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AN ASSOCIATION OF SOLE PRACTITIONERS

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January 27, 2004

Craig J. Wilson  
TMDL Listing Unit  
Division of Water Quality  
State Water Resources Control Board  
P.O. Box 100  
Sacramento, California 95812-0100

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

Dear Mr. Wilson and Members of the Board:

I am an attorney who represents Soper-Wheeler Company, a non-industrial, California timberland owner. Soper-Wheeler Company has long been interested in the listing of water bodies under section 303(d) of the Federal Clean Water Act, as such listings have substantial impacts on the value, use and management of its timberlands. Please accept the following comments on the draft policy for listing.

I. General Comments

We are happy to see the state board develop a written policy to guide listing decisions by the regional boards. Statewide consistency is necessary for effective and appropriate protection of the state's waters as well as equitable allocation of public funds.

Since listing of a water body under section 303(d) results in both the expenditure of substantial public funds, substantial reductions in land management revenues and reduced land values, it is imperative that any policy to guide listing decisions is crafted in such a manner so as to assure that no water body is ever listed unnecessarily. Further, it is clear that the quantity of listed water bodies scheduled for development of TMDLs in California has been consistently increasing. Even without these increases, the volume of work already facing the regional and state boards is far more than can be completed in any reasonable time frame. Added to that is the critical shortage of funds available in California for all government activities. All these factors support a policy for listing decisions that results in the listing of only those water bodies where there is compelling scientific evidence that the water quality conditions are seriously impaired by human activity and implementation of control measures is clearly feasible to achieve measurable remedial results.

We believe that the basis of past listings resulted in the inclusion of far too many water bodies. As mentioned above, the volume of listed water bodies is already far more than can reasonably be addressed, and many of the listed water bodies are listed on the basis of scanty questionable evidence. We suggest that the standard for listing be strengthened from a weight of the evidence test to a clear and convincing evidence standard such that where there exists doubt as to impairment, no listing would occur.

As landowners and taxpayers, we are always concerned about the exercise of discretion by agency personnel that are remotely affected by the democratic election process. We appreciate policy decision-making by those, like yourselves, that are accountable to the public for their actions. We are always suspicious of bureaucrats that have broad discretion when the exercise of their discretion can affect their employment security. We believe that past policies for listing of impaired water bodies have given far too much discretion to lower level bureaucrats, and that that discretion has been exercised to increase their influence over land management through unnecessary listing of water bodies. We believe the draft policy under review is an improvement over the past; however, we do not think it goes far enough. We urge you to roll up your sleeves and work to adopt a policy that leaves a minimum level of discretion for regional and state board staff.

We are particularly concerned about listings based on narrative standards and the adoption of thresholds of concern by regional and state board staff rather than the policy-making boards. Use of narrative standards inherently allows for the listing of virtually any water body. If all a decision maker has to determine is whether a pollutant adversely affects beneficial uses or constitutes a nuisance, it is a simple matter to reach a listing determination without any real analysis as to whether the pollutant is actually causing a problem. Such determinations are better suited for judges and juries rather than bureaucrats, as evidenced by the volume of litigation that has now emerged. We urge you to adopt numeric standards based on scientific study of California's waters to assure that all listings are warranted.

In the past, regional and state board staff have adopted and used thresholds of concern for their recommendations for listing. We have commented previously regarding these thresholds for temperature and sediment. We believe that the temperature thresholds for salmonids used by staff were inappropriate for the more southern latitudes of California. Further, in the staff's evaluation of sediment and the V\* metric, they adopted an unreasonably low threshold by committing an egregious error in averaging. They averaged a threshold based on some sixty samples with another threshold based on only one sample. The point here is that if thresholds for listing are going to be used, the public is entitled to be notified of the proposed adoption and have an opportunity to provide input to a policy making board, not some individual staff member. Please consider adopting a policy that requires all thresholds be adopted by the state or regional boards.

## II. Specific Comments

Under Section 3.1, there is a provision that data and information collected during a known spill or violation of an effluent limit in a permit or WDR shall not be used in assessing listing. We believe this is a step in the right direction, but suggest that data collected during

other events such as floods and other human or natural catastrophes also be excluded. Data gathered during extreme unusual circumstances may represent water quality conditions that are beyond human remediation.

We believe you have taken a major step in the right direction by excluding water bodies where the water quality conditions result from natural background conditions or that cannot be controlled by human intervention. Clearly, we cannot improve on natural conditions, and there is no rationale in spending scarce funds to remedy something that cannot be fixed. We have long advocated such a policy and are happy to see that someone is listening. We are concerned however that the policy suggests that only the most recent data (up to 10-years old) can be used. Determining if conditions are the result of natural conditions will inherently require the admission of data much older than ten years. It is important to keep in mind that water bodies, particularly rivers and streams, are dynamic ecosystems that vary dramatically under natural weather cycles. It is critically important that any policy adopted for listing and de-listing include criteria to evaluate the range of natural conditions, and water bodies should not be listed unless conditions exceed that range.

We support the exclusion of visual assessments or other semi-quantitative assessments as the sole basis for a listing. We would urge that assessments based on narrative standards or other qualitative assessments be added to the list of excluded assessments. In order to avoid unnecessary listings, the policy you adopt should allow for listing only where there is clear and convincing quantitative scientific evidence that human activity has caused impairment that can be reasonably remedied.

Section 3.1.11, Alternative Data Evaluation, should be removed from the policy. As discussed above, good decision-making results from limited discretion in others than the policy makers. This section that allows for alternative methods of evaluation off sets the positive policy changes otherwise effected and adds additional discretion at agency levels far below the policy makers. Again, we urge you to move away from subjective policies and toward objective measurable criteria for listing.

