

January 28, 2004

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

**Re: Proposed TMDL Listing and De-Listing Policy and
Draft Functional Equivalent Document**

Dear Chairman Baggett and Members of the Board:

The California Manufacturers & Technology Association (CMTA) appreciates the opportunity to comment on the State Water Resources Control Board's (State Board) Draft Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List (Draft Listing Policy) and Functional Equivalent Document (FED). CMTA has been actively involved in the development of the State Board's TMDL Listing and De-Listing Policy through its participation in the AB 982 Public Advisory Group, started three years ago.

CMTA acknowledges the efforts of the State Board and its staff, led by Craig J. Wilson, to develop a reasonable and objective approach to assessing California's surface waters. We believe there are many positive aspects of the Draft Listing Policy - - such as the use of consistent and scientifically sound criteria as well as the reliance on specifically adopted water quality standards to determine *actual* water segment impairments. Nevertheless, we have a number of concerns with the current draft that we urge the State Board to modify before adopting the Policy.

1. **Review Criteria for Existing 303(d) Listings.** The current Draft Policy allows for review of historical listings *only* when there is new data or information not previously considered by the Regional or State Boards. This is a substantial change from the July 2003 draft, and one that will likely lead to substantial waste of limited state and private resources used to develop TMDLs where no *real* impairments exist.

Although the requirement for new data or information may be reasonable to reassess listing decisions made based upon the final adopted statewide Listing Policy, we do not believe the requirement for *new* data or information is appropriate in reassessing the 2002 Section 303(d) List which, as you are aware, simply re-adopted the 1998 Section 303(d) List, wherein many historical listings have been called into question.

The Draft Listing Policy continues the practice of using the existing 303(d) list as a basis for the next list. Many of these listing have never been reevaluated under any guidelines because the lack of new data or information. (See, FED at p. 189.) However, many of the listings decisions on the current 303(d) list were made with limited data, which would *not* meet the objective listing criteria set forth in the Draft Listing Policy, such as statistical exceedance

frequency requirements, data quantity or quality requirements, *etc.* Requiring *new* information or data for these cases adds an onerous burden to the reevaluation process for existing listings.

TMDLs take significant time and resources to develop. In the State Board's document "*A Process for Addressing Impaired Waters in California*" (December 2003), the State Board estimated the staff time to develop a bacteria TMDL to be a *minimum* of 684 hours, not including time for the regulatory process and approval tasks (*e.g.*, OAL review, *etc.*). Requiring that TMDLs be developed for water segments whose listings cannot withstand the criteria in the Draft Listing Policy burdens not only State and Regional Board staff, but stakeholders and watershed groups as well.

The draft Functional Equivalent Document (FED) only considered two options with regard to future review of past listing decisions: (1) a complete reevaluation of the existing list for conformance with listing policy; or (2) an evaluation only when *new* data is available. CMTA believes that is both reasonable and fair to examine and adopt a third option that would allow review of existing segments without requiring the data or information to be new. This would address some concerns stated in the evaluation of other two options in the FED.

First, it would not require staff to review the entire existing 303(d) list at this time, but would focus efforts on those segments where a interested party requests the review and states how under the adopted policy the listing decision would change. Second, it would allow reevaluation of existing listings that do not warrant the development of costly and time consuming TMDLs on segments that do not meet the listing criteria. This would save both staff time and money to focus on segments where a TMDL is really warranted. Third, it does not require an interested party to obtain *new* data or information when the existing information does not warrant a listing decision. Segments needing additional data could be placed on a preliminary list.

CMTA believes that this third approach is both fair and reasonable and strongly urges the State Board to include this option in the FED and adopt it in the final Listing Policy. This can be done by modifying the language in Section 6.1 to allow an interested party to request review of an existing listing by stating how the newly adopted policy would lead to a different listing decision without having to provide new data or information.

CMTA strongly urges the State Board to revise the language in Section 6.1 to allow review of any water segment listed on the 2002 Section 303(d) list for conformance with the adopted listing policy when an interested party requests the review and states why, using the adopted policy, the listing decision would change, rather than limit the review to water segments with *new* data or information.

