

Appendix F

**Transcript of the May 12, 2010
Testimony Hearing**

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California Regional Water Quality Control Board

San Francisco Bay Region

May 12, 2010, 10:00 a.m.

Elihu M. Harris Building

First Floor Auditorium

1515 Clay Street

Oakland, CA 94612

Item 7. Planning - Proposed Amendment to the Water Quality Control Plan (Basin Plan) to add Surface Water Bodies and Designate Beneficial Uses - Hearing to Receive Testimony on Proposed Basin Plan.

1 **Item 7. Planning - Proposed Amendment to the Water Quality**
2 **Control Plan (Basin Plan) to add Surface Water Bodies and**
3 **Designate Beneficial Uses - Hearing to Receive Testimony on**
4 **Proposed Basin Plan.**

5 Mr. Wolfe - Item 7 is a testimony hearing on both
6 Basin Plan Amendment that would add a number of surface
7 water bodies to the Basin Plan and designate beneficial uses
8 for both those surface water bodies and a number of water
9 bodies that are already in the Basin Plan that do not have
10 designated beneficial uses. So I would like Janet to make
11 the staff presentation. And I remind you that, since this
12 is a testimony hearing, there is no action on this idea
13 today.

14 Ms. O'Hara - Good morning. I am Jan O'Hara, an
15 engineer with the TMDL Planning Division. This item, as
16 Bruce said, is the first of two hearings. It is a testimony
17 hearing today, so you will have a chance to hear from
18 stakeholders and plenty of time to ask questions of the
19 stakeholders, as well.

20 The item before you is a proposed Basin Plan
21 Amendment that would update the list of water bodies in our
22 region for the first time since the Basin Plan was adopted
23 in 1975. At that time, the Basin Plan was really a
24 groundbreaking accomplishment, but it was also meant to be a
25 living document. So this item is a significant effort to

1 update the Basin Plan with new information about water
2 bodies and beneficial uses. So, clearly, one of the main
3 purposes of this Amendment is to update the Basin Plan. We
4 want the Board, the staff, and the public all to have access
5 to current and unambiguous information. We are also adding
6 clarity by identifying more water bodies and stating their
7 beneficial uses. And to give you an example of how the
8 Basin Plan is not real clear now, we hear from people when
9 they are referring to water bodies that either are not on
10 the Basin Plan, or they are on there, but do not have any
11 beneficial uses, those people will say, "Well, there are no
12 uses of that water." And that is not correct. Also, we aim
13 to increase efficiencies with this amendment because the
14 current practice of determining beneficial uses when they
15 are not identified in the Basin Plan is inefficient.

16 The Board recognized these issues and prioritized
17 this project in both the 2004 and 2009 Triennial Reviews,
18 and actually Board member Steve Moore remembers initiating
19 this project in 2003. He started up the work and we built
20 upon it. And we had to do other things for a while, other
21 priorities, but we put our resources back into this project
22 and think it is really important, and we are here today.

23 Chair Muller - We did not realize there was child
24 labor in the state at that time.

25 Ms. O'Hara - Well, he was precocious.

1 Mr. Moore - I could not get anything done.

2 Ms. O'Hara - He got a lot done. Okay, it is not
3 our purpose here to create beneficial uses. The amendment
4 follows Clean Water Act Guidelines for designated beneficial
5 uses that exist, or have existed, since 1975. So we are not
6 creating, but rather clarifying what uses exist. This
7 proposed amendment would modify Chapter 2 of the Basin Plan.
8 And Chapter 2 is all about beneficial uses of the waters in
9 our region, surface waters, ground waters, wetlands. Today,
10 we are only talking about surface waters. Chapter 2, along
11 with Chapter 3, which is all about water quality objectives,
12 forms the Water Quality Standards that we have to attain
13 under the Clean Water Act.

