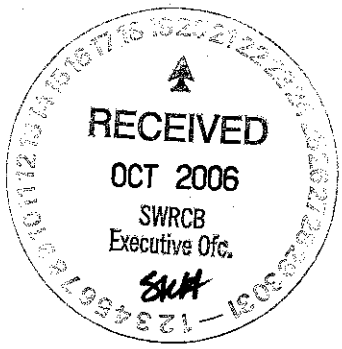
10/25/06 BdMtg Item 10
303(d) List
Deadline: 10/20/06 5pm



October 20, 2006

Ms. Song Her
Clerk to the Board
State Water Resources Control Board
1001 I Street
Sacramento, California 95814

Re: Comment Letter—2006 Federal Clean Water Act Section 303(d) List

Dear Ms. Her:

On behalf of the Orange County Chapter of the Building Industry Association of Southern California (BIA/OC), we appreciate the opportunity to submit comments on selected proposed impaired waters listings relative to waterbodies in Orange County. The BIA/OC is a non-profit trade association representing more than 970 companies employing over 114,000 people affiliated with the home building industry. The BIA/OC mission is to promote proactive participation in the development of economic and community issues in Orange County. The BIA/OC is affiliated with the California BIA and the National Association of Home Builders.

In addition to our comments, we understand that the County of Orange is submitting comments, including technical reports, regarding the proposed impairment listings for waterbodies in Orange County. The BIA/OC joins in the comments submitted by the County of Orange, and incorporates them by this reference, as if fully set forth herein. In addition, where relevant below, we have made reference to technical comments and/or reports being submitted by the County of Orange.

We are concerned that the State Water Resources Control Board (SWRCB) is poised to list certain waters in Orange County as impaired for specific organochlorine compounds and sediment toxicity when these impairment listings are unwarranted. Specifically, we are concerned about the proposed listings for Upper and Lower Newport Bay for DDT and chlordane, Peters Canyon Channel for DDT and toxaphene, and San Diego Creek Reach 1 for toxaphene (the "Proposed OC Listings"). These Proposed OC Listings are being proposed contrary to fact as well as applicable law, regulations, state policy, and federal guidance documents. We are concerned that the Proposed OC Listings will have a detrimental effect on the regulated community of Orange County, requiring resources be spent to develop and meet the Total

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Maximum Daily Loads (TMDLs) that would be required without commensurate water quality benefit. Our specific comments are detailed further below.

A. The Proposed Listings Are Based Upon Flawed Science, And Are, Thus, Without Foundation.

There are numerous technical defects contained within the Proposed OC Listings. These scientific defects are described in detail in the previous comment letter submitted on January 31, 2006 by the County regarding these listings and the County's additional comment letter being submitted now. The scientific defects inherent in the Proposed OC Listings include, but are not limited to: using data that is not temporally representative of the waterbody conditions, site-specific scientific evidence, demonstrating the absence of a connection between toxicity and organochlorine compounds in the relevant waterbodies, utilizing inappropriate fish tissue samples, and utilizing inappropriate criterion for comparison to sample values.

Through the County's comments efforts, appropriate, site-specific scientific evidence has been provided to the SWRCB that fully supports not making the Proposed OC Listings.[1] For example, as described in the County of Orange's comments, certain of the Proposed OC Listings are not warranted because there is no toxicity of the waterbody linked to the specific organochlorine compound being proposed for listing, and the levels of organochlorine compound concentrations in the watershed are declining. Should the SWRCB continue to use flawed scientific information to justify the Proposed OC Listings, then those listings will be supported only by bad science. Water quality impairment listings must be based upon good science, as required by the SWRCB Policy requiring only data of "sufficient high quality" may be used in determining impairments. (SWRCB, *Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List*, at 21 (2004) ("Listing Policy").) As described in greater detail in the County of Orange's comment letter, the technical deficiencies with the SWRCB's information

[1] In particular, the SWRCB should give significant weight to scientific evidence and opinion provided by Dr. James Byard and Dr. Ronald Tjeerdema through the County of Orange's comments. Drs. Byard and Tjeerdema sit on the Technical Advisory Committee for the Organochlorine TMDL Implementation Plan convened by the Santa Ana Regional Water Quality Control Board (RWQCB). By virtue of their being considered experts by the RWQCB and appropriate peer reviewers for the TMDL, SWRCB should value their opinions greatly. (*See* Cal. Health & Safety Code § 57004 (requiring the SWRCB utilize peer reviewers for actions it takes to effectuate a statute such as it is doing with the 303(d) list).) Both Dr. Byard and Dr. Tjeerdema agree that the relevant scientific evidence does *not* support the Proposed OC Listings.