2. **Consolidation of the Lists.** The Draft Listing Policy proposes a single Section 303(d) list, with three categories (Water Quality Limited Segments, TMDLs Completed, and Enforceable Programs). This is another substantial change from the July 2003 draft Listing Policy, which recommended multiple to describe water body conditions. We strongly urge the State Board to adopt a final policy that contains, at minimum, a separate list for waterbodies where impairment may be suggested (*i.e.*, a "preliminary list"), but there is not enough credible or objective data to warrant a listing.

The FED itself recognizes the value of having such a "preliminary" list to better "triage" the real and pressing water quality problems facing California. For instance, the FED notes that, "water bodies placed on the preliminary (watch, monitoring or planning) list would be the focus of additional monitoring and assessment of new data and information. This additional assessment would lead to a better understanding of the impacts to beneficial uses and water quality standards exceedances. If, as a result of the more complete assessment, there is sufficient evidence to indicate that water quality standards are indeed exceeded, the water segment on the preliminary list would be moved to the section 303(d) list." (FED at p. 36.) A preliminary list provides all stakeholders the assurance that attention will be focused on waters suspected to be impaired without imposing the consequences of developing a TMDL on stakeholders and the State and Regional Boards.

CMTA is concerned that a Listing Policy which does not include at least a preliminary list will result in the Regional and State Boards being pressured to place water segments on the 303(d) list using some of the more subjective listing criteria currently contained in the Draft Listing Policy, for fear that the water segment would be forgotten. This preliminary list could also be used for impairments where the pollutant has not yet been identified (such as for toxicity, adverse biological response or degradation of biological populations) or for cases where current water quality standards may be inappropriate. A watch or preliminary list is also an appropriate place for water segments exhibiting negative "trends" in water quality but where standards are currently being obtained.

3. **Listing of Water Segments Due to Trends in Water Quality.** CMTA opposes the use of "trends in water quality" as a basis for listing water segments, where the objective criteria set forth in the Draft Listing Policy are not otherwise met. The use of such a basis allows water segments to be listed in the absence of information that water quality standards are exceeded or that beneficial uses are impaired. This 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. Moreover, use of such criterion would most likely result in substantial waste of limited state and private resources needed to address real water quality problems.

The FED specifically recognizes that there are currently no widely accepted approaches for documenting "trends" and that data is often difficult to interpret. (See, FED at p. 139.) The Draft Listing Policy describes five very general guidelines for determining the trends, but these guidelines are ambiguous and lack the specific requirements for consistent and statistically valid data evaluations, requirements for data quality and quantity, and other similar provisions in the other listing factors.

For example, the Draft Listing 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. The recommended minimum of three years of data may not be adequate to account for seasonal and interannual effects, or to separate out the occurrence of adverse biological response or degradation of biological populations from within-site variability for those factors. Hydrologic conditions such as droughts and *El Nino* weather patterns may be more likely to impact short-term trends in water quality than to increases in pollutant loading. The Draft Listing Policy also does not provide a standard

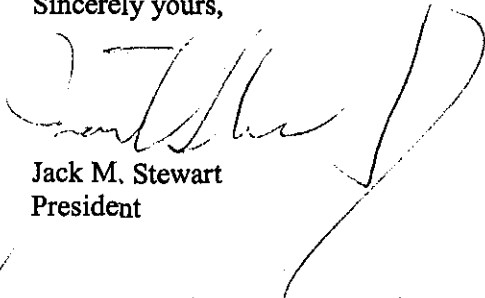
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threshold amount to assess when a decline would trigger a listing (i.e. increase in a pollutant concentration of 25% in five years, etc.). The Draft Listing Policy does not provide delisting guidelines if a water segment is listed by this criterion,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

Because this criterion is so subjective, CMTA believes this criterion is inappropriate for listing purposes and will lead to inconsistent interpretation of antidegradation requirements because each Regional Board would develop its own set of criterion. The 303(d) list is not the appropriate forum to evaluate the proper balance between the highest water quality achievable and the maximum benefit to the people of the State. CMTA believes that a preliminary or watch list is the appropriate placeholder for such water segments.

Thank you for this opportunity to provide these comments.

Sincerely yours,



Jack M. Stewart
President

cc: Members, CMTA Environmental Quality Committee
Craig S.J. Johns, Co-Chair, AB 982 PAG