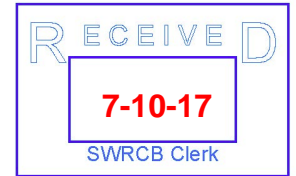




California Stormwater Quality Association®

Dedicated to the Advancement of Stormwater Quality Management, Science and Regulation

July 10, 2017



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

Submitted electronically – commentletters@waterboards.ca.gov

Subject: Comment Letter—303(d) List portion of the 2014 and 2016 California Integrated Report and Comment Letter—303(d) List for waterbodies in the Los Angeles Region

Dear Ms. Townsend:

The California Stormwater Quality Association (CASQA) appreciates the opportunity to comment on the 303(d) List portion of the 2014 and 2016 California Integrated Report, including the list for the Los Angeles Region. CASQA previously provided many of these comments in an informal comment letter to the State Water Resources Control Board (State Water Board) and Regional Water Quality Control Boards (Regional Water Boards) to highlight a number of common issues that were identified during the approval processes for the San Francisco Bay (Region 2), Los Angeles (Region 4) and Santa Ana (Region 8) integrated reporting process. CASQA has reviewed the 2014-2016 303(d) list available for comment and determined that many of the issues identified in the letter are still applicable and is therefore submitting this letter to formally request consideration of these bigger picture issues prior to adoption of the list. CASQA believes it is important to address these issues because 303(d) listings of pollutant and waterbody combinations initiate expensive TMDL development processes and implementation requirements, and inappropriate listings may result in the poor use of limited public funds. CASQA's primary intent and purpose is to provide comments that will assist in improving the state's listing process, correct pervasive errors, focus valuable public funds on the most critical issues, and avoid similar issues in future listing cycles.

The letter is organized into three sections and includes recommendations to:

- I. Address Consistency with Listing Policy;**
- II. Improve the Data Evaluation Process; and**
- III. Update the Listing Process.**

Within CASQA's recommendations are examples of errors and concerns from the various Regional Water Boards' proposed listings. However, the intent of this letter is to provide an overview of the key issues – not detail each and every observed error as such comments were already made by individual stakeholders during the Regional Water Board comment periods. However, given the State Water Board's role in developing the list, CASQA felt it was appropriate to comment on these consistent issues in the hope that they can be addressed at the State level.

I. Address Consistency with Listing Policy

In 2004, pursuant to state law, the State Water Board adopted what is commonly referred to as the state's Listing Policy.¹ The purpose of the Listing Policy is for the state to implement a standardized approach for developing California's section 303(d) List.

Comment 1: Ensure that (A) only adopted standards are used in the assessment of numeric water quality objectives and that (B) the evaluation guideline applied to narrative water quality objectives is correct and consistent within a given Region.

In some cases waterbodies were listed using numeric criteria that have not been adopted by the Regional Basin Plan or California Toxics Rule even though adopted numeric criteria exist. For example, in the Los Angeles Region, many of the proposed 303(d) listings for mercury were assessed with a 2006 U.S. Environmental Protection Agency (EPA) nationally recommended criterion, however, a California Toxic Rule (CTR) adopted criteria exists for mercury. No explanation was given for the use of the EPA recommended criterion over the adopted CTR value. The state should not use an EPA criterion when an existing adopted water quality objective/criteria exists.

In other cases, there are pollutants assessed using numeric evaluation guidelines that are inconsistent within Regions or that the selection thereof deviated from the Listing Policy with no explanation provided within the Fact Sheets. Specifically, there are many pollutants that do not have applicable numeric water quality criterion and, instead, must be assessed by interpreting an applicable narrative water quality objective with an evaluation guideline per the Listing Policy. For pesticides (e.g., bifenthrin, cyfluthrin, cypermethrin) the evaluation guidelines selected have often been either inappropriate, inconsistently applied, or are generally not well documented in the Fact Sheets. In Region 4, there are several instances where an LC50 or threshold for individual species was used for the assessment. This is inconsistent with the Listing Policy, which states that it must be demonstrated that an evaluation guideline is "*applicable to the beneficial use, protective of the beneficial use, scientifically-based and peer reviewed, and well described.*" The response of a single species should only be used when it has been shown that

¹ State Water Resources Control Board. Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List. Adopted September 30, 2004. Amended February 3, 2015.

the species is representative of the native population response to the specific pollutant. This was not demonstrated for this listing and therefore an LC50 cannot be assumed to be protective of the beneficial use and should not be used to make a listing. Another example in Region 4 occurred for two proposed malathion listing decisions with the same beneficial use that used conflicting guidelines from two different sources.²

The lack of consistency in the evaluation guidelines especially within a given Region makes review of the impaired waters list difficult and results in some waterbodies being incorrectly listed. In order to avoid this issue in the future, CASQA requests that the State Water Board identify consistent guidelines/thresholds that may be used to interpret narrative objectives throughout the State and include this information within the Fact Sheets.

