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By E-Mail

State Water Resources Control Board
1001 I Street
Sacramento, California 95814
Attn: Song Her, Clerk to the Board
commentletters@waterboards.ca.gov



Subject: 2006 Section 303(d) List of Water Quality Limited Segments for California; Region 8, Big Bear Lake, polychlorinated biphenyls

Dear Ms. Her:

I am writing on behalf of Big Bear Municipal Water District (the "District") and Risk Sciences to provide comments on the proposed listing of the Big Bear Lake segment as impaired because of polychlorinated biphenyls ("PCBs"). For the following reasons, in addition to those presented by Tim Moore of Risk Sciences¹ in his letter of 30 January 2006 ("Moore Letter", attached as Exhibit 1), the State Water Resources Control Board (the "State Board") should *not* list Big Bear Lake for PCBs:

- The listing violates the California Environmental Quality Act ("CEQA").
- The listing violates State Board regulations.
- The listing violates the Water Quality Control Policy For Developing California's Clean Water Act Section 303(d) List ("Listing Policy").
- The listing is arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence.
- The listing depends on an invalid water quality objective.

¹ Mr. Moore is a scientist who has been providing consulting services related to Big Bear Lake to the District and other public entities for more than five years. He has personal knowledge of the lake, its environmental condition, and the consequences of listing decisions.

- The listing violates the California Supreme Court's decision in the *City of Burbank* case, and the provisions of Water Code § 13241.
- The listing violates due-process protections guaranteed by the federal and California Constitutions.

The facts here are simple. Staff from the Regional Water Quality Control Board, Santa Ana Region (the "Regional Board") and California Office of Environmental Health Hazard Assessment ("OEHHA") met and concluded that the PCB levels in a few carp samples were not sufficient for issuing fish-consumption warnings for Big Bear Lake or listing the lake as impaired. State Board staff nevertheless chose to override the decisions of the Regional Board and OEHHA. In order to override those who were closer to the issue and knew more about it, State Board staff interpreted an OEHHA staff report in a way contrary to the intent of the OEHHA authors. State Board staff also violated countless provisions of state law, State Board regulations, and the Listing Policy, as described below.

Big Bear Lake should not be listed for PCBs.

CEQA

There is sufficient evidence to support a fair argument that the listing of Big Bear Lake for PCBs may have a significant effect on the environment, thereby requiring the State Board to prepare an EIR or its functional equivalent. (*See City of Arcadia v. State Water Resources Control Board* (2006) 135 Cal.App.4th 1392, 1420.) Available evidence for these effects includes the following:

- Any conceivable response to the listing will have a significant effect on the physical environment. Because PCBs are found in sediments, a likely response would be to dredge the lake to remove the top layer of sediments. The District has previously considered dredging, and has identified severe negative consequences. Because there is no disposal site for sediments in the vicinity, the District has calculated that dredging would require hundreds of thousands of truck trips on a two-lane road to take the sediment to a site off the mountain.
- Dredging would also disturb biota in the lake, because it removes and destroys aquatic life on the lake bottom. Dredging is an imperfect operation that results in the release of fines, which would redistribute sediments, including potentially

contaminated sediments, thereby affecting fish, macroinvertebrates, and plants elsewhere in the lake.

- Other possible responses include removing the PCB-containing carp from the lake by applying rotenone, a potent fish toxin that would kill all fish in the lake, and then re-introducing fish into the lake. This action would kill all the fish in the lake.
- Another possibility is draining the lake, taking bottom samples to identify the location of PCB contamination, and then conducting limited dredging to remove that contamination. This action would kill all the fish and other aquatic life in the lake.
- Carp in Big Bear Lake (the fish identified as having elevated levels of PCBs) are considered a nuisance fish unsuitable for human consumption. The district routinely engages in round-ups in which thousands of pounds of carp are removed from the lake and buried. Listing could result in a discontinuance of this procedure, thereby changing the prevalence of fish species and the biology of the lake.
- The District now stocks sport fish in Big Bear Lake. If there is a significant reduction in fishing, the District may discontinue stocking and thereby transform the fish population and biology of the lake.
- Listing is likely to result in mechanized operations at the lake, which produce elevated noise levels.
- Big Bear Lake attracts 6 million visitors each year. Many visitors fish in the lake. If the State Board lists the lake as impaired because of PCB contamination of fish, a significant reduction in tourism can be expected.
- A significant reduction in tourism will produce negative effects on the local economy and lead to urban decay and physical deterioration of the area.
- A significant reduction in tourism will produce significant effects on the physical environment elsewhere. Tourists will travel elsewhere in Southern California, thereby exacerbating the poor air quality of the region.

