

10/25/06 BdMtg Item 10  
303(d) List  
Deadline: 10/20/06 5pm



October 20, 2006

Chair Tam Doduc and Members of the State Water Board  
c/o Song Her, Clerk to the Board  
State Water Resources Control Board  
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VIA EMAIL: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

**Re: Agenda Item #10:** Comments on "Proposed 2006 Federal Clean Water Act Section 303(d) List of Water Quality Limited Segments in California"

Dear Chair Doduc and Board Members:

On behalf of the under-signed groups, including working men and women in the fishing fleet whose livelihoods depend upon clean water, we welcome the opportunity to submit these comments on the Proposed 2006 Federal Clean Water Act Section 303(d) List of Water Quality Limited Segments in California ("303(d) List"). Overall, our organizations support adoption of the listing of the identified impaired water bodies on California's 2006 Section 303(d) List provided that the specific recommended changes as discussed in this letter are made to the list.

With respect to positive additions to the list, we strongly support the listings of waters impaired by temperature and exotic/invasive species. The identification of these impaired waters as required by the Clean Water Act will ensure their cleanup and return to full use and enjoyment by all Californians. However, we have continuing concerns with the failure to list a number of impaired or threatened waters due to misapplication of the law, Listing Guidance Policy, and other factors. As noted in our letter on the draft list dated January 31, 2006, which is incorporated herein by reference, we have a number of overarching concerns with the approach taken to develop the list before the Board. These concerns were almost unilaterally dismissed with no analysis in the responses to comments. The only concern that was addressed was with regard to the failure to list impaired waters for which a TMDL or other program has been developed by including those waters on the 303(d) List, though in a separate category. We first summarize our general concerns as well as discuss the need to correct the failing TMDL program. We then list our overarching specific concerns.

## GENERAL CONCERNS

Concerns that were dismissed with little to no analysis include the following:

- The list fails to meet the regulatory requirement of reviewing all readily available information. In addition, fact sheets have no links to actual data submitted, rendering verification of completeness of data review impossible.
- The list violates the law by failing to list impaired waters where there is no standard or guideline for the pollutant at issue (*i.e.*, either does not list or lists based on standard or guideline for a different pollutant).
- The list violates the law by failing to list impaired waters where there is only a narrative standard or guideline for the pollutant at issue (*i.e.*, either does not list or lists based on standard or guideline for a different pollutant).
- The list violates the Listing Guidance by refusing to allow appropriate and required Regional Water Quality Control Board (“Regional Board”) involvement.
- The list violates the Listing Guidance and the law by delisting waters where the original file cannot be located.
- The list violates the Listing Guidance and the law because it does not use the “weight of evidence approach” in many cases, including prior to delisting waters, thus missing impaired waters.
- The list violates the law by inappropriately downsizing the size of the water body that is listed (*i.e.* delisting part of an existing listed water body).

In addition, as we noted in our January letter, the precautionary approach should be the rule in determining whether water bodies are impaired. The consequences of missing an impaired water body are far greater than the unlikely event of a false listing.

## GLOBAL CORRECTION OF TMDL PROGRAM IS NEEDED

As the Board knows, the ultimate purpose of the Clean Water Act Section 303(d) List is to meet the goal the goals of that section: to cleanup our waters through implementation of total maximum daily loads (TMDLs). However, to date, the TMDL program remains moribund. In fact, not only has the TMDL program failed to identify listed waters, but it has also failed to ensure their cleanup once they are finally listed. The proposed list has an astounding 2055 water-body pollutant combinations that still need TMDLs. (Staff Report at 16.)

This number becomes a greater concern given the overall delay of the TMDL program. The proposed list projects TMDL development dates to 2019—well over ten years from now. (Staff Report at 16; Table 11). Currently, state and federal agencies have only fully developed and implemented less than 15 percent of water-quality limited segments. (See Staff Report at 16.) Further, the process of TMDL development, establishment, and approval by federal and state agencies generally takes over two years to complete. (See, e.g., Marina del Rey Harbor Mothers’ Beach and Back Basins Bacteria TMDL.) Moreover, once TMDLs are adopted, the

implementation schedules can span decades and include clauses for further delays with re-openers. (See *id.* (Implementation Schedule of 10 years).) The full implementation can be further delayed since most TMDLs have not been incorporated into NPDES permits. Indeed, the State Board cannot identify even one water body that has actually been cleaned-up as a result of effective TMDL implementation.

