

**WATER COMMITTEE ISSUE SUMMARIES**  
**303(d) LIST/TOTAL DAILY MAXIMUM LOAD (TMDL) ISSUES**  
**OCTOBER 2003**

**Background:** Under Section 303(d) of the Clean Water Act and associated USEPA regulations, States are required to prepare a list every 2 years of water bodies for which water quality standards will not be met after application of technology-based controls, and establish priorities for action among the listed water bodies. The States must then establish total maximum daily loads (TMDLs) for each listed water body, which are the sum of wasteload allocations for point sources, load allocations for nonpoint sources, natural background contributions, and a margin of safety.

**303(d) List Update:** The State Water Resources Control Board (SWRCB) adopted the 2002 303(d) list for California on February 4, 2003, EPA Region 9 approved it in June 2003, and finalized the addition of about 15 additional waterbody-pollutant combinations to the list in July 2003. California's 2002 303(d) list includes more than 1,850 waterbody segment-pollutant combinations on 684 waterbodies.

**SWRCB Development of Listing & TMDL Development Guidance:** SWRCB staff is preparing a draft Policy regarding listing and de-listing pursuant to section 303(d). A preliminary draft policy was released in July 2003, and a formal public review draft is expected to be released for public comment in Fall 2003. Final adoption of the Listing Policy is expected in late Spring or Summer 2004.

SWRCB staff are also in the process of preparing a TMDL Development Policy and related guidance document. As with the Listing Policy, the SWRCB released preliminary drafts of these documents in July 2003, and formal public review drafts are expected to be released for public comment in Fall 2003. Final adoption of the Policy and guidance are expected in 2004.

[The Regulated Caucus of the AB 982 Public Advisory Group provided comments on both draft policies to SWRCB staff on September 12, 2003.](#)

**EPA's TMDL Regulations:** In March, 2003, U.S. EPA withdrew the controversial 2000 TMDL regulation, which had been promulgated but never implemented, due to a combination of congressional action and litigation. U.S. EPA is now working on a new proposed "Watershed Rule." The draft rule is still under internal review, but in its current form includes many positive changes from the POTW perspective. There is no firm date for release of the rule for public comment. In the meantime, U.S. EPA had told the states that they must submit the lists due in April 2004. The SWRCB has indicated that it will begin to develop the 2004 list in late 2003, with the goal of submitting it to U.S. EPA by the end of 2004.

~~**TMDL-related Permit Issues:** NPDES permitting procedures emerged in the San Francisco Bay region for pollutants contained on the 1998 303(d) list. EPA Region IX indicated that it would object to permits issued by the Regional Board that did not contain the following elements: (1) no dilution allowance for 303(d) listed pollutants in performing reasonable potential analyses or setting final effluent limits; (2) mass limits for bioaccumulative 303(d) listed pollutants based on current performance; and (3) final mass limits of zero ("no net~~

loading”) for bioaccumulative pollutants. These requirements, placed in the Tosco refinery permits and several other Bay Area permits, were similar in many respects to positions advocated by the San Francisco Baykeeper in numerous appeals filed on Bay area permits. On March 7, 2001, the SWRCB issued its decision in the appeals of the Tosco permits (one refinery then owned by Ultramar). The decision addressed the interim permitting issues in a way generally favorable to the regulated community's positions.

A San Francisco Superior Court judge ruled that water quality based effluent limits were required under CWA §301(b)(1)(C) and 40 C.F.R. §122.44(d) and could not be deferred until the TMDL was performed. However, this decision has been appealed by Tesoro, the latest owner of the previous Ultramar and Tosco facility.

On May 30, 2003, the California Court of Appeal for the First District reversed the lower court, holding that the permit did not have to include numeric effluent limitations for 303(d) listed pollutants in advance of the TMDL. (Tesoro v. CBE, Case No. A100327.) The Court held that a WQBEL “does not always have to be numeric, and that under the circumstances of this case the Regional Board did include valid WQBELs in the permit.” The Court noted that CBE’s arguments that numeric effluent limits were required “simply ignore the reality of a carefully conceived, agency approved, long term pollution control procedures for a complex environmental setting.”

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