14 The proposed amendment includes the elements
15 listed here, 280 plus water bodies are added to Table 2-1,
16 and examples of water bodies that we have added include
17 Oakland and Richmond Harbors and San Leandro Bay, all real
18 busy water bodies; it includes Sausal Creek, which still has
19 migrating Salmon, Hayward Shoreline Marsh with its numerous
20 rare species, Kirker Creek, we recently added that to the
21 303(D) List of Impaired Water Bodies, and lots and lots of
22 sloughs all around the Bay margins.

23 So another element is beneficial uses are
24 designated for the new 280, plus 100-odd water bodies that
25 are on Table 2-1 now without beneficial uses. It includes

1 maps that are updated and I will give you a bit more on
2 that, and of course the revision to Chapter 2 text.

3 So let's talk about these updated maps. The Basin
4 Plan now contains seven maps, one for each of our hydrologic
5 units. Central Basin is shown here. We are adding water
6 bodies, of course, to all seven basins. In 2005, staff put
7 in a lot of work and effort in updating the Basin Plan maps
8 with GIS and with work that the Oakland Museum did on
9 mapping water bodies all around the Bay. The proposed
10 Amendment would further update these maps by delineating or
11 labeling all of our new water bodies. To get adequate
12 resolution, we are upping the number of maps in the Basin
13 Plan, there are seven now, and there would be 18. We think
14 these newly updated maps would be a great resource online
15 for local creek groups and all the other stakeholders. But
16 where we are going is we hope to one day have just one large
17 map with the Basin Plan online, with lots of layers of
18 information that you can get at a click of the mouse, like
19 beneficial uses, impaired water bodies, even swamp data. So
20 that is where we hope to go with the maps.

21 Now, the central basin here, I would like to talk
22 about how it is a good example of where we added water
23 bodies because, for instance, here in the East Bay, none of
24 these water bodies, except for Berkeley Park Lagoons, are
25 currently on the Basin Plan. So we are adding all of this

1 Richmond Harbor, and all of these creeks. And here in
2 Northern San Francisco, just a little tip of the Peninsula,
3 we are adding the one that is here, so there are a few more
4 to be spoken for in San Francisco, it is not really totally
5 all pegged. We think it is important to show those things.

6 Okay, so far I have talked about adding water
7 bodies and map updates, two of the elements, and now I would
8 like to talk about how we designated the additional uses.
9 And beneficial uses are the beneficial ways water is used by
10 humans and wildlife. I am going to quickly touch on each of
11 the beneficial uses that are part of this project, and then
12 add a couple more details on a couple issues after that.

13 All water bodies, be they salty or fresh, have got
14 these three beneficial uses, wildlife habitat, water contact
15 recreation, called Direct 1, which is recreation where
16 ingestion of water is likely, like swimming and fishing.
17 And non-contact water recreation, we call Rec 2, and
18 examples of that are picnicking, beach combing, and
19 aesthetic value, aesthetic enjoyment. So all fresh waters,
20 like streams and rivers, were designated with warm fresh-
21 water habitat and, if evidence existed, they also were
22 designated as cold freshwater habitat. So evidence of cold
23 freshwater habitat includes published reports and the
24 National Marine Fishery Service Database that tells the
25 distribution of cold water species, like Salmon, Steelhead,

1 Rainbow Trout, and Coho Salmon. A stream can have both warm
2 and cold because of temperature gradients. For the most
3 part, we did not try to segment streams into different
4 reaches, we designated uses on the whole water body, with
5 two exceptions, and that is tidally influenced waters, like
6 Napa River Tidal, Napa River Non-Tidal, which has two
7 separate listings, different uses, and also creeks that have
8 above-dam and below-dam would often get two listings. But
9 other than that, not so much. Because documentation does
10 not exist to show which reaches of streams would have, say,
11 cold water, where fish would be spawning, particularly, it
12 would be extremely resource intensive to try to gather all
13 of that information to break into reaches. So we feel that
14 being protective of uses throughout the watershed is the
15 appropriate way to designate uses, and we find this is
16 consistent with regions across the state.