CASQA Recommendation:

- *Reevaluate listings that are based on numeric standards that have not been adopted in the Regional Basin Plan and/or adopted by the California Toxics Rule.*
- *Evaluate listings for consistent use of guidelines/thresholds used to interpret narrative water quality objectives within a Region, document the guidelines within the Fact Sheet, and reevaluate any listings made based on inconsistent guidelines.*

Comment 2: Ensure that all readily available data are analyzed, especially National Pollutant Discharge Elimination System (NPDES) permit-required water quality data.

As stated in the Listing Policy “*the states are required to assemble and evaluate all existing and readily available water quality-related data and information to develop the list.*” Despite this, there are multiple examples where large datasets from NPDES permit or Total Maximum Daily Load (TMDL) monitoring data are not assessed. For example, NPDES water quality data collected from 2002 to 2008 at approximately 70 sites in Santa Clara Valley creeks including total and dissolved metal concentrations and aquatic and sediment toxicity results, submitted to the San Francisco Bay Regional Water Board, were not included in the Region’s 303(d) List analysis as noted in a stakeholder comment letter.³ A similar omission occurred in the Calleguas Creek Watershed in Region 4 where monitoring data from five effective TMDLs were not included in analyses despite the annual submission of monitoring reports to the Regional Water Board as mentioned in the Calleguas Stakeholder’s comment letter.⁴ By not including data collected via NPDES permit and TMDL monitoring, the 303(d) list may mischaracterize water quality conditions in local receiving water bodies.

² Calleguas Creek Reach 4 used a 0.028 µg/L guideline from Aquatic life water quality criteria derived via the UC Davis method: II. Pyrethroid insecticides. Reviews of Environmental Contamination and Toxicology 216:51-103. While Calleguas Creek Reach 12 used a 0.1 µg/L guideline from USEPA National Recommended Water Quality Criteria (Red Book). 1976. Office of Water. Office of Science and Technology.

³ Comment letter to Richard Looker, San Francisco Bay Regional Water Quality Control Board from Dr. Adam Olivieri Program Manager of Santa Clara Valley Urban Runoff Pollution Prevention Program RE: Proposed revisions to the Clean Water Act Section 303(d) List of Impaired Water Bodies in the San Francisco Bay Basin. Letter dated March 13, 2017.

⁴ Comment letter to Dr. Jun Zhu, Los Angeles Regional Water Quality Control Board from Lucie McGovern Chair of Stakeholders Implementing TMDLs in Calleguas Creek Watershed RE: Comment Letter – Revision to the Los Angeles Region 303(d) List. Letter dated March 30, 2017.

Many stormwater stakeholders have been informed by State and Regional Water Board staff that NPDES or other similar data were not included in the listing assessment because they were not entered into CEDEN (California Environmental Data Exchange Network – the central database used to aggregate waterbody information in California). However, the Listing Policy defines “*readily available data and information*” as data that can be submitted to CEDEN or its successor database, however, “*if CEDEN is unable to accept a particular subset of data and information, the State Water Board or the Regional Water Board will accept that data and information if it meets the formatting and quality assurance requirements detailed in section 6.1.4 of the Policy and the notice of solicitation for the current listing cycle.*” There is no requirement in the NPDES permits for stormwater stakeholders to submit permit data to CEDEN. Thus, CASQA believes that the State and Regions should be responsible for compiling the data already in their possession into their own database, not the Permittees. This should be further clarified by adopting language in the Listing Policy that *readily available data* includes datasets submitted to the state from NPDES, TMDL, or other similar monitoring programs.