precludes SWRCB from deeming its information to be the requisite "sufficient high quality" and does not, therefore, sufficiently justify the Proposed OC Listings. Use of inadequate scientific data also is contrary to United States Environmental Protection Agency (EPA) guidance stating that, in making impairment determinations, state agencies should apply "reasonable and scientifically sound data evaluation procedures." (EPA, *Guidance for 2006 Assessment, Listing, and Reporting Requirements Pursuant to Sections 303(d), 305(b) and 314 of the Clean Water Act*, at 32 (Aug. 12, 2005) (EPA 303(d) Guidance).)

The Proposed OC Listings amount to a factual finding by the SWRCB that Newport Bay, San Diego Creek and Peters Canyon Channel are impaired for specific chemical compounds; however, SWRCB's use of flawed science cannot properly support its proposed factual finding. Should SWRCB proceed with the Proposed OC Listings based upon flawed science, its action would constitute an arbitrary and capricious decision that is entirely lacking in evidentiary support and in violation of California law. (Cal. Code Civ. Proc. § 1085.)[2] Additionally, as stated by the U.S. Supreme Court:

> Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. (463 U.S. 29, 43 (1983) citations omitted). *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*

The SWRCB's utilization of inappropriate data and flawed scientific analysis to support the Proposed OC Listings is not what Congress intended and runs

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[2] We do not concede that the SWRCB's 303(d) listing process is a quasi-legislative as opposed to a quasi-judicial process, which has a standard of review requiring that the SWRCB base its decisions on substantial evidence in the record. (Cal. Code Civ. Proc. §1094.5) In fact, because the Proposed OC Listings will affect a discrete number of dischargers, SWRCB's present process should be considered quasi-judicial. Regardless of whether or not the SWRCB's 303(d) listing process is quasi-legislative or quasi-judicial, the record for the Proposed OC Listings does not support SWRCB's proposed actions; SWRCB would violate the Administrative Procedures Act were it to adopt the Proposed OC Listings.

counter to other evidence before the SWRCB. Failure to properly consider the scientific information provided by the County of Orange amounts to a failure to consider an important aspect of the Proposed OC Listings. Use of bad science makes any SWRCB decision to approve the Proposed OC Listings implausible, and would, therefore, make the decision arbitrary and capricious. On the other hand, consideration of the valid, site-specific, scientific evidence and data presented by the County of Orange would lead the SWRCB to conclude that it should not adopt the Proposed OC Listings, and this conclusion would be in accordance with the Listing Policy.

B. Chemical-Specific Organochlorine Impairment Listings Are Not Required.

The Newport Bay watershed (which includes San Diego Creek and Peters Canyon Channel) currently is listed for pesticides and unknown toxicity. (SWRCB's 2002 303(d) List.) The EPA established a TMDL for "Toxic Pollutants" in Newport Bay, San Diego Creek and their tributaries (inclusive of Peters Canyon Channel) on June 14, 2002 (the "EPA Toxics TMDL"). The EPA Toxics TMDL addressed each of the organochlorine compounds proposed for listing by the SWRCB through the Proposed OC Listings.

Through the EPA Toxics TMDL, the EPA, the Santa Ana RWQCB and stakeholders have been working to establish implementation plans for each of the constituents covered by the EPA Toxics TMDL. With regard to organochlorine compounds, the RWQCB is poised to adopt its implementation plan and Basin Plan amendment for these compounds and has scheduled a workshop on this issue for December 1, 2006 with adoption to occur at a subsequent public hearing. (Santa Ana RWQCB, *Notice of Public Workshop to Incorporate TMDLs for Organochlorine Compounds for San Diego Creek, Upper Newport Bay, and Lower Newport Bay into the Water Quality Control Plan for the Santa Ana River Basin* (Oct. 11, 2006).) The Proposed OC Listings are not warranted nor required given the existing EPA Toxics TMDL and the RWQCB's ongoing implementation plan process. The SWRCB Listing Policy allows for waterbodies to be categorized as "being addressed," which would not require specific TMDLs be developed, when EPA has approved TMDLs and implementation plans are expected to result in attainment of the standards. As described in the RWQCB's documents, the proposed loading allowances for organochlorine compounds by the RWQCB are, in fact, more stringent than those proposed by the EPA Toxic TMDL (in order to ensure consistency

between the organochlorine TMDLs and the existing sediment TMDLs in the watershed).[3]