17 Beneficial uses on this slide were designated on
18 specific types of waters, Estuarine habitat found in San
19 Francisco Estuary and tidally influenced rivers, streams
20 that discharge to reservoirs or wetlands were designated
21 with freshwater replenishment, ocean waters are identified
22 as marine habitat, and reservoirs were designated as
23 municipal and domestic supply, along with a couple of North
24 Bay Creeks that are actually used as drinking water sources
25 by municipalities.

1 The remaining beneficial uses shown here were
2 designated only where documentation shows that they exist
3 now, or have existed since 1975. These include commercial
4 and recreational fishing, and for that we looked mostly at
5 California Fish & Game website that talked about fishing
6 opportunities or fishing licenses.

7 The next is groundwater recharge. We primarily
8 used the Watershed Characteristics Report from the Santa
9 Clara Valley. A good portion of our recharge is in the
10 South Bay, and that was a good source of documentation.
11 Fish migration we got from reports and databases, navigation
12 was based on NOAA Nav Charts. Preservation of rare
13 endangered species - resource agencies provided most of the
14 documentation for this, either staff or web-based
15 information. And fish spawning, again, from reports and
16 databases, pretty much the same ones for cold spawn and
17 migration, the same reports and databases.

18 So that is how we designated beneficial uses, and
19 as I said, a couple of issues need further explanation,
20 starting with why we designated warm, wild Rec 1 and Rec 2,
21 on nearly all water bodies. The rationale for these
22 designations is the Clean Water Act rebuttable presumption,
23 which says that wherever attainable, water quality which
24 provides for the protection and propagation of fish,
25 shellfish, and wildlife, and provides for recreation in and

1 on the water, will be achieved. You have heard of this as a
 2 "Fishable, Swimmable Waters Goal" of the Clean Water Act.
 3 And that is why we proposed to designate warm for protection
 4 and propagation of fish, wildlife habitat for protection and
 5 propagation of wildlife, Rec 1 for recreation in the water,
 6 Rec 2 for recreation on the water, for all water bodies
 7 virtually. We are being consistent with what has been done
 8 in other regions and this approach is supported by the U.S.
 9 EPA.

10 The rebuttable presumption is about water quality.
 11 Although water quality must support these four uses, the
 12 four presumptive uses, when it comes to reservoirs, body
 13 contact recreation does not actually occur. You know that
 14 water supply agencies prohibit swimming and other activities
 15 to protect water quality for drinking water. Some agencies
 16 also limit public access to the entire watershed surrounding
 17 a reservoir, like this one here, Calaveras Reservoir. Even
 18 so, under the Clean Water Act, the water quality of these
 19 reservoirs must be protective of recreational uses.
 20 Currently, our Basin Plan designates Rec 1 as limited or
 21 existing for reservoirs, with little mix, some are limited,
 22 some are existing, for recreation in the water. And in the
 23 Basin Plan now, limited is not defined, but we all pretty
 24 much understand what that means. What we propose to do is
 25 to designate Rec 1 as E-Star for Reservoirs, to indicate

1 that Rec 1 exists, but barriers to recreation are in place.
2 This convention is consistent with other regions, most of
3 the regions across the state. By doing so, we are not
4 saying that the public should be allowed access to
5 reservoirs. And that brings me nicely to the comment
6 letters we received on the proposed amendment because we
7 heard from four water supply agencies that are all listed
8 here, who object to the E-Star designation for water contact
9 recreation. They are concerned the public will perceive
10 that swimming and similar uses should be allowed, and that
11 public pressure to allow swimming will increase and they
12 already have pressure like that from various public groups.
13 Also, by saying that Rec 1 exists, when recreation in the
14 water is not allowed, these agencies think that we are not
15 clarifying the Basin Plan, which is one of our objectives;
16 but please note, the agencies do not object to the
17 application of the bacteriologic water quality objective to
18 reservoirs, their concern is only that people may feel
19 increased access is warranted based on seeing the "E" in the
20 Rec 1 column. So we stand by our designation of E-Star for
21 reservoirs. I repeat that this is consistent with other
22 regions across the state; however, we do agree with the
23 commenters that the explanation of E-Star in the Basin Plan
24 text and how it means that this is a water quality, not a
25 physical access requirement. This could be expanded in the