The tragic events in the Salinas Valley watershed exemplify the failures of the TMDL program. These failures have actually resulted in public harm—including a death attributed to *e. coli* O157 contamination. This tragedy is even more disturbing considering that the recent outbreak was the 10th since 1995 linked to water quality and spinach in the Salinas Valley. In fact, every river but one in the Salinas Valley is listed as impaired for *e. coli*. Yet, there are no completed TMDLs for these waterbodies that are known to pose lethal public health risks. (See Proposed 303(d) List TMDL list at 19.) Further, the 2005 NPDES permit for the City of Salinas not only fails to include any TMDL related requirements, it was issued without a storm water management program—a mechanism for pollution prevention tools. (See Salinas Permit at Proposed Salinas SWMP at 1.7.) Moreover, Region 3 not only fails to have WDRs for grazing—the primary culprit for the O157 deaths—the region doesn't even have a “waiver” process for grazing. This is complete and flagrant violation of the Porter-Cologne Act.

The tragedy of the Salinas River Valley makes clear that that the law can no longer be ignored. The situation shows that just because a water body is identified as “impaired” on the 303(d) List does not mean that it's taken care of in terms of cleanup; rather the reverse is true. It seems that the agencies' approach to the listing process is to adjust the 303(d) List every few years and then delay TMDL development and implementation for decades, even in the face of serious public and environmental risks. The law requires more.

Before the State Board is the distinct opportunity to correct this ineffective approach. It is time for California to take not only the listing process seriously, but also the implementation process. This means swift schedules for TMDL development, approval, and implementation. This commitment also includes full employment of pollution prevention tools, such as WDRs and NPDES permits. California needs to have WDRs for every impaired water body, including reduction of waivers or voluntary programs. The water boards also need to stop extending dates by which dischargers must comply with standards. (See, e.g., agenda item #8.)

Critically, the State Board must prioritize TMDL development and implementation of waterbody pollutant combinations for impaired waters upstream from and part of Areas of Special Biological Significance (“ASBSs”). The 303(d) List, however, fails to prioritize TMDLs for ASBSs. For instance, the TMDL completion date for the impaired Fitzgerald Marine Reserve ASBS is 2019. (303(d) List TMDL list at 15.) A delay of over ten-years for one of California's marine sensitive ecosystems is unacceptable. As the Board knows, the Ocean Plan contains a waste discharge prohibition to the 34 ASBSs because of their “intrinsic value”, thus ASBSs are worthy of “fast-track” cleanup. (See Ocean Plan at 13.)

Ultimately, the State Board's lack of a clear commitment to preventing and cleaning up pollution will only lead to more and more impaired waters—as evidenced by the over 2000 impaired waterbody pollutant combinations in our state, even with the flaws with the listing process used for the 2006 List. We urge the State Board to show its commitment to clean water by requiring global corrections to the TMDL program, including, among other things, prioritizing TMDL development, swifter completion schedules, shorter implementation times, and timely incorporation into NPDES permits and WDRs.

## **OVERARCHING SPECIFIC CONCERNS**

In approving the 303(d) List, we urge the Board to address these problems, not only to ensure that impaired waters are properly identified and listed on the 2006 303(d) list, but also so that future impaired waters are not missed due to continued misapplication of the law and the Listing Guidance Document, which went through years of stakeholder processes and public hearings before being finalized. Examples of each of these concerns are addressed in more detail below.

### **A. The List Fails To Meet Regulatory Requirement Of Reviewing All Readily Available Information**

The response to comments states, “All data and information in the administrative record were reviewed.” (RTC Table 2 at 13.) However, staff failed to actually consider all of the data and information submitted. For example, as extensively discussed in Humboldt Baykeeper's January 2006 petition, Humboldt Bay is impaired for both penta and dioxin. Dioxins are one of the most potent reproductive toxins known to humans. They bioaccumulate and biomagnify as they move through the food chain—contaminating local sediment and marine life, thus impacting beneficial uses for Humboldt Bay. As submitted by Humboldt Baykeeper, sampling that has been conducted by the ACOE, the City of Eureka, and the Humboldt Bay Harbor District show elevated levels of dioxins in sediment, and sampling conducted as a result of a consent decree between the NCRWQCB and a local mill show elevated levels of penta in local biota. (See Humboldt Baykeeper January 2006 letter at 2-4.)