CASQA Recommendation:

- *Ensure that all “readily available data” are included in analyses for the proposed listings, especially NPDES permit and TMDL monitoring data submitted annually to the Regional Water Boards.*
- *Readily available data should not only be defined as data entered into CEDEN. Broaden the definition in the Listing Policy (section 6.1.1) to include any data that has been submitted to the State or Regional Water Boards to include NPDES and TMDL monitoring data.*

Comment 3: Provide documentation of how data analyses were performed in supporting documents as opposed to presenting raw data spreadsheets.

The Fact Sheets for the 303(d) List are meant to document the process for evaluation of data. As part of these Fact Sheets, Regional Water Boards must provide documentation of how they reached their listing decision as required in Part M, Section 6.1.2 of the Listing Policy. However, the Fact Sheet link to the Data Reference often includes spreadsheets with raw data, but no corresponding analyses, making it difficult to follow the reasoning behind a listing decision. In addition, where data need to be transformed by calculating a Water Effect Ratio, total to dissolved transformation, or other simple unit conversion, these data processing steps should be detailed in the associated spreadsheets/analyses.

In addition, the data reference for a specific waterbody-pollutant combination line of evidence can sometimes link to a zip file containing over 20 individual excel spreadsheets – each with many individual tabs. Finding the raw data that were used to support the line of evidence in addition to the omission of any data analyses makes review of the listing process extremely cumbersome and opaque. This can be avoided by simply providing spreadsheets that include data analyses and, in cases where there are multiple source spreadsheets for a single line of evidence, providing the name of the spreadsheets that relate to a particular decision in the Fact Sheet.

CASQA Recommendation:

- *Provide better documentation of the data analyses by presenting the spreadsheets used to reach a listing decision.*
- *Link to appropriate data files that support a listing, or provide the name of the relevant files that were used to reach a listing decision within the Fact Sheet.*

Comment 4: Ensure that all listed waterbodies are in fact waters of the United States (WOTUS) subject to the Clean Water Act.

There were numerous cases in all three Regions where manmade flood channels (portions of the storm drain system), manmade lakes, or agricultural drains were listed as newly impaired waterbodies (e.g., Alondra Park Lake in Region 4 and Bolsa Chica Channel in Region 8). The listing of these waterbodies as impaired waters pursuant to Section 303(d) of the Clean Water Act is inappropriate. As originally stated in a comment letter from Orange County Public Works to the Region 8 Regional Water Board,⁵ many of these waterbodies are man-made flood channels constructed as part of a municipal separate storm sewer system (MS4) or as an agricultural drain used to collect and transport stormwater or agricultural runoff. Notably, as an MS4, the CWA presumptive uses (fishable/swimmable) do not apply, and these channels have no designated beneficial uses, and no applicable water quality objectives within the corresponding Basin Plans. Further, the Staff Report and Fact Sheets for such listings do not contain sufficient basis upon which jurisdiction under the CWA can be substantiated. These channels are not traditional navigable waters, and should also not be classified as tributaries to traditional navigable waters subject to CWA jurisdiction.

The NPDES regulations define an MS4 as “a conveyance or system of conveyances (including roads with drainage systems, municipal streets...ditches, man-made channels or storm drains) designed or used for collecting or conveying storm water.” 40 C.F.R. 122.26(b)(8). For the channels to be subject to section 303(d) would mean that a single waterbody can be both an MS4 and a jurisdictional receiving water. The pretense that an MS4 and a receiving water body can be one in the same is contrary to the NPDES regulations. In EPA’s Preamble to the initial MS4 regulations, the agency expressly determined that “streams, wetlands and other water bodies that are waters of the United States are not storm sewers for the purposes of this rule” and that “stream channelization, and stream bed stabilization, which occur in waters of the United States,” were not subject to NPDES permits under Section 402 of the CWA.⁶ The “conveyances” identified in the regulation – “roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, man-made channels, or storm drains” – all refer to anthropogenic structures, not natural streams.⁷ Under 40 C.F.R. § 122.26(b)(9), an MS4 outfall is defined as the point at which an MS4 discharges *to* waters of the United States. 40 C.F.R. 122.26(b)(9) (emphasis added).

⁵ Comment Letter to Ms. Heather Boyd, Santa Ana Regional Water Quality Control Board from Shane Silsby, Director of Orange County Public Works. RE Draft 2016 Clean Water Act Sections 305(b) and 303(d) Integrated Report for the Santa Ana Region Technical Staff Report February 2017. Letter Dated March 27, 2017. OC

⁶ 53 Fed. Reg. 49416, 49442 (Dec. 7, 1988).

