

## WATER COMMITTEE ISSUE SUMMARY

# TOXICITY CONTROL PROVISIONS OF THE POLICY FOR IMPLEMENTATION OF TOXICS STANDARDS FOR INLAND SURFACE WATERS, ENCLOSED BAYS AND ESTUARIES CALIFORNIA TOXICS RULE (CTR) AND STATE IMPLEMENTATION POLICY (SIP)

### Background

The SWRCB was required to adopt water quality objectives for priority pollutants under the Clean Water Act, Section 303(c)(2)(B). SWRCB originally adopted the Inland Surface Water Plan/Enclosed Bays and Estuary Plan (ISWP/EBEP) in 1991, but both plans were rescinded in 1994 in response to a court order overturning the plans for failure to comply with Water Code requirements. As a result, USEPA began efforts to promulgate the California Toxics Rule (CTR), which was finalized on May 18, 2000 and was not subject to California's legal requirements.

In conjunction with the CTR, the SWRCB developed the Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bay, and Estuaries of California (State Implementation Policy, or SIP) and functional equivalent document (FED), which contains provisions for determining reasonable potential, calculating effluent limits, compliance determination, compliance schedules, and other related topics. The SIP became effective upon USEPA promulgation of the CTR in May 2000. National Pollutant Discharge Elimination System (NPDES) permits now must be written to incorporate the provisions of the SIP and CTR.

In 2001, EPA issued a letter conditionally approving the SIP. EPA approved most provisions of the SIP, subject to various conditions on the proper interpretation, but withheld action on the compliance schedules provision which allows up to 15 years for a TMDL to be developed and 5 years for compliance with the wasteload allocations derived from the TMDL (for a total of up to 20 years). In light of EPA's inaction, the status of these TMDL-based compliance schedule provisions is unclear, although the SWRCB recently indicated that this provision is not in effect due to EPA's failure to approve it. However, it is also not clear that EPA approval of state implementation provisions is required under the Clean Water Act.

In February 2005 the SWRCB adopted amendments to the SIP that:

- Allowed water effects ratios (WERs) to be established in individual NPDES permits, rather than in the Basin Planning process as currently required.
- Eliminated the reasonable potential trigger for situations where ambient background pollutant concentrations are greater than a priority pollutant objective or criterion.

- Directed staff to introduce an amendment to the SIP to address narrative toxicity control provisions by January 2006.

### **Current Status:**

SWRCB released for public review and comment a scoping document for revision of the toxicity control provisions of the SIP. A workshop was held January 17, 2006. The current toxicity control provisions establish minimum chronic toxicity control requirements for implementing the narrative toxicity objectives for aquatic life protection in the various Basin Plans. According to the scoping document, there are “significant implementation gaps” in the SIP with regard to development of permit requirements for toxicity. For example, the SIP does not specify the appropriate form and implementation of toxicity limits. The SWRCB directed staff in 2005 to develop more detailed toxicity control provisions. The current proposal includes numeric limits for chronic toxicity.

### **Key Concerns:**

CASA and Tri-TAC submitted comments supporting the use of narrative effluent limitations with numeric monitoring triggers, rather than numeric toxicity effluent limits. CASA has consistently argued against the application of numeric effluent limitations for toxicity in POTW permits. Unlike chemical test methods, whole effluent toxicity (WET) test methods lack sufficient reliability and reproducibility to support placing a discharger in violation for a single test failure. One USEPA interlaboratory study, for example, revealed a false positive rate of 20 percent for chronic toxicity tests. In addition, as recognized in the SWRCB scoping document, “POTWs face the unique challenge of treating a highly variable and partially unrestricted influent.” A current schedule for adoption is unknown at this time.

Another concern is the sunset provision for compliance schedules in May of 2010. CASA and Tri-TAC sent a letter to the State Board regarding this issue and received a response letter from Celeste Cantú stating that the SIP would not be amended on this issue.

A final concern is that there has not been the requisite triennial review of the CTR. The State was supposed to take those numbers and adopt them in to Basin Plan, and hopefully adjust them to local conditions. However, neither a three-year review nor amendment into Basin Plans has occurred in the nearly 6 years since the CTR was adopted.

### **More information:**

- See CASA/Tri-TAC Comment letters:

[http://www.tritac.org/documents/letters/2006\\_01\\_17\\_Toxicity%20Control%20in%20SIP.pdf](http://www.tritac.org/documents/letters/2006_01_17_Toxicity%20Control%20in%20SIP.pdf)

[http://www.tritac.org/documents/letters/2004\\_11\\_08\\_CASA%20Final%20Ltr%20SIP.pdf](http://www.tritac.org/documents/letters/2004_11_08_CASA%20Final%20Ltr%20SIP.pdf)

➤ See SWRCB Website:

<http://www.waterboards.ca.gov/iswp/index.html>

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Current as of: April 2006*

## WATER COMMITTEE ISSUE SUMMARY

# 303(d) LISTING POLICY AND TOTAL DAILY MAXIMUM LOAD (TMDL) GUIDANCE POLICY

### **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.

On September 30, 2004, SWRCB adopted the 303(d) Listing Policy. The Listing Policy became effective in December 2004. The stated objective of the Listing Policy is to establish a standardized approach for developing California's section 303(d) list with the overall goal of achieving water quality standards and maintaining beneficial uses in all of California's surface waters.

On June 16, 2005, SWRCB staff adopted TMDL Development Policy (also called the California Impaired Water Guidance). "The goal of this guidance document is to assist the California State Water Resources Control Board (SWRCB) and Regional Water Quality Control Boards (RWQCBs) in addressing impaired waters through actions that are consistent with both national and regional United States Environmental Protection Agency (USEPA) regulations and guidance as well as with state technical, regulatory, and legislative requirements."

### **Current Status**

The SWRCB released the Draft 2006 Section 303(d) List on September 30, 2005. (Instead of releasing a late 2004 list, the SWRCB is calling this list the "2006 List".) The 303(d) list encompasses those water bodies where water quality standards are not attained. The 2006 list is the first to be developed using the Policy for Developing California's Clean Water Act Section 303(d) List (the "Listing Policy" described above).

The basis for the 2006 section 303(d) list is the 2002 list. The Draft 2006 303(d) List recommends the addition 464 water quality limited segments (water body-pollutant combinations) to the section 303(d) list. It is further recommended that 177 water body-pollutant combinations be removed from the section 303(d) list. Draft staff reports are also included with the proposed list. According to SWRCB staff, the current schedule for the draft state 303(d) list is to release the list for review and comment in August of 2006.