In response to these compelling reasons showing impairment of Humboldt Bay for penta and dioxin, staff decided not to list this waterbody for these pollutants. Even though staff indicated that it reviewed all of the data provided to them, it conditioned that statement by stating, “priorities for using the data to prepare new fact sheets were established on the data sets that were already summarized in fact sheets. These priorities were established because *limited staff resources preclude* the development of summaries for all waters, all pollutants, and all water bodies.” (RTC at 177 [emphasis added].) Therefore, it appears that staff—  
notwithstanding a nine month delay in preparing the list in 2006—illegally did not evaluate all the information in making determinations for listing but, instead, merely used the data to update fact sheets for their previously made determinations. This is a violation of the Listing Policy and the Code of Federal Regulations. (Listing Policy at § 6.) Other examples of staff's failure to

consider all readily available information include, among others, 45 statewide beaches for bacterial indicators (as discussed in Heal the Bay's October, 2006 letter) and San Francisco Bay for PBDE (as discussed in San Francisco Baykeeper's January 2006 letter). **As such, the list should be modified to include a review of all available data and list for those water bodies, such as Humboldt Bay for penta and dioxin as well as the 45 statewide beaches impaired by bacterial indicators and San Francisco Bay for PBDE.**

**B. The List Violates The Law By Failing To List Impaired Waters Where There Is No Standard Or Guideline For The Pollutant At Issue**

Staff maintains that it cannot list waterbodies where there is no existing guideline. (RTC at 13.) This is improper given that beneficial uses are not attained and overwhelming scientific studies that show impairment. For example, as extensively discussed in San Francisco Baykeeper's 2006 letter, San Francisco Bay is impaired for PBDEs. PBDEs are known to bioaccumulate in the environment and cause liver, thyroid, and neuron-development toxicity in organisms. In support of the listing San Francisco Bay for PBDEs, several studies were submitted to staff discussing that disturbing levels of PBDE's in the bay that can cause impairment, including studies finding PBDE in the tissue of local filter-feeding bivalves.

Instead of considering these impressive studies demonstrating the bay's contamination, staff simply asserted that there is no applicable guideline. Such a response is indefensible in light of the evidence and the law. The Clean Water Act and its implementing regulations cast a wide net to assure that water quality standards are met. This is apparent throughout Section 303(d) and its regulations, which require TMDLs to be established and also require a margin of safety where uncertainty is present. (33 U.S.C. § 1313(d).) **Therefore, the list should be modified to include listing of impaired water bodies supported by scientific evidence even if no guideline exists, such as for San Francisco Bay for PBDEs.**

**C. The List Violates The Law By Failing To List Impaired Waters Where There Is A Narrative Standard Or Guideline For The Pollutant At Issue**

The response to comments indicates that staff has narrowly interpreted the listing policy to defeat the statutory purposes of the Clean Water Act as well as the Porter-Cologne Act. For instance, staff proposes to delist several nuisance conditions—including algae impairments—even though narrative standards and scientific evidence of impairment exist. (See RTC at 14.) As discussed in our previous comment letter, federal regulations explicitly state that narrative water quality standards should be assessed for the purpose of listing waters under Section 303(d). (40 C.F.R. § 130.7(b)(3).) In addition, consideration of narrative standards is consistent with the core "fishable, swimmable" goals of the Clean Water Act as well as the objectives of the Porter-Cologne Act. (Water Code § 13241.) Thus, violations of narrative standards for algae must be listed, such as algae impairments in the Klamath River in Region 1 (as discussed in Klamath Riverkeeper's October 2006 letter) as well as algae impairments throughout Region 4 (as

discussed in Heal the Bay Oct 2006 letter). **Therefore, the 303(d) List should be revised to include waterbodies that violate a narrative standard, such as algae.**

**D. The List Violates The Listing Guidance By Refusing To Allow Appropriate And Required Regional Water Board Involvement**

Throughout the response to comments, State Board staff selectively chooses when to follow Regional Board recommendations, usually resulting in the delisting of waterbodies. As the Board knows and as discussed in our previous comment letter, one of the chief functions of the Regional Boards is to allow for detailed factual review of local water quality conditions; by contrast, the State Board role is as a final “check” on the entire process as well as to consider matters of statewide interest or significance. (Functional Equivalent Document, Appendix B, Response to Comments at B-167 [“the SWRCB approval process is the last stage of review”].) Staff, however, has chosen to selectively ignore regional board recommendations.