Under section 4 of the draft policy, there are listed and described criteria for the de-listing of water bodies. It appears that based on the statistical thresholds the policy will require a higher evidentiary standard for de-listing than for listing. We believe the same standard should be used in both instances.

Section 6.1 provides for the right of interested parties to request reassessment of existing listings by the regional boards. However, there is no detail as to the procedure the regional boards are to undertake upon receipt of such a request. The policy should set forth specific guidance for the regional boards as to the burden interested parties must show in order to trigger a procedure for a thorough re-evaluation. Nor is there any policy regarding appeal of regional board decisions to the state board. We urge you to add provisions specifying the procedure for requesting re-evaluations of existing listings, including an appeal procedure.

Section 6.2.3 provides for the establishment of numeric evaluation guidelines for the evaluation of narrative water quality objectives. Again, we are concerned about the adoption

of numeric guidelines by other than policy-making bodies using rule-making procedures with public notice and opportunity to provide input. Numeric guidelines or thresholds should not be adopted summarily by board staff. Further, under this section, it provides, "This section supersedes any regional water quality control plan or water quality control policy to the extent of any conflict." We question whether there exists authority to supersede such plans and policies.

Section 6.2.4 relating to assessment of data quality is critical to adopting an effective policy. We urge you to adopt a policy that requires all listings to be based upon measurable criteria established through the utilization of accepted, peer reviewed, scientific procedures and processes.

### III. Alternative Selection

Listings based on non-attainment of water quality objectives from natural pollutants is a concern in many parts of the state, particularly from sediment and temperature. Many listings in the north coast region are based on sediment impairment using narrative water quality objectives. Many of the listed water bodies were originally listed based solely on subjective opinions and have remained on the list due to the absence of any real policy for de-listing and an inherent reluctance on the part of regional and state board staff to relinquish the influence attributable to the listing. These waters lack any measurable scientific evidence that their water quality conditions are outside the range of natural river dynamics. Couple the subjective criteria and evidence that support these listings with the fact that sediment is an essential component of riverine ecosystems, and the problem is compounded. We urge you to adopt a policy that provides that river systems will not be listed for sediment impairment unless there is quantitative scientific evidence that clearly and convincingly shows that the sediment conditions in the subject river are beyond the range of naturally occurring conditions. Existing policies have resulted in rivers with naturally high sediment loads to be listed on the basis that sediment is impairing salmonid reproduction even while these rivers are producing salmonids at what are considered record levels. Where populations have evolved under heavy sediment conditions, they have adapted, and to try to fix such natural conditions is a waste of public and private resources.

With respect to sediment, two alternatives were considered. The first alternative is in essence to continue the status quo as discussed above. The second alternative is to provide specific guidance. Your draft policy recommends adopting the first alternative, the status quo. We strongly disagree and urge you to reconsider specific guidance in your effort to avoid unnecessary listings. The rationale given for choosing alternative one is that the specific criteria may not be applicable throughout the state. Of course not. This is what we have been saying for years. The criteria must consider local conditions. This is not a legitimate reason to continue to grant unlimited listing discretion with regard to sediment. The functional equivalent document admits that our understanding of sediment in rivers and its affect on aquatic species is poor. If our understanding is poor, we should not adopt a policy that leaves listing to bureaucratic discretion rather than science. We should undertake the necessary effort to inform ourselves scientifically and then make appropriate decisions.

The functional equivalent document at page 119 discusses the incident in which staff made a wholly inappropriate determination regarding thresholds of concern, and illustrates the problem. Your own document states:

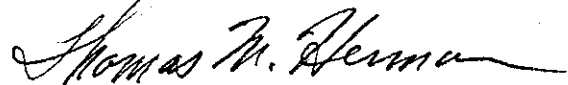
“V\* values for Elder Creek, an undisturbed tributary of the South Fork Eel River averaged only 0.09 (Lisle and Hilton, 1999). A study of over sixty streams in Northern California found that mean V\* values of 21 percent or less represented good stream conditions (Knopp, 1993). ... The numeric target representative of properly functioning conditions for V\* used in several North Coast TMDLs is 15 percent, the average of 21 and 9 percent – the results represented in the studies above.”

A sixth grader would see the fundamental mathematical error in the foregoing. A mean based on a population of 60 cannot be averaged with a mean based on a population of one. Even if the studies were comparable, an assumption that may not be valid, the average that should be used would be very near to 21, not 15. Had this metric been subjected to public notice and hearing, it is likely an appropriate number would have been used, and perhaps some water bodies would not have been unnecessarily listed.

Regarding evaluation of temperature data, we are concerned that in most cases, the input of thermal energy to water is not the result of human activity, cannot be controlled and should not be considered a pollutant unless artificially heated water is being discharged into the State's waters. Despite these concerns, we recognize that it is impossible to determine whether most water bodies are affected by temperature pollution because there exists no evidence of the historic temperatures. We believe this raises serious doubts as to the validity of a listing based on temperature. Even so, if your policy is going to use evaluation of beneficial uses to determine thermal pollution, we urge you to adopt a policy that establishes numeric objectives based on application of scientific, peer reviewed research that considers the differences in temperatures based on drainage area, stream size, geographic location, climatic conditions, elevation and other relevant factors. For too long now we have suffered from the assumption that salmonids in the State of Washington have the same temperature requirements as those in the central valley. This simply is not true. Numeric criteria must be based on an understanding of the needs of organisms that have evolved in the climates where we intend to regulate. The costs of listing should not burden this state based on inference and assumption about how cool the water in California used to be.

Thank you for the opportunity to comment on the proposed policy.

Sincerely,



Thomas M. Herman

TMH:th  
cc: Client