### **Key Concerns**

Since the implications of a waterbody being included on the 303(d) List can be costly, it is critical that unnecessary listings not be included. Removal of waters not truly

“impaired” ensures that real water quality problems are addressed and funds are not wasted where waterbodies already meet water quality standards. Tri-TAC has developed a checklist that can assist agencies when reviewing the 303(d) list to verify that listings of waterbodies are appropriate (See Page 3). The proposed 2006 list has already proven controversial with nongovernmental organizations, which have requested that hundreds of additional waters be added to the list as impaired.

**More Information:**

See CASA/Tri-TAC Comment Letters:

<http://www.casaweb.org/committee/tritac/pdfs/letters/012405TMDL%20Policy.pdf>

[http://www.tritac.org/documents/letters/2004\\_02\\_18\\_Tri-TAC%20Letter%20303d%20Listing%20Policy%20Comments.pdf](http://www.tritac.org/documents/letters/2004_02_18_Tri-TAC%20Letter%20303d%20Listing%20Policy%20Comments.pdf)

See SWRCB Website:

[http://www.waterboards.ca.gov/tmdl/303d\\_update.html](http://www.waterboards.ca.gov/tmdl/303d_update.html).

[http://www.waterboards.ca.gov/tmdl/docs/ffed\\_303d\\_listingpolicy093004.pdf](http://www.waterboards.ca.gov/tmdl/docs/ffed_303d_listingpolicy093004.pdf)

[http://www.waterboards.ca.gov/tmdl/303d\\_lists.html](http://www.waterboards.ca.gov/tmdl/303d_lists.html)

*Contacts: Bobbi Larson, CASA; Sharon Green, LACSD; Rodney Andersen, Burbank. Current as of: May 2006*

## **303(d) List Review Tips and Checklist**

### **INTRODUCTION**

The State Water Resources Control Board (State Board) released the Draft 2006 Section 303d List on September 30, 2005. If you are unfamiliar with the Section 303d List, see the background provided by the State Board below:

Section 303(d) of the CWA requires states to identify waters that do not meet applicable water quality standards with technology-based controls alone. Applicable standards include the designated beneficial uses, the adopted water quality objectives, and the State's antidegradation policy. The section 303(d) list must include the water quality limited segments, associated pollutants, and a priority ranking of the waters for purposes of developing Total Maximum Daily Loads (TMDLs) in the next two years. A TMDL is the maximum load of a pollutant that can be discharged from point and nonpoint sources without exceeding water quality standards. States are required to submit the section 303(d) list and TMDL priorities to the U.S. Environmental Protection Agency (USEPA) for approval. The 2006 section 303(d) list is due to USEPA by April 2006.

In short, this document lists all the waterbodies (lakes, rivers, streams, etc.) that are not meeting water quality standards. The Clean Water Act requires that a TMDL be created for every pollutant-waterbody combination on this list. A TMDL, when created by the State Board, includes an implementation plan and schedule that often requires costly treatment upgrades and/or studies to be performed by discharges into that waterbody. Listing alone may lead to restrictive "interim" requirements on dischargers to the waterbody during the period prior to TMDL adoption.

Since the implications of a waterbody being included on the 303d List can be costly, it is critical that unnecessary listings not be included. This ensures that true water quality problems are addressed and funds are not wasted where waterbodies already meet water quality standards. Below is a checklist that can assist in your review of the draft list to verify that listings of waterbodies of interest to your agency are properly listed.

### **CHECKLIST**

#### **1. Was the listing performed in accordance with the State Board Listing Policy (Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List)?**

This is the overarching question. In September 2004, the State Board approved a policy to determine how the Section 303d List is created. Although this policy does provide some flexibility, it established certain criteria for when water bodies should be listed or de-listed. If the proposed listing is inconsistent with the policy or does not follow its guidelines, the water body has not been properly listed. The remaining

items on this checklist attempt to highlight some areas where a listing may have strayed from the Listing Policy.

## **2. Is the correct Beneficial Use (BU) indicated?**

The basis of each 303d listing is that the water quality standard for a pollutant is not being attained. The Water quality standard consists of the designated Beneficial Use (BU) and the criterion or objective to protect that use. Thus, you should verify that the beneficial use indicated in the 303d List fact sheet is consistent with the Basin Plan for your region. For example, if a listing shows that the BU impaired is MUN – Municipal and Domestic Drinking, but the Basin Plan for your region does not indicate this use for the waterbody, this is an incorrect listing.

## **3. Is the correct Water Quality Objective/Criterion indicated?**

As stated above, the basis of each 303d listing is that the water body is not meeting an applicable Water Quality Objective/Criterion (WQO) for protection of that use. Typically the WQO is based on the California Toxics Rule (CTR) or a Basin Plan Objective. Verify that these numbers are correctly applied. The Listing Policy provides for some flexibility when evaluating narrative criteria, however the policy requires the selection of representative “Evaluation Guidelines” for interpretation of narrative water quality objectives for listing/de-listing purposes. Section 6.1.3 of the Listing Policy contains the provisions for selecting an appropriate Evaluation Guideline. Acceptable guidelines for evaluating sediment quality, fish tissue levels, and other parameters are described in this section of the policy.

## **4. Were all data sets submitted included in the analysis?**

The fact sheet for the listing will indicate the *Data Used To Assess Water Quality*. Are all samples submitted by your agency or others in your watershed included in this data set? Do you know of other data that were not included? The State should be looking at all existing and readily available data. Further, data that should be considered by the SWRCB is not limited to data submitted in response to SWRCB/RWQCB data solicitations for development of the 303d list (i.e., data and information previously submitted to the RWQCBs, such as Discharger Monitoring Reports, are considered to be “readily available” and were not required to be submitted again during the data solicitation process). See Listing Policy Section 6.1.1 and 6.1.2.

## **5. Is the math right?**

The fact sheet indicates the number of samples not meeting WQO under *Data Used To Assess Water Quality*. To determine if the pollutant meets the exceedance criteria to be considered impaired or not impaired, refer to the tables in the Listing Policy. Table 3.1 and 3.2 of the Listing Policy contain the minimum number of measured exceedances needed to place a water segment on the 303d list for

toxicants, and conventional pollutants, respectively. Tables 4.1 and 4.2 in Section 4 of the policy contain the maximum number of measured exceedances allowed to remove a water segment from the 303d list for toxicants, and conventional pollutants, respectively. Note that for the de-listing tables, a minimum sample size of 28 samples (for toxicants) or 26 samples (for conventional pollutants) is required for the water body to be considered for de-listing. It may be worthwhile to review existing listings (i.e., older listings that have been carried over to the 2006 draft 303d list), to see if they meet the criteria for de-listing under the provisions of the Listing Policy.