1 Basin Plan text and we plan to do that.

2 Two storm water programs, San Mateo and Santa
3 Clara, and Santa Clara's legal counsel, object to our broad
4 application of Clean Water Act presumptive uses. Instead,
5 they ask that we show documentation for every use. The
6 programs particularly do not think that Rec 1 applies to all
7 creeks, they say that people are not swimming or wading in
8 those creeks. We stand by our designation of presumptive
9 uses in similar fashion as we do for the reservoirs.
10 However, the programs did submit some information about
11 specific creeks, Ross, Canoas Creek, and others, and we will
12 look at information that they submitted to us. The storm
13 water programs' concern is that the broad application of the
14 Clean Water Act Presumptive Uses will result in compliance
15 issues. Under the Clean Water Act, though, the presumptive
16 uses have existed on all these water bodies, whether or not
17 they were stated in the Basin Plan, so we are not changing
18 applicable water quality objectives. The programs also ask
19 that we take the time to designate uses on a reach by reach
20 basis, rather than on the entire water body. Again, their
21 concern is potential compliance problems. We do not agree
22 that adequate information exists to assign beneficial uses
23 to some creek reaches and not to others. Also, we expect to
24 be practical in any potential impairment listing; for
25 example, we would monitor cold water temperatures in creeks

1 in the upper reaches of the watershed where we would expect
2 to find cold water species, not in the lower reaches.

3 In its letter, the U.S. EPA expressed support for
4 the proposed Amendment and designation of Presumptive Uses
5 to virtually all water bodies, and asked that the Basin Plan
6 text be clearer about how the only way to remove beneficial
7 use is by D-Designation. We agree with them, and we will
8 make sure the text is clear on that.

9 And lastly, we got a lot of good helpful
10 information from some of the other commenters that are
11 listed here. They gave us specific instances where we have
12 gotten spellings, we have gotten creek names wrong, we have
13 got a case where the City of San Jose misplaced a creek into
14 the wrong slough, where we switched slough names, all of
15 that is really helpful. There are 400-500 water bodies
16 being looked at here, so we really appreciate when people
17 helped us with some of those specific comments, and we feel
18 like we can make the changes they suggested.

19 Okay, in the coming weeks, we will be preparing
20 responses to all the written comments and to all of the
21 comments that we hear today from you and the stakeholders.
22 And we will make revisions to the Amendment and Staff Report
23 based on those comments. We will be bringing the revised
24 proposed Amendment back to you in July for consideration for
25 adoption. And that concludes my presentation and I would be

1 happy to take your questions.

2 Chair Muller - Any questions of Janet at this
3 time?

4 Dr. Singh - [Inaudible]

5 Chair Muller - Bring your mic in, Dr. Singh,
6 please. Yes, you can ask questions of staff.

7 Dr. Singh - You know, I agree with many of the
8 comments we have received. Some of the creeks are simply
9 [inaudible], do not have water in the summertime, and just
10 listed tiny tiny creeks [inaudible] and there is no
11 beneficial use at [inaudible]. Some of the sloughs along
12 the way are not approachable [inaudible]. So I think it is
13 nice to open a dialogue, collect that, but I do agree that
14 even big creeks like Coyote Creek in our area, is not usable
15 for beneficial uses, and many regions. So probably you will
16 need a lot more work, a lot of [inaudible] to designate for
17 what is for what creek, what reservoir. Some of the
18 reservoirs which are especially for potable water,
19 especially connected to treatment plants, water treatment
20 plants, they cannot be allowed to have body contact
21 recreation, things like that. So I think this is nice to
22 invite comments. This is a good goal. But what we have
23 right now, probably out of 280 bodies you have listed,
24 probably more than half of them [inaudible]. Some of those
25 creeks are very deep, [inaudible], and it is very dangerous

1 to get in there. So I think it is a good goal, but I will
2 comment that staff, you have got a lot of work ahead of you
3 before you can implement it, in my opinion.