⁷ 40 CFR § 122.26(b)(8).

Thus, there is clear distinction between the MS4 used to collect, convey and discharge stormwater, and waters of the United States, into which point source discharges from MS4s are regulated. An MS4 cannot be a receiving water because a receiving water cannot discharge into itself. *See Los Angeles County Flood Control District v. Natural Resources Defense Council, Inc., et al.*, --- U.S. --, 133 S.Ct. 710, 712-13 (2013) (holding that the flow of polluted water from one portion of a river, through a concrete channel or other engineered improvement in the river, to a lower portion of the same river, does not constitute a discharge of pollutants); *see also So. Fla. Water Mngmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 112 (2004) (holding that where a canal and an adjacent wetland are not meaningfully distinct water bodies (rather, two parts of the same water body), then the transfer of polluted water from the former into the latter would not need an NPDES permit, as it would not constitute a discharge of pollutants into waters of the United States).

For similar reasons as to why man-made flood control channels cannot be WOTUS, man-made flood control channels cannot be deemed a “tributary” to WOTUS, for purposes of CWA jurisdiction. In some cases, the Regional Water Boards have indicated that a man-made concrete channel is being listed based on the “tributary rule.” Historically, the tributary rule has been used to invoke federal jurisdiction over non-navigable *natural waters* when such water has a significant effect on a WOTUS. However, EPA recently clarified in the waters of the U.S. rulemaking that concrete channels constructed in dry lands or uplands are not waters of the U.S. 80 Fed. Reg. 124 (June 29, 2015), Clean Water Rule: Definition of “Waters of the United States”; *see also* 40 C.F.R. §§ 230.3(o)(2)(vi) and §230(o)(3)(iii) (specifically excluding from the definition of “tributary,” and, therefore, WOTUS, “stormwater control features constructed to convey, treat or store stormwater that are created in dry land”). While this final rule review is currently under reconsideration by Executive Order issued on February 28, 2017, EPA’s explicit exclusion of dry land “stormwater control features” from the definition of WOTUS clearly demonstrates the regulatory intent that jurisdiction over man-made flood control channel should not be exercised under the tributary rule. Tributaries can and should only be waters of the U.S. under 40 C.F.R. § 230.3(s)(5) if they are natural water bodies. Therefore, pursuant to federal regulations, man-made flood channels are not tributaries to waters of the U.S. and cannot be listed.

CASQA Recommendation:

Ensure that all proposed new waterbodies in the 303(d) List are subject to the CWA and are not portions of the MS4 or agricultural drains/channels.

II. Improve the Data Evaluation Process

There are numerous issues with the data evaluation process across the three Regions. Similar to the previous section, most of these issues are due to deviations from the Listing Policy. The data evaluation is largely performed such that each data set was given equal weight regardless of quality or completeness and listing decisions often appear to be made without consideration of the context of the data. This results in erroneous listings. In order to make the data evaluation process more robust and transparent, CASQA recommends that the State Water Board consider the following.

Comment 5: Consider completeness and quality of the data set including temporal and spatial coverage.

Data sets should be evaluated to ensure they are complete and provide both temporal and spatial coverage of the waterbody consistent with Section 6.1.5 of the Listing Policy, which describes what constitutes spatial and temporal coverage and includes the following language:

- Spatial Representation: “*samples should represent statistically or in a consistently targeted manner the segment of the water body*”
- Temporal Representation: “*Samples should be representative of the critical timing that the pollutant is expected to impact the water body. Samples used in the assessment must be temporally independent. If the majority of samples were collected on a single day or during a single short-term natural event (e.g., a storm, flood, or wildfire), the data shall not be used as the primary data set supporting the listing decision.*”

Despite this requirement, there are multiple instances where new listings were proposed that lacked spatial and/or temporal coverage. For example, in Region 4, in Ventura County alone, there are 18 occurrences of new listings that relied on a single sample collection date for pollutant categories including metals, pesticides, and benthic community effects.

All data should go through a robust quality assurance/quality control (QA/QC) assessment before being used for a listing. Section 6.1.4 of the Listing Policy outlines the data quality assessment process however, based on the numerous errors noted in this round of listings, this QA/QC process should be strengthened to ensure such errors are not made again in future listings.

CASQA Recommendation:

Ensure data used to support new listings is temporally and spatially representative of the waterbody.