## **6. Was there adequate data quality assurance?**

Numeric data are considered credible and relevant for listing purposes only if the data set submitted meets the minimum quality assurance/quality control requirements. If there is data used in the determination of a listing that is unfamiliar, request a copy of the data from State Water Board staff (see below for contact information). See Listing Policy Section 6.1.4.

## **7. Is the listing based on weight of evidence?**

A listing may be the result of a “weight of evidence” determination (see Listing Policy 6.11). That is, when all other listing factors do not result in the listing of a water segment but information indicates non-attainment of standards, a water segment may be listed if the weight of evidence demonstrates that a water quality standard is not attained. If the weight of evidence approach is used for the listing, the State Board must justify the determination by:

- Providing any data or information including current conditions supporting the decision;
- Describing in fact sheets how the data or information affords a substantial basis in fact from which the decision can be reasonably inferred;
- Demonstrating that the weight of evidence of the data and information indicate that the water quality standard is not attained; and
- Demonstrating that the approach used is scientifically defensible and reproducible.

## **8. Proper spatial/temporal representation?**

Was the data collected from a site that is heavily influenced by a source so that it is no longer spatially representative? Were all exceedances a result of a single storm event? See Listing Policy Sections 6.1.5.2 and 6.1.5.3.

## **9. Was hardness taken into account?**

If hardness was considered, how? The hardness value used in the calculation will alter the WQO for metals. Metals WQOs are calculated in accordance with a formula contained in the CTR.

## **10. If the listing is a “nuisance” listing rather than a pollutant, is there another line of evidence showing an impairment?**

A qualitative listing nuisance for conditions must be associated with numerical water quality data where: (1) an “acceptable evaluation guideline” is exceeded or (2) a nuisance condition exists when compared with reference conditions, or (3) when nutrient concentrations cause or contribute to excessive algae growth. The most important aspect is to verify that any nuisance listing is associated with numerical water quality data. See Listing Policy Section 3.7.

### **Additional Information from the State Water Resources Control Board**

#### **DEVELOPMENT OF THE 2006 SECTION 303(d) LIST**

The State Water Board staff solicited, assembled, and considered all readily available data and information. A public solicitation of data and information from State and federal agencies, and from other interested parties, was begun in April 2004. This public data solicitation was concluded in June 2004. The data received generally covered the period of 2001 to early 2004. Some data were submitted that addressed pre-2002 listings. Data (through March 2005) from the Surface Water Ambient Monitoring Program (SWAMP) were included in the record. Other sources of data and information that became readily available to State Water Board staff were also included in the administrative record.

All data and information was reviewed using the listing and delisting factors in the Water Quality Control Policy for Developing California’s Clean Water Act Section 303(d) List (Listing Policy). The Listing Policy identifies the process by which the State Water Board and the Regional Water Quality Control Boards will comply with the listing requirements of CWA Section 303(d). The Listing Policy became effective in December 2004. The Listing Policy was used to make listing/delisting recommendations, which are summarized in fact sheets developed by State Water Board staff. In general, fact sheets were developed for all waters and pollutants where water quality standards were not attained.

A draft Staff Report (report) has been developed documenting recommendations for additions, deletions, and changes to the 2002 California section 303(d) list. Recommendations are also made for when TMDLs will be completed. The report provides a summary of list changes and the State Water Board staff analysis of data and information. Two additional staff reports were also developed for waters and pollutants where the recommendations were “Do Not List” or “Do Not Delist.”

## Resources

State Water Resources Control Board 2006 303(d) List documents:

[http://www.waterboards.ca.gov/tmdl/303d\\_update.html](http://www.waterboards.ca.gov/tmdl/303d_update.html)

State Water Resources Control Board 303(d) Listing Policy:

[http://www.waterboards.ca.gov/tmdl/docs/ffed\\_303d\\_listingpolicy093004.pdf](http://www.waterboards.ca.gov/tmdl/docs/ffed_303d_listingpolicy093004.pdf)

EPA California Toxics Rule and associated documents:

<http://www.epa.gov/OST/standards/ctrindex.html>

You may also wish to review the Basin Plan for your region. These can be accessed through the SWRCB's website, [www.waterboards.ca.gov](http://www.waterboards.ca.gov), by clicking the link to the appropriate Regional Board.

## **WATER COMMITTEE ISSUE SUMMARY**

### **PERMIT ISSUES/APPEALS**

In the late 1990s, many POTW permits throughout the State began to be appealed because of onerous restrictions. At the height of the permit appeals (around 2001-02), the SWRCB reported nearly 300-400 appeals pending in California. While most of these appeals have been resolved, the following provides an update on several of the remaining administrative and judicial appeals.

#### **LA/Burbank (3 permits)**

The City of Los Angeles/Burbank appeals yielded a favorable initial ruling in 2001 from a Los Angeles Superior Court judge, who determined that the regional board failed to consider economics, potential environmental impacts and other public interest factors when adopting the cities' 1998 permits, as required by the Porter-Cologne Water Quality Control Act and Clean Water Act. The challenged effluent limits in these permits have been (and continue to be) judicially stayed since December of 1999.

The Attorney General (AG), representing the SWRCB and LARWQCB, appealed the LA/Burbank decisions and the Court of Appeal issued its decision in late 2003. The Cities appealed to the California Supreme Court and review was granted in November of 2003 and a final decision was issued by the Supreme Court in 2005. This decision generally upheld the Court of Appeal, but made the entire decision unpublished and remanded the case to the trial court on the issue of whether the challenged effluent limits were more stringent than federal law and, thus, an analysis of the factors in Water Code section 13241 (including economics) was required to be performed. A hearing date of March 23, 2006 has been set to determine if any of the requirements of these permits were more stringent than federal law, and if the court previously ruled on the validity of the Basin Plan's narrative toxicity objective.

#### **Bay Area POTW Appeals**

Nearly 20 appeals of the Bay Area of POTW permits were filed after the CTR and SIP began to be incorporated into NPDES permits. These appeals are currently being negotiated between the Regional Board and BACWA in an attempt to come up with acceptable permit language on the appealed issues and to set an acceptable template for future permit language.