- Diverting resources in response to the listing will harm the District's efforts to maintain and improve the water quality of the lake. For example, the District now actively removes invasive aquatic plants from the lake. The listing could interfere with that program, and thereby increase the spread of invasive aquatic plants in the lake.

(See Moore Letter; letter from Sheila Hamilton dated 20 October 2006 ("Hamilton Letter"), attached as Exhibit 2; District website at www.bbmbwd.org, excerpts attached as Exhibit 3.)

Listing a water segment in accordance with Clean Water Act § 303(d) is the decision that initiates a sequence of events, including the preparation of a total maximum daily load ("TMDL"), that will inevitably produce physical effects on the environment. In these circumstances, CEQA compliance is required. (*E.g. City of Arcadia* at 1425-1426 (letters from government officials support fair argument that Trash TMDL "logically may result in soils disruptions and displacements, an increase in noise levels and changes in traffic circulation"); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004)124 Cal. App. 4th 1184, 1205 (urban decay or deterioration must be considered as an indirect environmental effect).)

The listing action also violates CEQA in several other ways. There was no consideration of alternatives and mitigation measures, as required by 14 CCR ("Guidelines") § 15252(a).²

The State Board and its staff have not given serious consideration to the comments offered by the District, and have not provided a full written response. The partial response shows a lack of attention. In their few short statements, staff referred twice to mercury rather than PCBs, and identified the year as 2002 rather than 2006. (Responses to comments 140.1, 140.2, and 140.7.) The key omission, however, goes to the heart of the reason for listing. Staff assert that the listing was required by OEHHA's screening levels for PCBs. (Response to comment 140.5.) But, as Moore pointed out, "OEHHA has no official 'Screening Level' for PCBs." (Moore Letter at 2.) The value relied on was not intended for fish-consumption advisories, and in any case was simply a suggestion in a staff report rather than an official agency action. Staff reports are not binding on an agency. (*See* Order No. WQ-86-8, Petition by County of Santa Clara, Santa Clara Valley Water District, City of San Jose, Citizens for a Better Environment and Silicon Valley Toxics Coalition, at 31.) Staff did not respond to this point.

² This comment assumes that the listing decision is a "plan" covered by CEQA § 21080.5(b). If it is not, CEQA requires a full EIR.

Nor did the staff give thoughtful consideration to Moore's comment that the administrative record was missing the data used to derive the value staff relied on, and that because the data were missing there was no way to determine whether they met the quality requirements imposed by the listing policy. Staff responded that considerations of quality were not applicable to screening values. (Response to comment 140.5.)

The State Board does not appear to have conducted any CEQA review relevant to this listing decision. The State Board cannot rely on any previous CEQA review and documentation, because none of the previous documentation considered any environmental effects on Big Bear Lake, or any of the effects identified in this letter.

For these reasons, the State Board should decide not to list Big Bear Lake for PCBs during this listing cycle.

Violations Of State Board Regulations

In proposing the listing of Big Bear Lake for PCBs, the State Board has not complied with its own regulations, including the regulations applicable to "functional equivalent documents".

State Board regulations provide that "Any . . . plan proposed for board approval . . . must be accompanied by a completed Environmental Checklist . . . and a written report . . . containing the following: . . . (2) Reasonable alternatives to the proposed activity; and (3) Mitigation measures to minimize any significant adverse environmental impacts of the proposed activity." (23 CCR § 3777(a).) Here there is no checklist or written report identifying reasonable alternatives or mitigation measures.

State Board regulations provide that "the board shall consult with other public agencies having jurisdiction by law with respect to the proposed activity". (23 CCR § 3778.) Here the State Board has not consulted with other public agencies. In particular, it has not consulted with OEHHA, even though staff say that the State Board is relying on OEHHA screening values. The State Board also appears not to have not consulted with the Regional Board. Although *Regional* Board staff consulted with OEHHA, the State Board cannot rely on this consultation, because the Regional Board staff and OEHHA agreed that the data *do not support* listing. (Moore Letter at 2.) Here the State Board staff are overriding the decision of the Regional Board and OEHHA, without consulting with those agency personnel who have superior knowledge. The listing decision is therefore in violation of the regulation requiring consultation.

State Board regulations require “written responses to comments”. (23 CCR § 3779.) As discussed above, staff did not provide written responses to key comments.