Comment 6: Account for the existence of significant programs that could reasonably be expected to reduce the pollutant load to the waterbody.

The Fact Sheets should document significant programs that may affect the pollutant load in the waterbody. There are many occasions where no acknowledgement was given to significant implementation efforts to reduce pollutant loads. This is inconsistent with the Listing Policy, which states in Part L of Section 6.1.2.2 that the Fact Sheets must include any “*Program(s) addressing the problem, if known.*” Examples include the following:

- In Region 4, data from 2006-2010 are used to justify a new listing for the pesticides chlorpyrifos, diazinon, and malathion in Calleguas Creek Reach 12 despite the fact that significant use restrictions were placed on these pesticides beginning in 2009. TMDL monitoring data showed significant reductions in pesticide concentrations. However, these data were omitted from analysis as stated in the Calleguas Stakeholder comment letter.⁸

⁸ Comment letter to Dr. Jun Zhu, Los Angeles Regional Water Quality Control Board from Lucie McGovern Chair of Stakeholders Implementing TMDLs in Calleguas Creek Watershed RE: Comment Letter – Revision to the Los Angeles Region 303(d) List. Letter dated March 30, 2017.

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Even foregoing the TMDL data omission, use of the pre-2009 data should not have occurred, as it is no longer representative of the waterbody following the implementation of use restrictions.

- In Region 4, Echo Park Lake data from 2007 were used to justify new listings for dieldrin and chlordane despite the fact that the City of Los Angeles underwent a massive \$45 million Echo Park Lake Rehabilitation Project to upgrade the lake in 2015.
- In Region 4, a number of stakeholders invested significant resources to develop an Enhanced Watershed Management Program (EWMP) for the Upper Santa Clara River Watershed, including an extensive pollutant prioritization process. However, as detailed in the City of Santa Clarita comment letter,⁹ the existence of this program was not noted in the Fact Sheets and no less than 12 listings remain categorized as “Needing a TMDL” despite the fact that they are now being addressed by action other than a TMDL and should be re-categorized.

In cases where the only available data are postdated by significant programs that are likely to significantly affect the pollutant load, the waterbodies should be classified as Category 3 waterbodies, which are defined by the USEPA 2010 Integrated Report Guidance¹⁰ as the following:

“The existing and readily available data and information is not representative of current conditions of the water body. This rationale might include a determination that: significant land use changes have occurred in the watershed changing the hydrology and nonpoint source loadings, point source discharges were removed, new discharges are now operating, or the locations of sampling stations did not reflect the character of the segment (e.g., limited to locations near discharge outfalls).”

Category 3 waterbodies are not included on the 303(d) List until more data are available to properly assess the condition of the current conditions of the waterbody. Listings which already existed at the time of implementation of a significant pollutant reduction program should be re-categorized as 4B, defined as “*another regulatory program is reasonably expected to result in attainment of the water quality standard within a reasonable, specified time frame,*” as detailed in the comments from the City of Santa Clarita.

CASQA Recommendation:

- *Clearly document significant programs that have occurred during or after the data collection period that may render the data no longer representative of the waterbody.*
- *Base the listing analysis on data that are relevant and representative of the current condition of the waterbody.*

⁹ Comment letter to Dr. Jun Zhu, Los Angeles Regional Water Quality Control Board from Travis Lange, City of Santa Clarita RE: Comment Letter – Revisions to the Los Angeles Region 303(d) List. Letter dated March 28, 2017.

¹⁰ Page 5 of USEPA Information Concerning 2010 Clean Water Act Sections 303(d), 305(b), and 314 Integrated Reporting and Listing Decisions.

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- *When the only available data is postdated by the implementation of a program, which significantly alters the pollutant load the waterbody should either not be listed or listed only as Category 3.*
- *When a new program is implemented which significantly alters the pollutant load, existing listings should be re-categorized as Category 4B*

Comment 7: Incorporate the data assessment in the Fact Sheet and final listing decision.

All of the data analysis steps discussed above should be clearly documented in the Fact Sheets. Section 6.1 *Process for Evaluation for Readily Available Data and Information* of the Listing Policy details the required content of the Fact Sheets and data quality and quantity assessments. There are many cases where the Fact Sheet omits data and information. For example, many Fact Sheets have included:

- Incorrect numbers of observations for lines of evidence,
- Listing a sample site that is not located on the correct waterbody,
- Listing a pollutant criterion for the wrong pollutant (e.g., criteria for the wrong pesticide),
- Listing the incorrect TMDL (e.g., listing a metals TMDL for nitrate), and/or
- Omission of major implementation programs associated with the pollutant.