#### **City of Vacaville**

The SWRCB heard the City of Vacaville's Permit appeal on September 11-13<sup>th</sup>, 2001 and issued a final decision on October 3, 2002. Both the City of Vacaville and CASA appealed the SWRCB's decision. After an initial hearing on the scope of the case, the judge ruled that Vacaville and CASA could challenge the Basin Plan since there was no applicable statute of limitations, or alternatively, the challenge was brought within the applicable statutory period. The court also held several hearings on requests for

intervention by environmental groups, where the judge denied intervention each time. The groups appealed to the Court of Appeal and received a decision affirming the trial court's decision to deny the groups ability to enter the case as a party. CASA and Vacaville have requested publication of the Court of Appeal decision and intend to move the trial court hearings forward expeditiously.

### **Permit Template**

New permits coming up for renewal will be written using a new standard permit template, which is being implemented for consistency and "streamlining" of permits throughout the State. Tri-TAC has had several meetings and conversations with State Water Board staff and counsel to discuss changes to the template to avoid issues that may need to be appealed. Some changes have been made, and others have been proposed, but not yet acted upon. For example, one area of contention has been the Compliance Determination section, which currently states that monthly average exceedances are violations that count for each day of the month. While that might be the ultimate outcome of an ACL hearing on the issue, some exceedances with penalties issued under the MMP law would count a monthly average violation as only one violation. Alternative language has been proposed that would not make such a judgment call in the permit and would not prejudice an enforcement determination in the permit. Tri-TAC will continue to watch and react to changes in the template as they are proposed or incorporated, to aid its members in commenting on permit template-related issues.

The first draft of the template was issued in May 2006 and a second draft was released in April 2007. The latest version includes additional language addressing legal issues and many more definitions. Additional definitions include those from the SIP, statistical parameters, analytical terminology, as well as mixing zones and satellite collection systems. The new template also includes language in the Executive Officer (EO) certification statement that the attachments are part of the Order. What is still open is if all the attachments are enforceable. If they are all part of the Order, it may be difficult for minor changes such as sampling schedules to be considered administrative and made by the EO.

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Current as of: May 2006*

**WATER COMMITTEE ISSUE SUMMARY**

**TOTAL RESIDUAL CHLORINE (TRC) POLICY**

**Background**

The State Water Resources Control Board (SWRCB) has proposed a policy to implement the US EPA criterion for chlorine residual of 0.019 mg/l for a 1-hour average through the development of a Statewide Total Residual Chlorine (TRC) Policy. The proposed TRC Policy establishes numeric water quality objectives for chlorine and specifies an implementation program for permitting and compliance with the objective. The proposed effluent limits are:

<b>Proposed Effluent Limit</b>	<b>1 hour average (mg/L)</b>	<b>4-day average (mg/L)</b>
<b>Total Residual Chlorine – Freshwater (freshwater)</b>	0.019	0.011
<b>Chlorine Produced Oxidants – Saltwater (saltwater)</b>	0.013	0.0075

The Policy also requires continuous monitoring for chlorine or de-chlorinating processes with a frequency of one or more data points every minute. In addition, it requires that equipment have a sensitivity of 1 ppb and that it be calibrated to 0.500 ppm using a specified lab method. Other aspects of the policy include:

- ✓ A five-year compliance schedule
- ✓ The allowance of mixing zones (if allowed in basin plan)
- ✓ Treating non-detects as “zero” for compliance determinations; and
- ✓ The use of stoichiometric calculations to demonstrate compliance when analyzers are offline or to verify false positive.

**Current Status**

The policy has been in the development for over two years. The SWRCB held a scoping meeting on July 7<sup>th</sup> 2005, followed by two stakeholder workshops in the fall. In response to an invitation from SWRCB staff to “test drive” the proposed TRC Policy, Tri-TAC submitted additional comments on January 4, 2006. The final draft policy and Substitute Environmental Document (SED) have been released. Comments are due June 5<sup>th</sup> and the public hearing will be held June 19<sup>th</sup>.

## **Key Concerns:**

There are three key issues of concern to POTWs related to this initiative:

- 1) The need for a statewide policy, given the difference in receiving waters throughout the state;
- 2) The automatic insertion of chlorine limits and the ability to comply with the proposed effluent limits; and
- 3) The ability of continuous field instrumentation to reliably analyze at the low levels proposed. The sensitivity and monitoring frequency requirements in the policy do not reflect the actual limitations of the instruments currently available on the market or the realities of layers of variables in a continuous on-line field environment. Tri-TAC has stressed that no current on-line analytical technology is capable of reliably measuring chlorine at 1 µg/L under field conditions.

Drinking water supply agencies have also expressed concern for discharges from water line breaks where chlorine is added to their systems for public health reasons. The residual amounts may exceed the proposed objectives and limits.

## **More Information**

- See CASA/Tri-TAC Comment Letters

[http://www.tritac.org/documents/letters/2005\\_10\\_21\\_TriTAC\\_Comments\\_CI\\_Residual.pdf](http://www.tritac.org/documents/letters/2005_10_21_TriTAC_Comments_CI_Residual.pdf)

[http://www.tritac.org/documents/letters/2005\\_07\\_07\\_Joint\\_Comments\\_on\\_Total\\_Residual\\_Chlorine\\_Policy.pdf](http://www.tritac.org/documents/letters/2005_07_07_Joint_Comments_on_Total_Residual_Chlorine_Policy.pdf)

- See SWRCB Website:

<http://www.waterboards.ca.gov/iswp/chlorine.html>

*Contact: Ben Horenstein, EBMUD. Current as of: May 2006*

## WATER COMMITTEE ISSUE SUMMARIES

### PROPOSED OCEAN PLAN AMENDMENTS

In July 1999, the State Water Resources Control Board (SWRCB) adopted Resolution 99-073 directing staff to review a series of high priority issues identified in the 1999-2002 Ocean Plan Triennial Review Workplan (SWRCB 1999). Staff was further directed to make recommendations to the SWRCB for any necessary changes to the California Ocean Plan. In January 2004, the SWRCB held a workshop to receive comments on four draft proposed amendments. After receiving comments, the SWRCB directed staff to revisit the original list. On August 6, 2004, the SWRCB noticed a hearing for October 6, 2004 to consider two of the original four amendments to the Ocean Plan.

The two proposed amendments are:

1. Choice of Indicator Organisms for Water-Contact Bacterial Standards
2. "Reasonable Potential:" Determining the likelihood that the concentration of a pollutant would cause or contribute to an exceedance of water quality standards.

**Regulatory Background:** The California Ocean Plan establishes water quality objectives for California's ocean waters and provides the basis for regulation of wastes discharged into the State's coastal waters. It applies to point and nonpoint source discharges. The SWRCB adopts the California Ocean Plan, and both the SWRCB and the six coastal Regional Water Quality Control Boards (RWQCBs) implement the California Ocean Plan. Currently, the 2001 California Ocean Plan contains three chapters that describe beneficial uses to be protected, water quality objectives, and a program of implementation needed for achieving water quality objectives.