For instance, the Regional Board recommended listing sediment concentrations for cadmium, copper, silver, and zinc for Peyton Slough. (RTC at 15.) Instead of relying on the Regional Board’s knowledgeable recommendation, State Board staff asserts that a “remedial” program exists under the Cleanup and Abatement Order. (RTC at 15.) However, this rationale does not justify delisting based on the Listing Policy. (See Listing Policy at 26.) The same is true with staff’s recommended delisting for Goleta Slough and Carpinteria Salt Marsh for sediment and metals. (RTC at 44.) The State Board must follow regional board recommendations to list water bodies, especially given their local expertise.

In this connection, staff has largely ignored our comment that the State Board must allow appropriate and required regional board involvement. At best, Staff merely states the list was developed “in coordination with the Regional Boards.” (See, e.g., RTC at 25.) As discussed in our previous comment letter, after more than two years of stakeholder negotiation, the Listing Policy calibrated a relationship between the State Board and Regional Boards designed to enable these agencies collectively to manage the workload involved in preparing the Section 303(d) list for a state as large as California. Just as important, the Listing Policy took into account the need to provide adequate public participation opportunities. The Policy resolved these issues by providing for the Regional Boards to play a central role in the Section 303(d) process by (1) preparing the lists in the first instance, including the implementation of the Situation-Specific Weight of Evidence Listing Factor (Listing Policy at § 3.11); (2) holding public hearings; and (3) submitting proposed regional lists to the State Board for final review and approval. (Functional Equivalent Document, Appendix B, Response to Comments at B-167.) The Policy makes clear that the Regional Boards must play a central role in developing the 303(d) List.

Despite this clear guidance, in its first implementation of the Listing Policy, the State Board has turned these procedures on their head by eliminating Regional Board’s formulation and public consideration of lists, as well as the other basic structural steps carefully set forth in the Listing Policy. It is not difficult to connect this failure to follow the Listing Policy to the

State Board's related failure to consider all readily available information, given the scope of this task in a state as large as California. Moreover, the related failure to implement a weight of the evidence analysis, as required whenever evidence suggests non-attainment of standards, appears connected to the attenuated role played by the Regional Boards in making listing decisions in the first instance. **Therefore, the 303(d) List should be revised to include recommendations by the Regional Board's for listing of impaired water bodies, such as Peyton Slough and Goleta Slough and Carpinteria Salt Marsh.**

**E. The List Violates The Listing Guidance And The Law By Delisting Waters Where "The File Cannot Be Located"**

We previously commented that staff cannot delist for waters where "the file cannot be located". However, the response to comments continues to rely on this excuse or indicate "the original listing was not justified by data", even though it overrides the Regional Board's recommendations to the contrary. (Staff Report at 13.) For instance for Goleta Slough and Carpinteria Salt Marsh, State Board staff merely asserts that it considered the additional information submitted, but does not squarely address that the information has been lost. (See RTC at 44.) Moreover, the Region 3 explicitly requested to list these water bodies. (*Id.*) It is also unclear whether staff relies on the same reasoning in their evaluation for Ballona Creek, Ballona Creek Estuary and Los Angeles Harbor for several constituents and whether there is lost data for these water segments. (See RTC at 48.) In any case, staff's continued support for its flawed approach includes the following: "This approach was used to *avoid requiring a large burden of proof to delist* a water body pollutant combination if the original listing was found to be baseless in terms of Listing Policy procedures." (*Id.* [emphasis added].) Significantly, this approach also illegally avoids the Listing Policy's requirement to show that the segment would not have been listed absent the faulty or non-existent original data.

The application of these additional assumptions directly contradicts the Listing Policy. It is particularly problematic because this very issue was extensively discussed and debated in stakeholder meetings and public hearings, and the Listing Policy was subsequently adopted *without* these assumptions. These additional assumptions therefore go well beyond the intent of the Listing Policy, which requires a high burden of proof for de-listing. As staff acknowledges, these factors in fact *negate* that required burden. Given that the Regional Boards must have had a justification for listing the majority of these water bodies in the first place, substantial deference must be given to the original listing. A high degree of persuasion is necessary to overturn this presumption of correctness. **Therefore, the 303(d) List should be revised to list waterbodies that were originally listed with respect to lost files, such as Goleta Slough and Carpinteria Salt Marsh as well as Ballona Creek and Los Angeles Harbor.**