CASQA requests that the State and Regional Water Boards take the time to systematically review every proposed listing and provide a thoughtful, transparent assessment of the data that includes documentation of relevance of data context, collection program, data age, data temporal and spatial representation, and the existence of any programs that may affect the waterbody pollutant load.

CASQA Recommendation:

Fully document the data assessment process that is used to support a listing decision in the Fact Sheets by including the various components discussed above.

III. Recommended Updates to the Listing Process

CASQA believes that there are changes that should be made to the Listing Policy to improve the 303(d) listing process and avoid many of the issues that were encountered during this cycle.

Comment 8: Ensure that all listings are based on adopted policies and best available science.

In numerous cases, the proposed listings were based on outdated indices or sampling techniques. One example is the interpretation of dissolved oxygen (DO) in lakes that thermally stratify and show natural changes in DO across the hypolimnion (lower layer). The Listing Policy does not acknowledge the fluctuations of dissolved oxygen that are often observed in the hypolimnion or give guidance on interpretation of data in these conditions and, therefore, a listing based on a lack of proper scientific interpretation may result in an incorrect listing. CASQA recommends that the Listing Policy be updated to reflect the current state of the science regarding dissolved oxygen trends in stratified lake settings.

Another example raised in multiple stakeholder comment letters¹¹ involves the 32 new benthic community effects listings (21 new listings in Region 4 and 5 new listings in Region 8), despite the fact that there is not an established water quality criteria, process or policy to assess benthic community effects. Although the State Water Board is in the process of developing a Biological Integrity/Biostimulatory Substances policy for amendment into the Inland Surface Waters Plan,¹² this project is still underway. Additionally, other scientific tools and studies, such as the Algae Stream Condition Index and Bio Integrity Prediction Models, are being developed and there is no direction as to how these tools should be used, if at all, for listing purposes. As a result, there is concern that current listings are premature as they are in advance of policy development, scientific tools and data interpretation. Specifically, listing water bodies based on the California Stream Condition Index (CSCI) in the absence of statewide guidance (which is currently under development) will likely result in statewide inconsistency and inappropriate listings. At this time, CSCI should only be used as one of the options for water quality objective development - not as an evaluation guideline.

Further, use of the SoCal indices of biologic integrity (IBI) is even more inappropriate because it has been replaced by CSCI and its sampling methods are less standardized than those in CSCI. In addition, the SoCal IBI is considered less accurate and more likely than CSCI to falsely identify a stream as altered. The lead scientist who developed the IBI has acknowledged the limitations of the index particularly in controlling for elevation gradient.¹³ Many of the proposed new benthic community effects listings are based on IBI scores since the data were largely collected prior to the adoption of the CSCI. However, the Fact Sheets for some of the Region 4 listings incorrectly imply that the waterbody was assessed with a CSCI.

The Fact Sheets of Region 4 and 8 currently state the following, “[t]he California Stream Condition Index is a new scoring tool for bioassessment data that is applicable statewide, accounts for a much wider range of natural variability, and provides equivalent scoring thresholds in all regions of the state. The CSCI has been used in some assessments this reporting cycle and will be used in the future for water quality assessment purposes statewide over the regional indices of biologic integrity (IBIs). If CSCI scores have not been calculated for data and only IBI scores are available, IBI scores will still be used to interpret the data.”

CASQA strongly disagrees with this statement. First, as stated above, the IBI is known to have significant limitations and should not be used to justify new listings even in cases where no other data exist. Second, while we agree that the CSCI is improved over the IBI metric, we do not believe any new benthic community effects listings should be listed until a statewide policy has been adopted.

In addition to errors in the benthic community effects listing, there are numerous issues with newly proposed toxicity listings in Region 4 and 8 as detailed in numerous stakeholder

¹¹ E.g., Orange County Public Works, Calleguas Creek Watershed Stakeholders, City of Ventura, County of Ventura, Los Angeles County

¹² Biological Integrity/Biostimulatory Substances Amendment to the Water Quality Control Plan for Inland Surface Water, Enclosed Bays and Estuaries of California (Biostimulatory Substances Amendment).