EPA's 303(d) Guidance also would direct the SWRCB to *not* make the Proposed OC Listings, as that guidance states that waterbodies should be categorized as not needing TMDLs when "a TMDL has been established by EPA" that addresses the relevant waterbody and pollutant(s) (EPA 303(d) Guidance, at 53). Because the existing EPA Toxics TMDL covers the same compounds and watershed relevant to the Proposed OC Listings, these listings are not needed.[4] The EPA 303(d) Guidance also points toward *not* making the Proposed OC Listings when control measures are expected to result in the attainment of water quality standards within a reasonable time period. (EPA 303(d) Guidance, at 54). "Control measures" as described by the EPA need not be regulatory controls implemented pursuant to binding legal authority, but may be controls that are already in place and achieving progress. (U.S. EPA, Memorandum from Diane Regas, Dir. Ofc. of Wetlands, Oceans, and Watersheds, to Regions 1-10 Water Div. Directors (Oct. 12, 2006) (clarifying the EPA 303(d) Guidance).) There are "existing controls" in the Newport Bay watershed that merit not making the Proposed OC Listings; these existing controls include: the prohibitions on use of DDT, toxaphene, and chlordane as pesticides (in 1972, 1990, and 1988, respectively), the conversion of agricultural areas where such products were historically used to urban areas where development significantly reduces the ability of these materials to enter local water bodies through runoff, implementation of the existing Clean Water Act section 208 area-wide water management plan in the Newport Bay watershed, and implementation of controls under the sediment TMDL already imposed throughout the watershed.[5]

The EPA Toxics TMDL discusses implementation of the organochlorine compound TMDLs and recommends implementation of the existing sediment TMDL for the watershed as the primary vehicle for achieving declines in these compounds. EPA also acknowledges that implementation of the sediment

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[3] Santa Ana RWQCB, *Organochlorine Compounds TMDL Draft Technical Report*, at 65 (available at http://www.waterboards.ca.gov/santaana/html/newport_oc_tmdl.html).

[4] The SWRCB could retain the existing pesticide and toxicity impairment listings for the Newport Bay watershed until all applicable implementation plans are adopted by the RWQCB; however, chemical-specific listings are not warranted in light of the current general impairment listings and the existing EPA Toxics TMDL.

[5] Organochlorine compounds strongly associate with sediments; therefore, control of sediment in the watershed greatly aids in controlling the inflow of organochlorine compounds to waterbodies.

TMDL may be enough to achieve the desired reductions in organochlorine compounds. (*See* EPA Toxics TMDL, at 75.) As discussed further below in section C, all of the existing controls in the Newport Bay watershed are resulting in significant declines in organochlorine concentrations in the relevant waterbodies. In consideration of the above factors, if the SWRCB proceeds in its Proposed OC Listings, it will do so in disregard of the Listing Policy and guidance provided by EPA on administration of the Clean Water Act 303(d) program.

C. The SWRCB Is Inappropriately Disregarding Trends in Water Quality.

The SWRCB's Listing Policy allows for the consideration of trends in water quality when making listing determinations; the SWRCB appears to be ignoring evidence presented to it on trends regarding the Proposed OC Listings. (*See* SWRCB Listing Policy, at 7.) The EPA Toxics TMDL also acknowledged the importance of trends in concentrations of organochlorine compounds and encouraged monitoring to determine if declining trends in organochlorine compound concentrations were present. (EPA Toxics TMDL, at 75.) EPA stated that if declines in organochlorine compounds were confirmed through monitoring, that it would be unnecessary to impose additional erosion and sediment controls to control organochlorine compounds beyond the controls already required by the existing sediment TMDL in the watershed. (*Id.*)