**Project Description:** The CWC (§13170.2) requires that the California Ocean Plan be reviewed at least every three years to guarantee that the current standards are adequate and are not allowing degradation to indigenous marine species or posing a threat to human health. This project, if approved by the SWRCB, will amend the 2001 California Ocean Plan.

#### **Issues:**

**Issue 1:** Choice of Indicator Organisms for Water-Contact Bacterial Standards.

Summary of Proposed Amendment: *Add an enterococcus water-contact standard, delete the single sample standard currently in the California Ocean Plan and change it to a trigger for additional monitoring. Require monitoring for only total coliform at offshore stations.* Present California Ocean Plan: *Chapter II of the 2001 California Ocean Plan contains a total coliform water-contact standard, and a bacterial assessment and remedial action requirement that requires the measurement of enterococcus at all stations where total are sampled.*

**Issue 2:** Reasonable Potential: Determining when California Ocean Plan Water Quality-based Effluent Limitations are Needed.

Summary of Proposed Amendment: *Remove existing language that allows dischargers to certify that Table B pollutants are not present in their effluent in lieu of monitoring, and add new "reasonable potential" language to Chapter III (Program of Implementation) of the California Ocean Plan. Present California Ocean Plan: Dischargers are currently allowed to certify that Table B pollutants are not present in their effluent in lieu of monitoring.*

**Update:** On August 6, 2004 the SWRCB released the Draft Functional Equivalent Document and notice of hearing for October 6, 2004 to hear comments on the two proposed amendments. Previously, Tri-TAC provided the following comments on these two issues:

Issue 1, Tri-TAC supports the proposal with reservations regarding the daily resampling requirements and the continuous monitoring with all three indicators and that under some circumstances, such as when a waterbody had a history of clean water, some reduced level of maintenance monitoring would be sufficient using fewer indicators. A range of implementation alternatives should be evaluated in the FED process. Other speakers addressed Issue 1 with regard to the need for rapid test methods for these indicators; the need for research about the impact of feral and domestic animals on water quality; and that total coliform is of no use for making public health determinations. Others supported deletion of single sample standard, and that we may not need total and fecal coliform. Also there should be some seasonal allowance for "exceedances" based on the circumstances such as what you see in the CSO policy.

Issue 2, Tri-TAC supports the proposal, and provided a brief but detailed explanation about OCSD's problem with obtaining standards for some Ocean Plan constituents.

The 2005 California Ocean Plan was approved on February 14, 2006 by the United States Environmental Protection Agency, and is now available at:

<http://www.waterboards.ca.gov/plnspols/docs/oplans/oceanplan2005.pdf>. These 2005 Ocean Plan amendments were previously adopted by the State Water Resources Control Board on January 20, 2005 and April 21, 2005, and by the California Office of Administrative Law on October 12, 2005.

Also adopted was the California Ocean Plan Triennial Review and Workplan 2005-2008, which is available at:

<http://www.waterboards.ca.gov/plnspols/docs/oplans/coptrirev20052008.pdf>.

**Schedule:**

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*Current as of: May 5, 2006*

## WATER COMMITTEE ISSUE SUMMARIES

### SEDIMENT QUALITY OBJECTIVES

**Regulatory Background:** In 1989, the California Water Code (CWC) was amended to require the SWRCB to develop SQOs as part of a comprehensive program to protect existing and future beneficial water uses within California's enclosed bays and estuaries. The SWRCB is now developing sediment quality objectives (SQOs) in enclosed bays of California in accordance with the requirements of Section 13393 of the California Water Code (CWC). As a result of a lawsuit filed in 1999 by several non-governmental organizations, the Court ordered the SWRCB to develop SQOs in accordance with the following schedule:

- By August 5, 2005, SWRCB was to circulate draft proposed objectives to the public
- By February 28, 2007, the SWRCB was to adopt proposed SQOs and an accompanying implementation policy and submit these to the Office of Administrative Law

The SWRCB has been unable to meet this schedule and is in the process of negotiating a revised schedule with the petitioners in the court case. From an operational standpoint, the SWRCB is now targeting the following revised dates, reflective of a one year slip in the schedule:

- Circulate draft proposed SQOs and Functional Equivalent Document (FED) in August 2006
- Adopt proposed SQOs and implementation policy in a stand-alone water quality control plan and send to OAL in February 2008

To develop the SQOs, the SWRCB is utilizing three forums including a Sediment Quality Advisory Committee (SQAC) comprised of designated representatives from the regulated community and non-governmental organizations, a Scientific Steering Committee (SSC) comprised of national sediment quality experts that acts as a peer review/advisory committee to the SWRCB and its Science Team, and an Agency Coordination Committee (ACC) comprised of SWRCB, Regional Water Board and other state and federal agency representatives.

**Project Goals:** Develop scientifically defensible SQOs based on multiple lines of scientific evidence that are protective of beneficial uses. Develop implementation policy and guidance that provides for consistent application throughout the state. Develop methods and tools for assessing and managing sediment quality in enclosed bays that are applicable to estuaries in the future after further data collection in those areas.

**Key Project Objectives:** Utilize narrative SQOs to provide reasonable protection of sensitive beneficial uses affected by sediment quality, including those linked to aquatic life and fish consumption.

**Project Roles:** SWRCB staff and contractors (Science Team) are managing the project. The SWRCB Science Team includes: Southern California Coastal Waters Research Project (SCCWRP), San Francisco Estuary Institute (SFEI), Moss Landing Marine Labs and UC Davis-MPSL Granite Canyon. The Scientific Steering Committee, Advisory Committee, and the ACC members are reviewing and advising on the work. SWRCB Board will ultimately approve the SQOs and accompanying policy and FED, which will be forwarded to OAL and USEPA for approval.

***Sediment Quality Advisory Committee:***

***Regulated Community:***

- Ports: Paul Johansen, Port of Los Angeles. Alt: Andy Jahn, Port of Oakland
- POTWs: Tom Grovhoug, Larry Walker Associates. Alt: Lisa Haney, LACSD
- Municipal Stormwater: Desi Alvarez, City of Downey. Alt: Sandy Mathews, California Stormwater Quality Association
- Industrial Stormwater: Tim Piasky, BIASC. Alt: Steve Arita, Western States Petroleum Association
- Industrial Direct: Susan Paulsen, Flow science. Alt: Craig Johns, California Resource Strategies
- Federal Facilities: Bart Chadwick, Navy
- Legacy Pollutants: Paul Singarella, Latham & Watkins.