¹³ Ode, P.R., C.P. Hawkins, R.D. Mazor, Comparability of Biological Assessments Derived from Predictive Models and Multimetric Indices of Increasing Geographic Scope, J. N. Am. Benthol. Soc., 2008, 27(4): 967-985.p. 982. Copy included in Appendix 4.

comments including Los Angeles County.¹⁴ An intercalibration study of Southern California laboratories certified by the state and commonly used for toxicity tests found that the data were unreliable and not reproducible. Despite these results, ten new waterbodies were listed for toxicity in Los Angeles County relying on data from those very same laboratories.

CASQA Recommendation:

- *Update the Listing Policy to reflect the current state of the science regarding dissolved oxygen trends in stratified lake settings.*
- *Do not approve any new benthic community effects listings until the Biological Integrity/Biostimulatory Substances Amendment has been approved OR appropriate interim guidance is provided by the state.*
- *In the alternative to the first two recommendations, ensure that no new benthic community effects listings are based on the outdated SoCal IBI.*
- *Do not use tainted or un-reproducible data to justify a new listing as has been done for toxicity listings in Region 4 and 8.*

Comment 9: Amend the Listing Policy to only address pollutants that are reasonably controllable.

There has been an increase in the number of listings for pollutants that occur at natural levels in the environment such as iron, aluminum, and manganese as has been cited in numerous stakeholder letters. Currently two of the Regions include language in their Basin Plans that clarify that “*controllable water quality factors shall not cause a detrimental increase in concentrations of toxic substances found in bottom sediments or aquatic life.*”¹⁵ CASQA agrees that only controllable pollutants should be addressed by the 303(d) list and constituents that are found at naturally occurring concentrations should be considered uncontrollable. As such, it is recommended that similar language be formally adopted in the Listing Policy so that it would apply to all regions. Valuable resources should not be used to address concentrations of naturally occurring constituents.

CASQA Recommendation:

Amend the Listing Policy language to clarify that only reasonably controllable constituents are subject to assessment under the listing policy.

Comment 10: Consider the age of the data, especially whether the data are still relevant to the waterbody.

Due to the seven-year lag time between data solicitation and finalization of the 303(d) List, much of the data used for this listing cycle is at least a decade old and, in some cases, the data were over 30 years old. For example, one new toxicity listing, for Guadalupe Slough in Region 2, is

¹⁴ Comment letter to Samuel Unger, Los Angeles Regional Water Quality Control Board from the County of Los Angeles and the Los Angeles County Flood Control District RE- Comment letter – Revisions to the Los Angeles Region 303(d) List. Letter dated March 30, 2017.

¹⁵ San Francisco Bay Regional Water Quality Control Board Basin Plan.

based on two data points collected in 1997.¹⁶ As such, there are many listings where the data are no longer representative of the waterbody either due to natural changes in the waterbody or due to the implementation of a pollution control program since the data were collected (discussed further in the next comment).

The State and Regional Water Boards should make every effort to avoid listing waterbodies with old data that are less likely to be representative of the waterbody. Where more recent data exists, the newer data should be given a higher weight than the older data. Consideration should also be given to whether older data are still applicable, especially where measurement techniques and detection methods may have improved (e.g., in cases where historic sediment toxicity listings are now known to be caused by a particular pesticide). Proposing new listings with data over a decade old may result in significant resources being used to address pollutants that are no longer problematic.

The State Water Board should also consider modifying the Listing Policy to explicitly allow for exclusion of older data that are not representative of current conditions.¹⁷ The current policy does not discuss exclusion of older data and thus it is assumed that “all” available data must be assessed. Given that this is not addressed in the current policy, the right course of action when data are old or questionable is to put waterbodies in Category 3 instead of Category 5¹⁸ and continue to collect more recent information on the support of beneficial uses in those waterbodies.

CASQA Recommendation:

- *Consider the age of the data when making listing decisions.*
- *Ensure that older data (especially data older than a decade) are not given the same weight as more recent data.*
- *Exclude data that are no longer representative of the waterbody.*
- *Put waterbodies in Category 3 instead of Category 5 when data are old and otherwise questionable.*
- *Modify the Listing Policy to explicitly allow for exclusion of data beyond a certain time period.*

Comment 11: Solicit data in a time frame that reflects the staggered listing decision schedule.

