FL 57
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Executive Advisory Committee
Stormwater Program – County of Los Angeles

February 5, 2004

Arthur G. Baggett Jr., Chair
Craig J. Wilson, TMDL Listing Unit
Division of Water Quality, State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

Subject: Comments on the Draft Water Quality Control Policy for Developing California's CWA Section 303(d) List and Draft Functional Equivalent Document

Dear Chairman Baggett:

At the behest of the Los Angeles County Municipal Separate Storm Sewer System (MS4) National Pollutant Discharge Elimination System (NPDES) permittees, the Executive Advisory Committee would like to submit the following comments in regards to the subject policy document.

We appreciate that the Board recognized the significant level of local interest in these draft policy documents and chose to hold a hearing in Los Angeles County. The EAC believes that past, current, and future findings and actions in relation to the 303(d) listing and TMDL programs are of significant importance. The effort of the Board to hold this hearing and then carefully consider local agency input is both laudable and welcome.

In many respects, the local 1998 and 2002 303(d) listing processes appeared to border on the capricious, due to pollutant listings that were unidentified (toxicity), the construction and demolition of new lists (watch), wholesale listings and delistings based on scant or dubious data, and conservative water quality objectives (extrapolated CTR standards). We sincerely hope that the final policy document will settle much of the confusion that clouds what should be a transparent regulatory process, thereby allowing our municipal agencies to concentrate on the most significant and achievable water quality issues.

We recommend returning to the multi-list format that appeared in prior drafts and, more importantly, which was consistent with EPA Guidance and the National Academy of Science Report to Congress. As indicated in the prior paragraph, the 1998 and 2002 lists contained impairments based on dubious or inadequate data, that were subsequently rescinded or shuffled to other lists. Other impairments were for "parameters" such as toxicity, indicator organisms or pollutant groups. We request that the monitoring list be reconstituted, so that specific controllable pollutants may be identified prior to TMDL preparation. This will insure that listings result in solid predictable actions aimed at controlling the specific pollutants, which are causing the observed impairment.

Periodic re-evaluation of contaminant listings should be mandatory and new listings should be balanced by delistings (due to new data or objective achievement) so that a predictable workload exists for both the regulated and regulatory communities.

The statistical methods identified in Issue 6 of the Draft Policy are probably the most important aspect of this document. They have the potential to eliminate the perception that some listings have been set arbitrarily, or that delisting is overtly onerous and subject to political decisions that cannot be rationally objectified. With this in mind, we encourage the Water Board staff to carefully review the descriptions and clarify their meanings to the greatest degree possible. The final policy should include additional language with respect to analytical limitations and the confusion resulting from matrix effects, detection/quantification limits and the impact of dubious data for one parameter (hardness) on the standards applied to other correlated parameters (metals).

The discussion on trend analysis should be expanded to consider trends in meterologic conditions, such as extended droughts or increasing temperature regimes, which may exacerbate or improve contaminant concentrations.

The concept of transitioning numeric water objectives between adjacent receiving water reaches, has already arisen locally as difficult issue to discuss or reconcile in public forums. We are concerned that the utilization of pooled data from different receiving water reach areas will exacerbate the inherent political discord and lead to cases where alternate, but technically equivalent data sets, could independently argue for listing, monitoring, or delisting. This would further obfuscate the process and lead to an increase in the severity of both the volume and tone of the already deafening level of rhetoric.

The EAC appreciates your consideration of these requests and anticipates that the adoption of a modified 303(d) listing policy would reduce the rancor that currently surrounds the TMDL program throughout Los Angeles County.

Sincerely,

Desi Alvarez, P.E.
Chair, Executive Advisory Committee

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Subject: Comments on the Draft Water Quality Control Policy for Developing California's CWA Section 303(d) List and Draft Functional Equivalent Document

Dear Chairman Baggett:

The Los Angeles County National Pollutant Discharge Elimination System (NPDES) Municipal Separate Storm Sewer System (MS4) Executive Advisory Committee (EAC) represent the 84 municipal agencies in the Southern half of the County. We wish to commend and acknowledge the scheduling of a local hearing on the subject policy and the effort of State Board staff in drafting the proposed policy. We anticipate that having a clearly written policy will eliminate some of the confusion and apparent complexity associated with the current 303(d) listing and delisting process.