State Board regulations provide that “The board shall not approve a proposed activity if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the proposed activity may have on the environment.” (23 CCR § 3780.) Here there is a feasible alternative: postpone listing until at least the next listing cycle. The listing decision therefore violates this provision.

Violations Of The Listing Policy

The listing decision also does not comply with the procedures identified in the Listing Policy.

The Listing Policy requires the Regional Board to justify its recommendation by, among other things, “Describing in fact sheets how the data or information affords a substantial basis in fact from which the decision can reasonably be inferred”, and by “Demonstrating that the approach used is scientifically defensible and reproducible.” (Listing Policy at 8.) The fact sheet for Big Bear Lake does not describe how the decision can reasonably be inferred, or that demonstrates that the approach used is scientifically defensible. (Fact Sheets Supporting Revision of the Section 303(d) List, September 2006 (“Fact Sheets”) at 107-108.)

The Listing Policy requires that “fact sheets shall contain” a long list of specifics, including the “Effect of seasonality and events/conditions that might influence data and/or information evaluation”, a “Quality assurance assessment”, the “Potential source of pollutant”, and “Data evaluation as required by section 3 [California Listing Factors] or 4 [California Delisting Factors] of this policy”. (Listing Policy at 20.) The data evaluation required by section 3 is identified in the paragraph above. The fact sheet for Big Bear does not include any of these items. (Fact Sheets at 107-108.)

The Listing Policy requires that “the quality of the data used in the development of the section 303(d) list shall be of sufficient high quality to make determinations of water quality standards attainment.” (Listing Policy at 21.) Consistent with this requirement, “A QAPP [i.e. quality assurance project plan] or equivalent document must be available containing” a long list of specified items. (*Id.*) The regional boards “shall make a finding on the fact sheets on the availability of the QAPP (or equivalent), adequacy of data collection, analysis practices, and

adequacy of the data verification process (including the chain of custody, detection limits, holding times, statistical treatment of data, precision and bias, etc).” Here there is no QAPP or equivalent document available, the State Board has not determined that the data used are of sufficient quality, and none of the required findings has been made on the fact sheet. (Facts Sheets at 107-108.)

The Listing Policy specifies that that the State Board shall perform all tasks required of the regional boards only for the 2004 list. Following that cycle, the role of the State Board is limited to evaluating the regional board recommendations for completeness, consistency with the Listing Policy, and consistency with applicable law. (Listing Policy at 26.) In this cycle—the 2006 cycle—the Regional Board has recommended *against* listing Big Bear Lake for PCBs, and in overriding that decision the State Board has exceeded the bounds of the Listing Policy.

In these ways, the listing decision violates the Listing Policy.

Arbitrary and Capricious, Abuse of Discretion, and Not Supported By Evidence

The State Board’s logic proceeds as follows: (1) the beneficial uses to be protected are “Commercial and Sport Fishing” and “Agricultural Supply”; (2) these uses are protected by the narrative criterion specifying that “Toxic substances shall not be discharged at levels that will bioaccumulate in aquatic resources to levels which are harmful to human health”; (3) notwithstanding the fact that this narrative on its face applies only to *discharges*, it can be violated by the presence in fish tissue of PCB concentrations of greater than 20 ng/g, and (4) concentrations exceeding this level were found in three carp samples and one largemouth bass sample. (Fact Sheets at 107-108.) There are at least six problems with this logic.

First, the logical connection between Agricultural Supply and fish tissue is not explained, and does not appear to exist.

Second, carp are neither commercial nor sport fish in Big Bear Lake. Carp are a nuisance that are systematically killed in hopes of improving the environment for preferred fish. (Hamilton Letter.) Because the beneficial use to be protected is “Commercial and Sport Fishing”, and carp are neither, the carp samples should be eliminated from consideration. Without the carp, the listing rests on a single laboratory result.

Third, the fact sheet does not evaluate whether the State Board can appropriately rely on a single result, but the Listing Policy says that a minimum of two samples are needed for toxic substances. (Listing Policy at 9.)

Fourth, the narrative criterion applies only to discharges, and the fact sheet does not identify any discharges. In fact, there are no discharges of PCBs to Big Bear Lake. (Moore Letter at 3.)