As presented in previous comments by the County of Orange as well as County comments submitted during this present comment period, site-specific data and scientific analysis confirm the trend of declining organochlorine compound concentrations in the Newport Bay watershed. These declines are due to a number of factors, including: (1) the prohibition on use of DDT, toxaphene, and chlordane by the EPA; (2) the conversion of former agriculture lands in Orange County to urban uses (which has the effect of limiting the ability of these former pesticides to enter area waterbodies in runoff); and (3) the degradation of the organochlorine compounds in the environment over time. Based upon the SWRCB's responses to previously-submitted County of Orange comments related to the issue of declining concentrations of organochlorine compounds, it is clear that the SWRCB is ignoring the issue of this trend in water quality. Ignoring the valid scientific evidence of declining trends violates SWRCB's Listing Policy that requires the SWRCB consider "all readily available data and information" (Listing Policy, at 17 (emphasis in original)) and would violate federal regulations on the 303(d) program that mandate "all existing and readily available water quality-related data and information" be considered in preparing the 303(d) list (40 C.F.R. §130.7(b)(5)).

D. The SWRCB Has Improperly Failed to Articulate Its Rationale for the Proposed OC Listings.

Long-standing principles of administrative law and due process mandate that an agency decision-maker, such as the SWRCB, articulate the reasons for decisions it makes. (*See e.g.*, Cal. Administrative Procedures Act (Cal. Govt. Code §§11346 *et seq.* requiring agencies to articulate the reasons for their proposed actions), *Topanga Assoc for a Scenic Comm. v. County of Los Angeles*, 214 Cal.App.3d 1348, 1356 (1989) (requiring that agencies articulate their decisions in such a way that there is an "analytic bridge between the evidence and the agency's decision"), and SWRCB Order no. WQ-74-1 (stating that an "administrative agency's reasons be clearly disclosed in the agency's records").) As stated previously, the SWRCB's Proposed OC Listings amount to a *finding* that the relevant water bodies are impaired for the particular organochlorine compounds for which they are being listed. In an effort to explain its reasons and support these findings, the SWRCB has issued responses to comments. (SWRCB, Staff Report, Revision of the Clean Water Act Section 303(d) List of Water Quality Limited Segments, Vol. IV (Sept. 2006).) In order to provide the requisite analytical bridge between the evidence and its findings, the responses to comments must be cogent and responsive to the comments provided. However, with regard to the Proposed OC Listings, many of the critical responses to comments do not respond to the comment provided or provide responses that are not coherent, have flawed reasoning, or are otherwise inadequate. Please see the comments submitted by the County of Orange during this present comment period for a greater articulation of the deficiencies with the responses to the comments relative to the Proposed OC Listings.

Should the SWRCB adopt the Proposed OC Listings without any adequate consideration of the comments provided and adequate expression of responses to those comments, then the SWRCB's decision will represent a failed administrative process contrary to state law and prior SWRCB rulings on such matters. Furthermore, the SWRCB's failure to adequately articulate its rationale will harm the due process rights of the stakeholders in the areas affected by the Proposed OC Listings. Without sufficient explanation in the record, the SWRCB would be abusing its discretion in making the findings of impairment through the 303(d) listing process. The SWRCB must revise its responses to comments to clearly and completely respond to the comments provided on the Proposed OC Listings.

E. The SWRCB Has Failed to Follow Proper Basin Planning Procedures and Has Not Considered Required Factors for the Proposed 303(d) List.

The SWRCB's proposed 303(d) list includes listings of the impaired water bodies and their pollutant stressors along with schedules for proposed

TMDL implementation. Based upon these components, the 303(d) list is a component of water quality control planning under both California and federal law. Under section 13170 of the California Water Code, the SWRCB may "adopt water quality control plans in accordance with the provisions of Section 13240 to 13244 ... for waters for which water quality standards are required by the [federal Clean Water Act]." The federal Clean Water Act requires that states adopt "plans for all navigable waters" which include "adequate implementation, including schedules for compliance." (33 U.S.C. §1313(e)(3).) The process for listing of impaired waters in California is part of the implementation component of water quality control planning for at least two reasons: 1) the impaired waters list, by its very nature, serves to implement the water quality objectives within water quality control plans by determining which waters are not meeting objectives and prioritizing the clean-up of those waters, and 2) the schedule of TMDL implementation included with the 303(d) list is a "schedule for compliance" as contemplated by the federal statute.[6]