**F. The List Violates The Listing Guidance And The Law By Failing To Use The “Weight Of Evidence Approach”**

In the response to comments, staff misinterprets the “weight of the evidence approach” under the Listing Policy. Staff incorrectly argues that the “weight of the evidence approach” is merely a “separate” factor for listing and not a safety net. However, as extensively discussed in our previous comments, the Situation-Specific Weight-of-the-Evidence Approach set forth in Sections 3.11 and 4.11 of the Listing Policy was included to cure well-understood legal and technical inadequacies in the State Board’s draft binomial-only listing policy. (See Environmental Caucus of the AB 982 Public Advisory Group Comments on SWRCB, “Water Quality Control Policy for Developing California’s Clean Water Act Section 303(d) List” (2/18/04).) Board members required that a weight of evidence approach complement the specified listing and delisting factors, acting as a “safety net” to ensure that all impaired water bodies are included on the 303(d) List. Both of these sections require an evaluation of all available evidence under the situation-specific weight of the evidence process whenever there is any information that indicates non-attainment of standards. Together, these sections provide flexibility to allow the State to use its best professional judgment in listing and de-listing decisions so that it can meet Section 303(d) standards and submit impaired waters lists that EPA can approve.

As discussed in our previous letter, sediment chemistry data should be evaluated under the situation specific weight of the evidence approach given the sediment water quality data. For instance, for Region 4 waters several sources show sediment impairment for water quality data, including data from the Army Corps of Engineers (as discussed in Heal the Bay’s October 2006 letter). Other examples include the entire listing of the Klamath River for sediment in Region 1 (as discussed in the Klamath Riverkeeper’s October 2006 letter) as well as the faulty delisting of 16 water segments in Region 3 (as discussed in the San Luis Obispo Coastkeeper October 2006 letter). The weight of the evidence approach should be applied to all of these segments, among others, because sufficient data and evidence warrant listing. Moreover, application of the precautionary approach compels listing of these waterbodies. **Therefore, the State Board should correct this interpretation by clarifying that staff is required to apply Sections 3.11 and 4.11 of the Listing Policy whenever there is any information indicating impairment regardless of the other factors, consistent with both the language of the Listing Policy and the intent of the State Board in including these sections, as well as, modify the 303(d) List to include impairments identified by application of the weight of the evidence approach.**

**G. The List Violates The Law By Inappropriately Downsizing The Size Of The Water Body That Is Listed**

As stated in our previous comments, EPA mandates that states “document the process used for defining water segments in their methodologies.” The Listing Guidance fails to do this because California has not identified a uniform definition of “segments” (formerly called “assessment units”). In particular, the data management system (GEOWBS) that was previously



used by the state to explicitly identify water bodies and their segments was discontinued under the assertion that CIWQS would provide such features. However, the CIWQS system is inadequate to implement this task.

As a result of these inadequacies, impaired waters such as "Pacific Ocean at Arroyo Burro Beach," "Pacific Ocean at Carpinteria State Beach" and "Pacific Ocean at Jalama Beach" in Region 3 have been downsized, with no supporting documentation, from a size of up to 3.3 miles down to a mere 0.06 miles. (Staff Report, Volume II at 202-05.) Examples exist in other regions as well. **Therefore, we urge the State Water Board to retain these waters as listed until full documentation, in accordance with federal law and the state Listing Guidance, is provided to fully support any such delistings.**

\* \* \*

Section 303(d) of the Clean Water Act was established and intended by Congress to be the "safety net" that is used when other elements of the Act fail to protect water quality. The state can invest now or later in the continued health of its waters; what is certain is that investment now will surely be more cost-effective than later. In approving the proposed 303(d) List, we urge the State Board to consider and implement these recommended improvements to the list to ensure that Californians will enjoy clean water now and in the future.

Thank you for your attention to these comments. If you have any questions, please do not hesitate to call.

Regards,



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**APPENDIX I:  
LEGAL BACKGROUND ON SECTION 303(D) OF THE CLEAN WATER ACT**

*The TMDL Program Is the Clean Water Act's "Safety Net"*

Stripped of technicalities, Section 303(d) represents the Clean Water Act's "safety net."<sup>1</sup> It is the bedrock component of the Clean Water Act, the requirement that all waters be restored so that they are safe for fishing and swimming, and meet all other water quality standards.<sup>2</sup> As U.S. EPA Assistant Administrator for Water Robert Perciasepe noted:

Almost twenty-five years after the passage of the [Clean Water Act], the national water program is at a defining moment . . . . The [Total Maximum Daily Load (TMDL)] program is crucial to success because it brings rigor, accountability, and statutory authority to the process.<sup>3</sup>