***Environmental Community***

- Gabrielle Sumner and Laura Hunter, Environmental Health Coalition
- Mitzi Taggart, Heal the Bay. Sarah Newkirk and Linda Sheehan Alt. Representing The Ocean Conservancy;
- Bruce Reznik, San Diego Bay Keeper
- Leo P. O'Brien, San Francisco BayKeeper
- Robin Rierdan, San Diego River Park- Lakeside Santee Conservancy
- Bill Jennings, DeltaKeeper
- Ed Kimura, Sierra Club, San Diego Chapter
- Marco Gonzalez Surfrider Foundation, San Diego Chapter
- Dave Paradies, Bay Foundation of Morro Bay.

***Scientific Advisory Committee:***

- Dr. Todd Bridges, U.S. Army Corps of Engineers
- Dr. Bob Van Dolah, South Carolina Department of Natural Resources
- Dr. Peter Landrum, NOAA, Great Lakes Environmental Research Lab
- Edward Long, ERL Environmental
- Dr. Rob Burgess, USEPA.

*Agency Coordination Committee:* SWRCB, RWQCB, Department of Fish and Game, Department of Pesticide Regulation, Department of Toxics Substances Control, State

Lands Commission, San Francisco Bay Conservation and Development Commission, California Coastal Commission and OEHHA.

**Issues:** The SWRCB has established a data-driven, science-based work plan to formulate sediment quality objectives (either narrative or numeric). SWRCB has stated that it will follow the requirements of the California Water Code in setting enforceable objectives. SWRCB staff will capture important policy and implementation issues in a Policy Support Document (PSD). The Phase 1 effort is limited to the development of SQOs in marine and estuarine areas of enclosed bays in California. The primary focus for SQO development will be the protection of sensitive benthic communities using benthic invertebrate community measures, acute and sublethal sediment toxicity tests, and sediment chemistry analysis. Tools for assessment of human health and wildlife protection will be examined but these end points are not expected to be the subject of SQOs in Phase 1.

**Update:** The most recent meeting of the Sediment Quality Advisory Committee (SQAC) was held on January 26, 2006 in Sacramento. The January 26 meeting provided a review of technical progress on the direct and indirect effects. The meeting included a review of a document summarizing SQO Issues and alternatives (prepared by Chris Beegan) which will provide a framework for the FED, a revised approach to the Multiple Line of Evidence (MLOE) assessment approach for direct effects developed by SCCWRP, and more information on the development of fish tissue thresholds for consideration of indirect (bioaccumulative) effects by SFEI. The next meeting of the SQAC has not been scheduled.

The most recent meeting of the Scientific Steering Committee was held February 28 through March 2, 2006 in Westminster. The SSC reviewed the technical work completed to date and concluded that the proposed direct effects MLOE approach for individual site assessment was supportable. The SSC also found that the development of SQOs to address indirect effects required additional work.

On April 13, 2006, the SWRCB convened a meeting of interested parties to solicit participation in an Advisory Committee to be involved in the development of SQOs in estuaries (in particular the Sacramento-San Joaquin Delta). The SWRCB intends to issue a work plan for SQO development in the Delta and other estuaries in June 2006, with planned release of a draft Functional Equivalent Document and proposed SQOs in December 2010.

**Schedule:**

- January 2003: Project start, Work plan development, Database creation
- June 2003: Adopt work plan
- August 3-4, 2004: First meeting of Scientific Steering Committee
- February 28-March 2, 2006: Most recent meeting of the Scientific Steering Committee
- August 2006: Draft SQOs for direct effects in enclosed bays, Functional Equivalent document (FED), draft guidance document for public review and comment

- February 2008: Adopt SQOs for direct effects in enclosed bays
- December 2010: Draft SQOs and FED for direct effects in estuaries and tools and approach for indirect effects

*Contacts: Tom Grovhoug, LWA; Lisa Haney, LA Co. Sanitation District; Jim Marchese, City of LA - Bureau of Sanitation*

*Current as of: May 1, 2006*

## WATER COMMITTEE ISSUE SUMMARY

### MERCURY REGULATORY DEVELOPMENTS

#### San Francisco Bay TMDL

On April 30, 2004, the San Francisco Bay Regional Water Quality Control Board (Regional Board) issued a notice regarding the adoption of an amendment to the Water Quality Control Plan for the San Francisco Bay (Basin Plan) to incorporate a Total Maximum Daily Load (TMDL) for mercury in San Francisco Bay and an implementation plan to achieve the TMDL targets and allocation. The Bay Area Clean Water Agencies (BACWA) submitted comments on behalf of area POTWs expressing concern over:

- The reduction in the pooled allocation for POTWs by 18% (from 17 to 4 kg/yr), which eliminates any allowance for POTW growth in flow or loads over the next 20 years;
- The reduction in the averaging period for compliance with the pooled allocation from 5 years to 1 year; and
- The modifications in the individual facility allocations that penalize communities with top performing treatment plants

EPA also submitted comments critical of the TMDL, including a request for the inclusion of limitations on waste load allocations for municipal and industrial wastewater dischargers set to current performance levels. EPA's comments also expressed concerns that:

- The TMDL document did not demonstrate how the numeric Basin Plan objective of 0.025 ug/L (set based on historic detection levels) as a 4-day average would be attained throughout the affected Bay segments;
- Asked for clarification in the Basin Plan amendment that individual waste load allocations would be adopted in NPDES permits, since Staff of USEPA Region 9 assert that this is a necessary component of a TMDL; and
- Expressed concerns over elements of the implementation measures in the proposed Basin Plan amendment that impacted NPDES permitting and may lead to EPA objections of permits.

On August 11, 2005, National Association of Clean Water Agencies (NACWA) submitted comments to the State Water Resources Control Board (SWRCB) pointing out that the cumulative point source (municipal and industrial) mercury contributions in the Bay Region comprise less than two percent of total loadings and are *de minimis* sources of mercury. Therefore, the TMDL should not require that they achieve reduced numeric NPDES limits for mercury. NACWA pointed out that this approach is consistent with national EPA and state guidance documents and TMDLs developed to address mercury and other legacy pollutants, as well as with past handling of *de minimis* sources. Furthermore, NACWA indicated that modifying the TMDL to include reductions from *de minimis* sources would be problematic and set adverse national precedent on mercury because:

1. Greater mercury reductions by municipal clean water agencies will not meaningfully reduce mercury levels in San Francisco Bay fish or in the water column;
2. The Regional Board found that reductions from nonpoint sources would bring the San Francisco Bay into mercury attainment without numeric reductions from *de minimis* point sources
3. Imposing additional requirements on municipal clean water agencies, excluding other point sources, is arbitrary and unduly punitive;
4. Such action would trade a watershed-based TMDL approach for a time- consuming NPDES permitting exercise;
5. Such action would be inconsistent with federal and California TMDL policy; and
6. Such action would fail to recognize that the TMDL contemplates an appropriate level of additional, enhanced pollution prevention efforts by the *de minimis* point sources.

