatic species in California. The limitation of these beneficial uses due to flow alteration has been identified in National Oceanic and Atmospheric Administration (NOAA) Fisheries Recovery Plans as well as site-specific watershed management plans and studies. While the SWRCB currently does not have a standard methodology for making this determination, there are waterbody segments where beneficial uses for aquatic species are clearly not being met due to complete elimination of stream flow or stream flow that is so limited as to make a segment of the waterbody unusable to salmonids or other species. These waterbody segments should be acknowledged in Category 4c immediately.

SWRCB Acknowledgement of Flows Through Other Actions

We appreciate the variety of realms in which the SWRCB currently acknowledges flows and would like to point out that the actions listed by the SWRCB in pages 11 through 13 of the Integrated Report are specifically connected to surface water rights. While these efforts play an integral role in the maintenance and management of flows and should be continued, they are geographically specific and have limited recognition of the impact of flow alteration on water quality conditions. The acknowledgement of flow alterations within the context of the CWA mandated Integrated Report provides the SWRCB with a unique opportunity and responsibility to acknowledge the status of flow conditions in the context of water quality. Utilization of category 4c to identify impairments caused by flow alteration will provide information that is useful for both local and national prioritization assessment that informs funding allocations and policy recommendations. Additionally, the identification of flow impairment through category 4c listing provides an important tool that can be utilized for local land use planning decision making and permitting via a nexus with CEQA that is not currently available via approaches to flows that are specific to the SWRCB’s own efforts to allocate and enforce surface water rights.

⁶ State Water Resources Control Board, (2014). 2012 California Integrated Report Clean Water Act Sections 303(d) and 305(b); page 9

(http://www.waterboards.ca.gov/water_issues/programs/tmdl/docs/draft_staff_report_2012_ir.pdf)

⁷ EPA Guidance, pp. 19.

⁸ EPA Guidance, pp. 56

⁹ 33 U.S.C. §1313(c)(2)(A)

The ability of local entities to utilize information provided by the SWRCB through the Integrated Report to make informed planning and policy decisions will become increasingly important over time as the State's water resources are further strained by demand and climate conditions. Additionally, it is anticipated that there will be an increasing local interest in water supply conditions as implementation of the Sustainable Groundwater Management Act places local entities in an ever increasing position of responsibility to effectively manage groundwater resources while recognizing surface and groundwater connections.

We appreciate SWRCB efforts in these important matters and look forward to ongoing dialogue with the State Board, water users, and other stakeholders on these issues. Thank you for your time and consideration of these comments. If you have questions, please contact Chris Alford at (530) 848-6211 or calford@americanrivers.org.

Sincerely,

A handwritten signature in blue ink that reads "Chris Alford". The signature is written in a cursive style with a large initial "C" and a stylized "A".

Chris Alford
Director, California Instream Flow and Water Supply
American Rivers#