303(d) List Categories: The three proposed categories do not align well with existing local listings, nor with the iterative process envisioned under the Clean Water Act. Locally, several water bodies may be listed under a single TMDL. Likewise, several pollutants (or an unknown pollutant) could be listed for a single water body segment. We recommend that the following categories be used or, to be consistent with Federal and State regulations, become separate lists isolated from the 303(d) impairment list :

- **A Monitoring (or Watch) Category** for contaminants that either 1) Marginally meet or fail the 303(d) listing criteria, especially when the sample size is small; 2) Legacy pollutants for which the major source is difficult to control (sediments) and time is the major remediation method; and 3) Minor coincident pollutants, which are likely to be reduced through other planned or implemented actions (i.e. nitrates when ammonia is on the Enforceable Program list and there are few agricultural sources). During periods of limited resources, this category can also be used to collect the data needed to identify sources, remediation opportunities, and beneficial use impairments.
- **Water Quality Limited Category** for water body segments that are not meeting a beneficial use objective and have a high priority for TMDL development. This would typically mean that sufficient samples have been collected to clearly demonstrate the statistical applicable of the listing, a recognized pollutant has been identified, controllable sources have been tentatively defined, and defined treatment or control

mechanisms or technologies can be identified for use by the regulated community. TMDLs that are preparation or moving through the regulatory review process would remain in this category until accepted by the EPA.

- **TMDLs Completed Category** would be used when a TMDL has been reviewed by the Office of Administrative Law, accepted by the EPA, and is essentially in the process of being implemented by stakeholders. Unless the regulatory community anticipates adopting TMDLs that would **not** result in full standard attainment, the definition used in the draft policy is overly cumbersome. A "completed" TMDL that is stayed, invalidated by litigation, fully implemented without standard attainment, or being modified to incorporate iterative changes, should be demoted to the Water Quality Limited or Monitoring Category.
- **Enforceable Programs Category** would remain as defined in the policy statement, except that once pollutants in this category are no longer limiting the beneficial uses, they would be removed from the category.

Finally, it is important to clarify that a single water body may be in several categories with respect to different contaminants and recognize that in some cases water quality standards may not be attained, because natural sources (such as bacteria) are the primary cause of the continuing exceedance. The description in this section seems to suggest that natural or background contamination could prevent a delisting.

Binomial Distribution: Two important aspects of this assumption support the Board's inclusion of this statistical model. First analytical noise and error generally follow the binomial distribution. For many methods, a relative standard deviation from a single sample analysis might be 10 to 50% with this value rising as the detection limit is approached. Similarly, real world samples are often subject to matrix interference effects that introduce an additional source of error. Assuming a contaminant has a standard of 10 PPB and the actual sample value is actually 9 PPB, a predictable number of samples, related the analytical method, would be expected to incorrectly exceed the standard. These false positives may unfortunately lead to a unwarranted diversion of effort. The second consideration is prioritization. While both the regulatory and regulated communities might appreciate living in a world of unlimited resources, the opposite situation has always predominated. If only 15% of the samples exceed an objective and those by only a small amount, then for most regions of the state, other objectives that more severely constrain water body beneficial uses should be emphasized. Based on the comments from all stakeholders, the current 303(d) listings greatly exceed governmental resources and the emphasis should be on cost effective management efforts.

Applicability of CTR Objectives for Low Hardness Data: While it is appropriate to adjust the toxicity level of various contaminants, such as heavy metals, for the ambient water hardness, exceedances have been designated based on mathematical extrapolation of hardness data to zero, that are below the lowest toxicity data point observed. The CTR standards were developed for application to industrial or municipal wastes discharges not stormwater runoff as is currently occurring. We encourage the Board to consider identifying a minimum hardness level based on CTR toxicity data points.

Dissolved Oxygen Measurement: The description in the second sentence of section 3.1.2 suggests that this policy document is becoming overly prescriptive. While the rational is correct, the appropriate solution is to take morning samples, when the critical conditions exist, rather than making assumptions. One morning sample would avoid collecting two samples to demonstrate increasing oxygen concentration with daylight.