4 Chair Muller - Any other comments? Board member
5 Peacock.

6 Mr. Peacock - Jan, you have listed 280 bodies of
7 water. Are the list of bodies of water that are not listed?
8 So every single body of water in --

9 Ms. O'Hara - I am Jan O'Hara. No, not every water
10 body made it onto the list. Some were very small. What we
11 tried to do was to get a geographic representation so that
12 water bodies are not all listed, but something near that
13 would be, that would help in identifying beneficial uses for
14 future for bodies that are not on the list.

15 Mr. Peacock - Well, I guess if you look at the
16 inverse of it, do you have a list of the bodies of water
17 that you are excluding from this?

18 Ms. O'Hara - No, I do not have a list. There are
19 many creeks with no names, there are creeks that I could
20 list that I know we looked at and did not put on. For
21 instance, sloughs, like if you look at this picture, well,
22 this is all Newark Slough, but there are places were sloughs
23 and sloughs and sloughs, and you might have six different
24 sloughs, and so not every one of them needed to be on the
25 Basin Plan, so one or two would be on, so I could develop a

1 list that I rejected, I do not have that list.

2 Mr. Peacock - No, I am not suggesting that. I am
3 just wondering how you arrived at the determination of one
4 goes on and one does not.

5 Ms. O'Hara - Well, that is a good question. So we
6 tried to get geographic representations so that there were
7 not bare spots, which is what I showed in that Central Basin
8 Map. We tried to make sure that all types of water bodies
9 were represented, so previously there were not too many
10 sloughs, so we looked at adding a lot of sloughs and made
11 sure there were - all the main stems, and then an assortment
12 of the tributaries. And reservoirs were a little sparse
13 before, too, so we concentrated on getting more reservoirs
14 represented in the Basin Plan.

15 Mr. Peacock - Thank you.

16 Ms. O'Hara - You are welcome.

17 Chair Muller - Vice Chair.

18 Dr. Young - Yeah, I have a procedural question. I
19 tend to come at this issue from the opposite direction of
20 Dr. Sing, which is to be very comfortable with the
21 presumption that any body of water that some kid might want
22 to wander into should have a rebuttable presumption that it
23 would be fit for contact recreation. But having said that,
24 I would like to dig down a little bit into the comments that
25 we received about people being concerned about compliance

1 issues, and it seems to me that what they were concerned
2 about is that there might be a stream reach that really for
3 some reason would be inappropriate for Rec 1, let's say, and
4 they were concerned that there would have to be some
5 expensive management, as a result. Can you walk us through
6 the process of what the Board and staff would do when faced
7 with the circumstance like that? You know, what is the
8 procedure that we would go through if we found ourselves in
9 a situation where we had the unintended consequence, let's
10 say, of forcing a compliance issue where - such as the one
11 the commenters are concerned about? I am trying to get a
12 sense of how big a deal this is.

13 Ms. Feger - We do not expect this to be a very big
14 deal because you would have a compliance issue if you had a
15 particular discharge to a particular segment of a water body
16 where you might have a problem, but in that event you would
17 end up having to do some kind of a Use Attainability
18 Analysis as your way to do this, but we do not really expect
19 this to be a big problem. We are not - we are looking at
20 the full length of the water body and looking at issues that
21 would be throughout the water body, so it is unlikely that
22 one particular segment is going to propose an issue that is
23 not related to the downstream segments that we might want to
24 be protecting.

25 Dr. Young - All right, thank you.

1 Chair Muller - We might have a comment on it also
2 from one who is a water resource specialist.

3 Mr. McGrath - Terry's question was exactly my
4 question, and I would hope that the testimony focuses their
5 viewpoint on that because that is really what I want to hear
6 today.