TMDLs are "the maximum amount of pollutants a water body can receive daily without violating the state's water quality standard."<sup>4</sup> Specifically, Section 303(d) requires the states to identify, and U.S. EPA independently to review and assess, those waters within their boundaries for which existing technology-based pollution controls are not stringent enough to ensure that the water quality standards ("WQSs") applicable to such waters are achieved and maintained.<sup>5</sup> Because Congress made clear that TMDLs must be calculated not only for waters that do not meet water quality standard, but also those that are not expected to meet those standards, it is clear that "threatened" waters must also be listed.<sup>6</sup>

The resulting list is called the "303(d) list." For each water body and type of pollution listed on a 303(d) list, the state must calculate the total maximum daily load (or "TMDL") necessary to implement the applicable WQS.<sup>7</sup> In simple terms, then, each TMDL defines the maximum amount of a type of pollution (*e.g.*, oil or grease) that an individual water body can assimilate in a day without violating its WQSs (*i.e.*, without becoming "dirty"). Once a TMDL

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<sup>1</sup> Houck, Oliver A., *The Clean Water Act TMDL Program* 49 (Envtl. Law Inst. 1999).

<sup>2</sup> See 33 U.S.C. § 1313(d).

<sup>3</sup> New Policies for Establishing and Implementing Total Maximum Daily Loads (TMDLs), Memorandum from Robert Perciasepe, Assistant Administrator for Water, U.S. EPA, to Regional Administrators and Regional Water Division Administrators, U.S. EPA (August 8, 1997).

<sup>4</sup> *Alaska Center for Environment v. Browner*, 20 F.3d 981, 983 (9th Cir. 1994).

<sup>5</sup> 33 U.S.C. § 1313(d)(1) and (2); see also 40 C.F.R. § 130.7(b)(1).

<sup>6</sup> *Id.*

<sup>7</sup> 33 U.S.C. § 1313(d)(1)(C).

is calculated for a water body and pollutant, any allowable pollution is allocated among the various dischargers of that pollutant to the water body for which the TMDL has been established.<sup>8</sup>

***The Consequences for Listing Unimpaired Waters Are Insignificant***

Legal developments in California in recent years have essentially eliminated any negative consequence of a mistaken listing (*i.e.*, including a “clean” water on the 303(d) list). Prior to 2001, dischargers mentioned two concerns prominently: the presumption that listing equates to a permit finding of no assimilative capacity and the inclusion of alternative final effluent limits in permits based on the mere fact of a listing. However, the Board’s order in Order WQ 2001 – 06 (“Tosco”) addressed those implications.<sup>9</sup> As a result, given the undisputed fact that Section 303(d) functions as the last effective regulatory approach to remedying threatened or impaired waters, it is clear that the implications of not listing an actually impaired waterway are far more severe than those attendant to any improper listing of a non-impaired waterway.

***The Listing Regulation Must Be Consistent with the Mandate of Section 303(d) and the Policy Choices Embodied Therein***

Any regulation or policy for identifying impaired waters must be consistent with the mandate of its enabling statute, in this case, Section 303(d) of the Clean Water Act.<sup>10</sup> Importantly, “in reviewing an agency’s statutory construction, [courts] must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement.” *Brower v. Evans*, 257 F.3d 1058, 1065; *Bureau of Alcohol, Tobacco and Firearms* 464 U.S. at 97 (stating that courts must not “rubber-stamp . . . administrative decisions they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying the statute.”)

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<sup>8</sup> 40 C.F.R. §§ 130.2(g)-(i). The TMDLs must be set “at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.” 33 U.S.C.A. §1313(d)(1)(c).

<sup>9</sup> In *Tosco*, the Board stated that it “agrees with Tosco, WSPA, and other petitioners, that a 303(d)-listing alone is not a sufficient basis on which to conclude that a water necessarily lacks assimilative capacity for an impairing pollutant. The listing itself is only suggestive; it is not determinative.” (*Tosco* at 20.) The Board further stated that it “concludes that the alternative final limits findings [in a permit based on the fact of a water’s inclusion on the 303(d) list] are inappropriate for several reasons.” (*Id.* at 22.)

<sup>10</sup> See *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983).

Section 303(d) represents the Clean Water Act's "safety net."<sup>11</sup> It is the bedrock component of the Clean Water Act, enacted 30 years ago, that all waters be restored so that they are safe for swimming, and meet all other water quality standards.<sup>12</sup> In this first application of California's Listing Guidance, it is critical to ensure that the state complies with the law and ensures that these standards will be met in impaired waters.

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<sup>11</sup> Houck, *supra* n. 1.

<sup>12</sup> *See* 33 U.S.C. §1313(d).