Unidentified Pollutants: The last sentence of the first paragraph in Section 3.1.6 indicates that staff have listened to comments regarding the listing of unidentified "pollutants" such as toxicity and is a useful example of the utility of a Monitoring Category. Existing toxicity impairments are dubious and unproductive for both the regulatory and regulated communities. If it is currently impossible to identify the cause of toxicity it is equally unlikely that a source can be demonstrated. In some cases, this concern may also extend to the nuisance criteria listed in section 3.1.7.

Re-evaluation of Listings: The second paragraph of section 4 allows for delisting based on faulty data, however it is unclear how this process might be initiated (local or state Boards) and how the quality of data might be assessed. During the 2002 cycle, discussions with our local board to clarify this issue were deferred until after the list had been completed.

Table 4.1 Delisting criteria: The delisting criteria assumes an incorrect null hypothesis that the water is contaminated. This is essentially equivalent to making a listed water body guilty, until proven innocent or at least waiting for 10 years. Assuming that analytical quality assurance was adequate and well above the method quantification limit, which is often not the case in low hardness waters, exceedance in five samples would result in a listing. These exceedances could be due to a mobile or closed pollutant source or atmospheric trend. Delisting would require 86 additional "clean" samples, assuming no analytical noise or random error for values near the standard. While this example is extreme and it is appropriate that there should be some separation between the listing and delisting criteria, The values on Table 3.1 and 4.1 are too far disparate unless a vigorous confirmation program is implemented for all values that exceed the standards.

Policy Implementation: It is notable that this 8 page policy guideline, is longer than most of the 2002 listings for a watershed area, which were typically 2 or 3 pages long including figures, graphs, and tables. Clearly, these old listings are not comparable to the proposed policy requirements. While many of the old listings maybe appropriate, they do not meet these policy guidelines. Clearly these pre-policy listings should be revisited to determine whether appropriate criteria were utilized, especially as it relates to analytical Quality Assurance and Control.

Data Pooling: Section 6.2.5.6 seems to allow data pooling between water body reaches. We fell that this is serious violation of data integrity and can only lead to further confusion. Given the cost of developing and funding the implementation of a TMDL, only reaches that have at least the minimum number of sample exceedances should be listed on the 303(d) water quality limitations list.

Prioritization Based on Funding Availability: We appreciate the policy decision to include funding as one of the prioritization criteria. Many of the TMDL implementers are creative motivated water quality experts, who have become alienated by a process that ignores fiscal reality. With support, the regulated community can achieve much.

Environmental Checklist Inadequacy: Recent court decisions confirm that Porter-Cologne section 13241 and 13242 requirements, as well as CEQA economic analyses, must be complied with, when regulations are modified and first considered by the Board. As indicated on page 2 of the draft, the SWRCB must comply with CEQA and APA when adopting a plan policy or guideline. This commitment was dropped from the current draft. For every item on the submitted Environmental Checklist the state has checked "No Impact", and then spends 3 pages explaining why this is appropriate. A typical example is I.d which indicates that listing will lead to a TMDL and that "Site specific impacts of individual TMDLs will be considered by the RWQCBs and SWRCB what the TMDL and implementation plans are developed."

This policy also reverses the entire goal of the CEQA process, which is to identify impacts before excessive commitments of public or private resources occur. We believe that the determination that this policy will not have significant adverse effects on the environment is incorrect and that the following CEQA required environmental impacts should be considered in an environmental assessment so that the policy will:

1. Be incompatible with exiting land uses by siting treatment plants in residential areas.
2. Affect agricultural resources/operations by excessively reducing nutrient discharges.
3. Displace existing affordable housing by injecting new housing costs and user fees.
4. Change the amount of Surface Water by increasing infiltration.
5. Change the direction of surface water movement by forcing it into treatment plants.
6. Use nonrenewable resources inefficiently by wastefully using energy and land.
7. Create potential public health hazards by creating more vector breeding sites.
8. Reduce all types of Public Services by diverting significant scarce fiscal resources.
9. Create new storm water drainage facility needs by altering hydraulic constraints.
10. Affect existing recreation by prohibiting activities that contribute bacteria.
11. Achieve short term goals to the disadvantage of long term goals.
12. Create projects that have limited individual, but cumulatively considerable, impacts.

In conclusion, while we appreciate the development of this policy document and believe that is a step in the right direction, we still need the help of the State Board in modifying sections of this policy to achieve the common goals of municipalities and the Boards.

Sincerely,

Desi Alvarez, P.E.
Director of Public Works, City of Downey

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