7 Mr. Wolfe - And I think it is also worth noting
8 that, just because there is a designated beneficial use,
9 that does not in and of itself drive our regulatory program.
10 The whole program of addressing impaired water bodies is
11 really specific to lines of evidence that we collect over
12 time to determine whether or not those water bodies are
13 impaired for certain uses. And so that gets down to the
14 very specific, much more specific than what this does here,
15 and so a water body would not be designated as impaired
16 unless we were able to demonstrate those various lines of
17 evidence. And then, based on that designation, it starts to
18 drive the regulatory programs through the development of
19 TMDLs that you have been involved in, and implementation of
20 the measures that are in those TMDLs. So this is a study
21 point, it essentially also addresses a number of instances
22 where, in the past, we have had to rely on what is called
23 the "Tributary Rule," which basically says that if you do
24 not have a designated beneficial use for a water body
25 upstream, you rely on what is designated downstream. The

1 1975 Basin Plan, in some instances, is so vague that some of
2 the creeks, we had to rely on the designation of the
3 beneficial uses in the Bay because that is the downstream
4 water body we had identified, and that is clearly
5 inappropriate. And so, getting to Board member Peacock's
6 point, is that, as Jan notes, there are some water bodies
7 that really it is not appropriate to get down to such a
8 level, there still is the tributary rule that, should there
9 need to be some determination, we can look at what is
10 downstream. We are really trying to look at this on a
11 watershed-wide basis.

12 Dr. Singh - I have a follow-up question, not a
13 question, maybe it is a comment. You know, I am familiar
14 with two creeks in my area which are mentioned in your
15 report, Ross Creek and Canoas Creek, and the Ross Creek,
16 [inaudible] and I have seen that because some people live in
17 that area, they usually walk along the embankment, walking
18 and hiking, like that. And I would not call it a water
19 body. It is not a water body. When it rains, there is
20 water there, you are going to have [inaudible] there, you
21 are going to have recreation there, [inaudible].
22 [Inaudible] Creek is kind of deep, but it is also the same.
23 Sometimes some storm water drains are connected with it and
24 it kicks up and the water runs, most of the time it is a dry
25 creek, but almost [inaudible]. So sometimes, I was

1 wondering, what is a water body? When I call it a water
2 body, the Canoas Creek, a water body, is the designation
3 right for that? What I was attempting to say over here, you
4 can designate the beneficial uses for a water body if it is
5 a water body. Of course, if your definition is that during
6 the storm, the water is plentiful there, and that becomes a
7 water body, then becomes a beneficial use, I do not know. I
8 am confused over here so what I was trying to say over here,
9 that this is a great effort, you are trying, but a lot more
10 data will be needed to justify even designating a beneficial
11 use for these tiny tiny, every little line you have on the
12 map has been put on the list over there. That is what I was
13 trying to -

14 Mr. Wolfe - Well, actually -

15 Chair Muller - Let me just help answer that, too.
16 I think, Board member Singh, with respect, there is some
17 amazing legal cases out there regarding exactly what you are
18 thinking, I believe, is that correct? I mean, trust me,
19 when there is a dry creek, there are a lot of opinions out
20 there, is this a water body? And if you want to hit a hot
21 button with great grandparents who live along a creek, have
22 neighbor kids walk in the creek. Trust me, that is a hot
23 button for everybody. But anyway, I am sorry, go ahead.

24 Mr. Wolfe - And I guess the brief answer is, there
25 is a lot of legal work that has been done in terms of

1 determining what are considered waters of the United States,
2 and essentially anything at a minimum if it is what they
3 call a "blue line creek," in other words, if it shows up on
4 the U.S.G.S. Map with a blue line, that is going to be a
5 "waters of the United States," and in many instances, even
6 tributaries to that. So we are not necessarily in this
7 determining what are waters of the United States. These are
8 already waters of the United States. But we do have the
9 responsibility to protect waters of the United States as an
10 agency, so we are moving the issue past what are waters of
11 the United States to designating the appropriate uses for
12 those waters. So that is really where we are getting at
13 because there is a long legal history that has identified
14 waters such as Ross Creek and Canoas Creek, as waters of the
15 United States that we need to protect.