Fifth, the federal Food and Drug Administration (“FDA”) has determined that fish with PCB concentrations 2,000 ng/g—a level that is 100 times higher than the level identified in the fact sheets—are not harmful to human health. (Moore Letter at 1.) *All* fish samples from Big Bear Lake were less than this level. (*Id.*) The OEHHA staff who proposed the 20 ng/g level noted that these levels “are not intended as levels at which [fish] consumption advisories should be issued but are useful as a guide to identify fish species . . . for which more intensive sampling, analysis, or health evaluation are to be recommended.” (*Id.* at 2.) There is, therefore, no evidence that PCBs in the fish samples are at levels harmful to human health.

Sixth, the effect of the listing is to endorse a procedure in which what should be a formal determination, subject to specified statutory requirements and public review, is transformed into an informal procedure in which staff choose any number that pleases them, and brushes off any public inquiry or comment about the validity of that number by insisting that the number is sacrosanct.

For these reasons, the State Board’s decision is not supported by logic or evidence. It is arbitrary and capricious, an abuse of discretion, and not supported by substantial evidence.

Invalid Water Quality Objective

Water quality objectives are sometimes numeric, and sometimes narrative. Narrative objectives are appropriate for conditions that are readily perceived by the senses, but may not be readily susceptible to measurement. For example:

Waste discharges shall not contain floating materials, including solids, liquids, foam or scum . . .

Waste discharges shall not result in deposition of oil, grease, wax or other materials in concentrations which result in a visible film or in coating objects in the water . . .

Waste discharges shall not contain concentrations of surfactants which result in foam in the course of flow or use of the receiving water . . .

(Water Quality Control Plan, Santa Ana River Basin, 1995, at 4-7, 4-9, and 4-11.) Here the narrative criterion at issue is as follows:

Toxic substances shall not be discharged at levels that will bioaccumulate in aquatic resources to levels which are harmful to human health.

(Fact Sheets at 107.) Neither the State Board nor the Regional Board has provided any information about what they may have understood the harmful levels to be when the objective was established in 1995. But they certainly could not have been thinking about the staff report in which the 20 ng/g level was identified, because that report was not published until 1999. (*See Moore Letter at 2.*) By reinterpreting a narrative objective to refer to levels that could not have been evaluated when the objective was approved, the State Board is establishing a new objective.

When the State Board (or Regional Board) establishes a water quality objective, it must consider the factors identified in Water Code § 13241. Among other things, the State Board must consider the costs associated with the objective (“Economic considerations”), and the potential for attaining the objective (“Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area”). (Water Code § 13241(c), (d).) Because the State Board in attempting to establish the new objective of 20 ng/g has not considered the factors required by Water Code § 13241, and has not otherwise complied with the procedure for establishing a new water quality objective, the objective of 20 ng/g of PCBs is invalid.

Violation Of *City of Burbank* and Water Code § 13241

Section 303(d) of the federal Clean Water Act requires that water segments be listed when they are not in compliance with their water quality standards (which are referred to as “water quality objectives” in California). Here Big Bear Lake complies with the narrative objective identified, because there are no discharges of PCBs. PCB listing therefore exceeds the requirements of the Clean Water Act.

When the State Board takes action exceeding the requirements of the Clean Water Act, it must comply with the provisions of California law, including Water Code § 13241. (*City of*

Burbank v. State Water Resources Control Board (2005)35 Cal. 4th 613, 627.) Because the State Board has not complied with these requirements, the listing is invalid.

Invalid Regulation

The narrative water quality objective at issue is also invalid as applied in this situation because it is so vague that no reasonable person could understand it. A reasonable person might understand “levels which are harmful to human health” to be consistent with those identified by the FDA as acceptable for food. But no reasonable person would think that “levels which are harmful to human health” meant 1/100th of the FDA level, and no reasonable person would think that the phrase applied to fish that people did not eat.

Dischargers who violate their Clean Water Act (i.e. NPDES) permits can be committing felonies. (Clean Water Act § 309.) NPDES permits issued by the State Board and regional boards prohibit the dischargers from causing violations of ambient water-quality standards. (*E.g.* General Industrial Stormwater Permit, General Construction Stormwater Permit.) Dischargers must therefore determine, at the risk of committing a felony, whether their discharges contain concentrations of unspecified substances that “will bioaccumulate in aquatic resources to levels which are harmful to human health”. Because these levels are subject to the whim of State Board staff, this narrative objective is not susceptible of independent objective determination.

Because no one can objectively determine whether dischargers have complied with this requirement, the narrative objective as applied is void for vagueness, and a violation of due process.

Thank you for this opportunity to comment, and please call with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "L. Bazel", with a large, stylized flourish at the end.

Lawrence S. Bazel