On September 7, 2005, the SWRCB held a meeting on the proposed amendment to the Basin Plan to incorporate a mercury TMDL developed by the Regional Board. The hearing was preceded by four public workshops. This hearing resulted in a politically-driven “policy-oriented” remand from the State Board that required the TMDL to be revised by the Regional Board. The State Board required the Regional Board to reexamine the WLA, pollution prevention, and technical improvements to ensure that Bay Area municipal and industrial dischargers are doing everything that they can. The Regional Board has been given nine months to do this, with an update due in six months.

Correspondence that swayed the State Board to remand appeared to be a joint letter from Baykeeper, Clean Water Action, and NRDC asserting that Bay Area POTWs had much worse performance than the rest of the nation. The letter asserted that local POTWs discharged at 87 ng/L, which is much higher than national average for POTW effluent mercury concentrations. However, this permit actually contains a not-to-exceed limit of 87 ng/L and the actual POTW average performance ranges from 10-30 ng/L for secondary treatment only. This confusion by the State Board of not-to-exceed limits with average performance was surprising, given that BACWA had provided funds for a technical consultant to serve Bay area stakeholders by providing technical review and comment.

The State Board conducted an analysis of data from USEPA Region 5 (Great Lakes States) and concluded that pollution prevention has been more effective at removing Hg in USEPA Region 5 than in the Bay Area. Early analysis from the dischargers points to flaws in the State Board’s analysis as zero was used for non-detect samples. Also, the conclusion that lower levels were due to pollution prevention efforts rather than other factors is questionable as it appears that advanced treatment (flocculation and filtration for phosphorus removal) is what determined final effluent mercury concentrations. The State Board did not respond to a letter from the Regional Board indicating that the analysis is flawed, nor did the State Board respond to this letter during the hearing.

Other areas of concern include the fact that the Bay will not attain the proposed sediment target for another 100 – 120 years (a geochemical fact of life), that dredging

was not being treated more strictly (dredging is a loss term for the Bay mercury load), and that there was not sufficient certainty that mine sites would be cleaned up. These concerns, like attainment of the Basin Plan objective as a four-day average, appeared to be window dressing for the real concern over a TMDL that does not “leverage” the resources of the wastewater community.

The Regional Board staff is developing revisions to the TMDL that address both the stated and actual concerns. Meanwhile, the State Board is considering revamping the TMDL on their own initiative, as well as considering how to implement statewide fish tissue-based mercury water quality objectives, in order to address the non-governmental organizations’ implied threat of legal action, and ultimately may find reason to negate the regional TMDL.

Update (May 1, 2006): An draft amendment for the Mercury TMDL was issued on April 21, 2006. Public hearings are scheduled for June 14 and August 9, 2006. Significant proposed changes include the following:

1. Establish two numeric mercury water quality objectives for all segments of San Francisco Bay
  - To protect people who consume Bay fish (applies to larger fish consumed by humans): 0.2 mg mercury per kg fish tissue (average wet weight concentration, measured in edible portions (muscle tissue) of trophic level 3 and trophic level 4 fish)
  - To protect aquatic organisms and wildlife (applies to small fish consumed by birds): 0.03 mg mercury per kg fish (average wet weight concentration measured in whole fish 3-5 cm in length)
2. Vacate (i.e. remove) the water column four-day average mercury water quality objective for San Francisco Bay (0.025 µg/L)
3. Clarify TMDL targets as follows, in line with objectives stated above:
  - “To protect sport fishing and human health, the average mercury concentration in 60-cm striped bass muscle tissue shall not exceed 0.2 mg mercury per kg fish tissue (wet weight).”
  - “To protect aquatic organisms and wildlife, the concentration of mercury shall not exceed 0.03 ppm, wet weight average, in whole fish 3-5 cm in length.”
  - The bird-egg target is a monitoring target.
4. Revise Wasteload allocations and the implementation plan for wastewater sources including:
  - Clarify the pollution prevention requirement for municipal wastewater
  - Establish more stringent Wasteload allocations for municipal wastewater dischargers, to be implemented via individual mass limits and aggregate mass

limits and incorporating ten-year interim and twenty-year final implementation schedules

- Correct the Wasteload allocations for industrial wastewater
- Impose more stringent application of compliance triggers for both industrial and municipal wastewater
- Require municipal and industrial wastewater and urban stormwater to conduct methylmercury monitoring

5. Add a statement to the dredging section of the Mercury TMDL Amendment clarifying the Regional Water Board's intent that all dredging activities in the Bay comply with the Long Term Management Strategy.
6. Expand risk management activities to include investigation of ways to address public health impacts of mercury on people and communities most likely to be affected by mercury in San Francisco Bay-Delta caught fish, such as subsistence fishers and their families.

For POTWs the initial Wasteload allocation remains at 17 kg/year. There is to be a 20% reduction within 10 years and a 40% reduction within 20 years. The five POTWs already using filtration of secondary effluent are required to only reduce 20% and POTWs with current loads of 0.1 kg/year or less are not required to reduce below the current level. The expectation is that improved treatment efficiency, pretreatment, and pollution prevention, including dental amalgam separators in 85% of dental offices will achieve the 20% reduction. The second 20% reduction is unlikely to be achieved without filtration unless the State Water Board implements the offset program noted in the TMDL remand order.

### **Technical Review of U.S Fish and Wildlife Service Mercury Report**

When EPA proposed the California Toxics Rule (CTR), the rule contained a human health criterion for total mercury of 50 ng/L. As part of its consultation under the federal Endangered Species Act (ESA), the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (Services) issued a draft Biological Opinion, which concluded that the certain components of the CTR (including the mercury criterion) proposed by EPA would likely jeopardize endangered species. After further consultations, EPA and the Services came to an agreement in 1999 on modifications to the CTR to remove the jeopardy opinion.

The CTR was promulgated in May 2000. As part of the agreement, EPA promised the Services that the agency would revise its recommended 304(a) human health criterion for mercury and that a soon to be proposed new human health criterion for mercury should be sufficient to protect federally listed aquatic and aquatic dependent wildlife species in California. EPA also agreed to propose revised human health criteria for mercury in California by January 2003 and to work with the Services to evaluate the degree of protection afforded to federally listed species by the revised criteria.