16 Chair Muller - I am a big believer, too,
17 personally that there are some reservoirs out there that I
18 do not want the public in it, I am sorry, I will fight that
19 one from my personal level all the way, and there are a
20 couple big ones in San Mateo on the Peninsula that I think
21 the public should stay out of.

22 Mr. Wolfe - Right, and again, we fully agree and,
23 in my mind, this is consistent with the approach we take
24 that this Board is not a land use agency, and in the same
25 way, we are not imposing any decisions on those bodies who

1 own those reservoirs as to whether or not they allow access,
2 that is not our call. We are just looking purely at the
3 quality aspects of the water in that reservoir, or in the
4 tributaries to that reservoir.

5 Chair Muller - What if we hear, this card from the
6 Water Resource Specialist and let him speak to it. I
7 believe it is Shim Cong. Are you in the room? Yeah. With
8 the Contra Costa Water District.

9 Ms. Kong - Hi, Shim Kong (phonetic) with the
10 Contra Costa Water District. Thank you very much, staff and
11 Board, for this opportunity to comment on the proposed Basin
12 Plan Amendment. CCWD had two comments to make -

13 Chair Muller - May I ask you to speak up, please?

14 Ms. Kong - Sure. CCWD has two comments to make.
15 The first is with regards to Mallard Reservoir, which is in
16 the Basin Plan, and we would like to see Mallard Reservoir
17 removed from the Basin Plan list of surface waters of the
18 region. First of all, the listing is an error and has been
19 since 1975. Mallard Reservoir was created as a forebay to
20 the Contra Costa Water District for a water treatment plant,
21 and is not a surface water of the region. It does not fall
22 under the definition of Water of the United States, it is
23 not a surface water, estuarine wetland, estuarine water, or
24 coastal water. It is in fact a man-made berm containment
25 constructed on dry land, well before 1972, and it does not

1 impound any natural drainage, but receives water through a
2 pipeline from Suisun Bay. Since Mallard is listed in error
3 as a surface water of the region, we strongly request the
4 removal of Mallard Reservoir from the Basin Plan. That was
5 our first comment. And then, our second comment was with
6 regards to the proposed designation of treating existing Rec
7 1 and Rec 2 beneficial uses to all water bodies. We believe
8 that this proposed Rec 1 and Rec 2 beneficial use
9 designation lies on an overly broad interpretation of the
10 intent of Section 101(A)(2) of the Clean Water Act. The
11 Regional Board staff sites this rebuttal presumption that
12 fishable and swimmable uses are attainable for all water
13 bodies; with regard to Mallard Reservoir, which is a forebay
14 to a drinking water treatment plant. The California Health
15 and Safety Code Section 115825B prohibits all body contact
16 recreation in drinking water reservoirs, and we believe that
17 the E-Star designation, while we understand that the intent
18 is to convey a water quality goal, the E-Star designation is
19 misleading in that it suggests an existing beneficial use,
20 where such a use has never been permitted or intended as a
21 drinking water source. And so this E-Star designation, we
22 believe, runs counter to the stated goal of clarifying the
23 Basin Plan. We would therefore strongly recommend the Board
24 to reconsider the use of assigning these Rec 1, Rec 2
25 beneficial uses for all surface water bodies. I believe

1 that captures all of our comments.

2 Chair Muller - Thank you.

3 Dr. Singh - Thank you.

4 Chair Muller - Response from -

5 Mr. McGrath - No other speaker cards.

6 Chair Muller - No other cards.

7 Mr. Wolfe - Yeah, we can provide a brief response,
8 but, remember, all of these - your comments, comments from
9 the public that we hear today, will be addressed as along
10 with all of the letters in your packet. So we are required
11 to do the Response to Comments.