As a component of water quality control planning, the California Water Code requires the SWRCB adhere to the requirements of sections 13240 through 13244 when adopting the 303(d) list. Pursuant to these sections, the SWRCB must describe the "nature of actions which are necessary to achieve the [water quality] objectives" that are being implemented through the 303(d) list. (Cal. Water Code §13242(a).) There is no discussion in the SWRCB's record for the current 303(d) of all of the actions the SWRCB would consider necessary to meet the water quality objectives being implemented. Additionally, there are several factors contained in California Water Code section 13241 that must be considered by the SWRCB through the 303(d) listing process, including the "water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." (Cal. Water Code §13241(c).) The SWRCB's record regarding the proposed 303(d) list does not contain discussions of any of the section 13241 factors, not the least of which is what level of water quality is reasonably achievable.

The fact that the 303(d) list is developed by the SWRCB per the requirements of the federal Clean Water Act does not abrogate the SWRCB's obligations under California law. Only if the federal law preempted California law would this be the case; there is no such preemption related to the 303(d) listing process.

> There are three different ways a state statute can be preempted by a federal law: where Congress has made its intent known through explicit statutory language; where state law regulates

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[6] *See also* Cal. Water Code §13242(b) requiring inclusion of time schedules for implementation actions in water quality control plans.

> conduct in a field that Congress intended the federal government to occupy exclusively; and where it is impossible for a party to comply with both state and federal requirements or where state law stands as an obstacle to the accomplishment and execution of the full congressional purposes and objectives. (*County of Los Angeles v. California State Water Res. Control Bd.*, at 25 (Docket No. B184034. Cal. Ct. App. 2nd Dist.) (Oct. 5, 2006).)

The federal Clean Water Act does not address California's requirement to consider specific factors during the water quality control planning process. The Clean Water Act also specifically contemplates that the states will prepare water quality control plans for waters within their jurisdictions. There is also no evidence that consideration of the factors contained in sections 13241 and 13242 of the California Water Code will stand as an obstacle to the objectives of the federal Clean Water Act or that the SWRCB would not be able to comply with both federal and state water quality control planning requirements. Thus, there is no federal preemption of the California Water Code in the context of water quality control plans.[7] Insofar as the 303(d) listing process is a component of water quality planning, which it is by virtue of its implementing water quality objectives including through use of compliance schedules, then, in this proceeding, the SWRCB must abide by the requirements of sections 13241 and 13242 of the California Water Code; the SWRCB has not done so.

F. The SWRCB Has Failed to Abide By the Requirements of the California Environmental Quality Act.

In addition to considering factors pursuant to sections 13241 and 13242, processing of the 303(d) list must also be conducted in compliance with the requirements of the California Environmental Quality Act (CEQA). The water quality control planning process is considered a CEQA certified program pursuant to California regulations. (14 C.C.R. §15251.) As a certified regulatory program, an alternate document substituting for an Environmental Impact Report must be prepared by the SWRCB that examines the potential environmental impacts of the agency's decision. (14 C.C.R. §15252.) There is no analysis in the record for the proposed 303(d) list that the SWRCB has assessed the potential environmental impacts of the proposed listings, has determined if mitigation for any identified impacts is necessary, or has determined that adverse impacts will not result from the proposed listings. Without preparation of the necessary CEQA-compliant analysis, the SWRCB's decision to approve the 303(d) list would violate CEQA. For reasons similar to

those discussed above related to Water Code sections 13241 and 13242, compliance with CEQA would not be preempted by federal law. *See City of Arcadia v. State Water Res. Control Bd.*, 135 Cal.App.4th 1392 (2006). Thus, the SWRCB must undertake the requisite CEQA-compliant analysis prior to adoption of the 2006 303(d) list.

We appreciate the SWRCB's consideration of these comments, and we look forward to continuing to work with the Agency on these important issues. Should you desire any additional information or clarification regarding these comments, please do not hesitate to contact me.

[1] The California Water Code section 13241 factors were, likewise, not considered with regard to the water quality objectives being addressed by the SWRCB through the Proposed OC Listings—the organochlorine standards set forth in the California Toxics Rule (40 C.F.R. §130.38), and consideration of the 13241 factors when adopting the California Toxics Rule into water quality control plans in California is not subject to federal preemption.

Sincerely,

Kristine Thalman
Chief Executive Officer

cc: Mr. Bryan Starr, Dept. Exec. Officer