To facilitate this biological evaluation, EPA entered into an Intergovernmental Agreement with the U.S. Fish and Wildlife Service's Sacramento Office and in October 2003, released a report on EPA's January 2001 methyl mercury (Me Hg) fish tissue criterion (*Evaluation of the Clean Water Act Section 304(a) Human Health Criterion for Methylmercury: Protectiveness for Threatened and Endangered Wildlife in California*). The conclusion of the report was that the 0.3 mg/kg Me Hg fish tissue criterion that EPA intended to propose (based on its national recommended criterion) was not protective of certain endangered species. However the report carefully says that these conclusions do not represent the results of consultation under Section 7 of the ESA, rather they were based solely on the agencies current understanding of Me Hg behavior in aquatic ecosystems and the toxicological foundation from which the risk assessment methodology was developed.

One of the primary concerns with the report is that since EPA helped develop it, the likely outcome of a revision to the CTR would be a mercury criterion significantly lower than the 0.3 mg/kg Me Hg fish tissue criterion. NACWA, CASA, FWQC, WSPA and UWAG are jointly funding a scientific review of the report, which is being conducted by Tetra Tech, to provide comments to EPA. A draft of the review has been provided to the sponsors, and comments will be provided to Tetra Tech by December 2005. These comments are intended to ensure that the findings and conclusions in the report are consistent with the results of the scientific review, as stated in the text of the report. The sponsors will be working with Tetra Tech to have the report completed.

### **EPA Guidance for Conversion of Methyl Mercury (Me Hg) Fish Tissue Criteria to Ambient Water Criteria**

EPA has been in the process of developing guidance for the states to use to implement the January 2001 fish tissue-based Me Hg guidance criterion (0.3 mg/kg) for the states' water quality standards programs. The schedule for releasing the draft document has been delayed. Based on previous drafts and input from EPA staff, it appears that the document will positively address such issues as using the fish tissue approach rather than using bioaccumulation factors (BAFs) for TMDL targets and permit limits, as well as the use of pollutant minimization plans (PMPs) for de minimis point sources.

The 4<sup>th</sup> Qtr 2005 status of Draft U.S. EPA Guidance is that the document has gone through review by the Office of Management and Budget. After addressing OMB's comments, the U.S. EPA will then forward draft guidance to a workgroup comprised of state regulators for review before releasing the draft guidance for public comment. NACWA and FWQC may be able to obtain a pre-public version when it is sent to the states, which may be late in 2005 or early in 2006.

After review of the draft guidance, FWQC/NACWA expect to submit comments to EPA, and also will likely prepare a summary of the guidance for use by the members in advocating use of the guidance by their states. That paper would explain why this Guidance does not represent reduction in mercury control. NACWA, FWQC and other stakeholders have expressed concern that without adequate guidance, states will

simply convert the fish tissue value to a water column number using a bioaccumulation factor for ease of implementation and permitting. The Guidance will hopefully give the states other, better options to use.

### **Idaho Mercury Water Quality Standards Regulatory Negotiation Process**

The Idaho Mining Association (IMA) petitioned the Idaho Board of Health and Welfare for a mercury standards change in June 2003. The IMA proposed that EPA's 0.3 mg/kg Me Hg fish tissue criterion be used along with chronic (1.4 ug/L) and acute (0.77 ug/L) aquatic life criteria for mercury. In October, the Idaho Department of Environmental Quality (IDEQ) entered into a negotiated rulemaking with IMA, the City of Boise and other stakeholders. IDEQ published the proposed rule and implementation guidance in the August 4, 2004 State Bulletin. The package includes a discussion of variances, UAAs, monitoring and assessment programs, endangered species, fish advisories, and a statewide fish-monitoring program.

As part of the proposal, municipalities will have options to defer permit requirements by participating in the statewide monitoring program. For determining reasonable potential in permits, if fish tissue Me Hg values are > 0.24 mg/kg, the discharger must undertake mandatory BMPs; < 0.24 mg/kg, the discharger can undertake voluntary BMPs. For listing and TMDL decisions, the 0.3 mg/kg Me Hg fish tissue criterion is used as the trigger. If fish tissue levels are > 0.3 mg/kg, the water body is listed and a TMDL must be conducted. If the discharger is a de minimis source, then the only regulatory requirement is to participate in the statewide monitoring program and voluntary BMPs. If fish tissue values are < 0.3 mg/kg, the water body is not listed as impaired. If the fish tissue levels are significantly below the criterion, it may be possible to relax monitoring requirements. Endangered and threatened species were also considered in developing the proposal, and IDEQ has determined that the 0.3 mg/kg Me Hg fish tissue criterion is protective. The primary species of concern was the bald eagle. Reasonable potential analyses for permits will also evaluate the aquatic life criteria. If there is reasonable potential, there will be permit conditions and mandatory BMPs.

In April 2005, Idaho became the first state in the US to adopt EPA's fish tissue mercury criterion for human health (adopted by the State Board in August 2004 and approved by the legislature in April 2005). This implementation document was also finalized in April 2005. Idaho's latest water quality standards, including the new mercury provisions and the latest mercury guidance document are posted on IDEQ's web site [http://www.deq.state.id.us/water/data\\_reports/surface\\_water/monitoring/standards.cfm](http://www.deq.state.id.us/water/data_reports/surface_water/monitoring/standards.cfm).

As discussed above for the draft, the final version provides guidance on how the criterion is to be implemented (e.g., in TMDLs, NPDES permits, etc); with the focus on the "fish tissue only" approach as contrasted with the approach in which the tissue value is translated into a water column criterion via bioaccumulation factors. The guidance could serve as a national precedent given that EPA's own implementation guidance has stalled with no announced reason for the delay or anticipated date of release for comment. The Idaho guidance is consistent with EPA HQ policy based on EPA's

internal pre-draft of its guidance. Note that the final rule adopted by Idaho does not include water column acute or chronic aquatic life criteria for mercury (i.e., the old EPA criteria were deleted and not replaced with the newer criteria) due to concern about the scientific validity of those criteria and because Idaho believes the tissue criterion will be protective of aquatic life in most cases. In October 2005, EPA Region 10 approved Idaho's fish tissue criterion as adopted, but took no action regarding the deletion of aquatic life criteria. Without EPA action on the aquatic criteria, this change is not in effect for NPDES permitting purposes (per the "Alaska Rule"). As a result, the EPA and IDEQ will be having further dialogue about the aquatic life criteria.

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*Current as of: May 2006*