Under the current cycle, the data used to justify the 2014-2016 lists are from a 2010 data solicitation. This lag between the data solicitation and finalization of the list can cause the listings to be outdated before they are even finalized. A way to avoid this in the future would be

¹⁶ Comment letter to Richard Looker, San Francisco Bay Regional Water Quality Control Board from Dr. Adam Olivieri Program Manager of Santa Clara Valley Urban Runoff Pollution Prevention Program RE: Proposed revisions to the Clean Water Act Section 303(d) List of Impaired Water Bodies in the San Francisco Bay Basin. Letter dated March 13, 2017.

¹⁷ The State of Colorado 2018 303(d) Listing Methodology requires that “in general, information and data should not be older than five years.”

¹⁸ Integrated Report Category 3 Criteria: A water with water quality information that is insufficient to determine an appropriate decision recommendation, but the available data and information that does exist indicates beneficial uses may be potentially threatened. Category 5 Criteria: A water segment where standards are not met and a TMDL is required, but not yet completed, for a least one of the pollutants being listed for this segment.

to have a staggered data solicitation that parallels the listing cycle. For instance, the Regions that are on the latest listing timeline and scheduled for the next review in 2022 (Regions 2, 4, and 8), should not have a formal data solicitation until 1 year (or another reasonable timeframe to allow enough time for data analysis) before they are scheduled to have a listing update.

Currently, there is language in the Los Angeles 2016 303(d) List Staff Report that states “*Los Angeles Water Board staff estimates that the 2022 303(d) list will include data submitted through 2021.*” CASQA supports this plan and expects that the same data solicitation timeline should apply to all three Regions. Such a change may address many of the issues outlined in this letter. It would also produce a more reliable and applicable list of impaired waters since the data would better reflect the current state of the waterbody.

CASQA Recommendation:

Adjust the data solicitation schedule to reflect the staggered listing schedule of the Regions.

Comment 12: Regional Water Board staff should conduct the data analysis.

As mentioned earlier, CASQA is aware that State Water Board staff performed many of the data analyses for the 2014-2016 303(d) List. CASQA recommends that, instead, the Regional Water Board staff be in charge of the data analysis or at least provide a final oversight and review of the proposed list. The Regional Water Board staff is more familiar with the waterbodies and ongoing implementation programs occurring at the regional level. As such, Regional Water Board staff will be better able to correct many of the errors detailed in this letter. Further, Regional Water Board staff are more likely to have developed relationships with local stakeholders and can consult with them when there are issues with the data analysis versus making assumptions or decisions that have resulted in a number of incorrect listings.

CASQA Recommendation:

Regional Water Board staff should conduct the data analyses OR coordinate with the State Water Board to provide final oversight QA/QC prior to the public release of the Draft 303(d) List.

An additional suggestion is to consider reorganizing the listing schedule by watershed instead of by Region. A listing schedule centered on watersheds may allow the State and Regional Water Boards to be more flexible and responsive to waterbody impairments. Adjusting the listing schedule to focus on watersheds may provide the following benefits:

- Provide the Regional Water Boards with the ability to prioritize specific watersheds.
- Provide the Regional Water Boards more time to review listings for a given watershed versus assessing all watersheds in a given Region at one time.
- Allow the Regional Water Boards to schedule listing cycles around the end dates of major monitoring programs.
- Allow Regional Water Boards to be more responsive to new pollutants.
- Allow Regional Water Boards to correct Listing Policy issues more frequently than once every 6 years.

CASQA Comments on the 2014-2016 303(d) List of Impaired Waters

Under a watershed approach the Regional Water Boards, which are in the best position to prioritize their waterbodies, could set up a listing schedule such that all watersheds in their Region will be reviewed within the current six-year time frame. The result will be a 303(d) List of impaired waterbodies that is much more current and effective.

Lastly, CASQA recognizes the inordinate amount of work that goes into each listing cycle. The intent of our comments is to address the key issues that we observed in the 2014-2016 listing cycle in order to improve the next cycle and ensure that valuable public funds are properly spent on the most pressing issues facing California waterbodies versus developing TMDLs for pollutants which are not properly listed.

Thank you for your thoughtful consideration of these observations, comments, and recommendations. If you have any questions, please contact CASQA Executive Director Geoff Brosseau at (650) 365-8620.

Sincerely,

A handwritten signature in cursive script that reads "Jill C. Bicknell".

Jill Bicknell, Chair

California Stormwater Quality Association