12 Ms. Feger - I just want to say that the case of
13 Mallard Reservoir is potentially a unique circumstance, and
14 we are looking into this a little bit because they have made
15 some statements that it is not considered a water of the
16 U.S., they have got some statements that have been made by
17 the Army Corps of Engineers, and I have talked a little bit
18 with EPA, so we will be following up on that.

19 Chair Muller - Some clarification on a number of
20 those that you stated in your comments.

21 Ms. O'Hara - It would be fair to say I think this
22 would be a separate action outside of the scope of this one,
23 perhaps.

24 Ms. Feger - Well, we will be looking into it
25 between now and in our Response to Comments.

1 Chair Muller - All right, if there is no other
2 discussion, this will be brought back to us. Yes, Board
3 member, McGrath.

4 Mr. McGrath - My concern about this, this one
5 gives me a lot of pause and it really, I think, has to do
6 with priority setting as to how much staff resources this
7 warrants, and whether or not it ends up increasing paperwork
8 for little benefit, or for benefit that is not clearly in
9 something that we would see as high priority. I am not
10 completely sure that some of the comments are merely
11 awfulizing. I think the staff had a very good response on
12 the recreation and indicated that they are going to change
13 the language and the explanation, and that satisfies me.
14 But the storm water concerns, I would like to see more
15 flushed out about what the potential concerns are, and the
16 like. I do represent water recreation users, kayaks, wind
17 surfers, kite surfers, stand-up paddlers, one thing is very
18 clear to me is, those uses change over time, people are
19 fascinated by water, and they go in there. I watched the
20 kids at Cal Day at Strawberry Creek, my grandchildren know
21 where San Leandro Creek is, and they know they should not go
22 in there, but they are kind of fascinated. So what I want -
23 I think there is an endpoint that I want to be able to
24 distinguish between discharges where there is reason to
25 regulate, and watershed modifications that may be mistakes

1 of the past that leave us with little remnants of the
2 stream, and I do not want to necessarily focus on those
3 through anything triggered by these regulatory mechanisms.
4 When water supplies are developed, there is supposed to be a
5 consideration of public trust, and maybe it was not
6 sufficient, but there certainly is the ability in good
7 governance to allocate public trust uses to one of the uses
8 - water supply, control of flooding, and the like. And as
9 long as that is properly done, an excluded public access, I
10 do not want to re-enter that. So I do not want to create
11 anything here that allows a re-entry to that. I do not
12 think that is a correct use of the Basin Plan. So perhaps
13 there just needs to be more explanation to me, as a Board
14 member, and the storm water agencies, that if it is not
15 creating that, I do not want to take it back to the 30,000-
16 foot level, I do not want to just regulate because we need
17 to update the Basin Plan; I want to make sure that any
18 regulation would end up focusing on a priority. So that is
19 my direction.

20 Chair Muller - Well said. Board member Moore.

21 Mr. Moore - Thanks for the really excellent staff
22 report. I think the staff have captured a lot of the
23 rationale here. So I want to throw my weight as the single
24 Board member behind this effort very strongly, not just
25 because I worked on it and have a sense of what is at stake,

1 you know, or in sort of a personal stake in it, but this, as
 2 articulated, has been indicated as a top priority through
 3 public review of the Basin Plan for the last decade or more,
 4 so this response to that interest in the public. There are
 5 some philosophical questions that have been brought up, and
 6 frankly I think folks know, I am pragmatically minded about
 7 this kind of thing, I am concerned about the unintended
 8 consequences of designating Rec 1 and strictly areas where
 9 it may not be appropriate. But I appreciate the response
 10 the staff had to that. And I will provide a little
 11 illustration that may help articulate why it is warranted to
 12 go about things this way. So when we talk about unintended
 13 consequences, I want to just respond strongly that there are
 14 unintended consequences of not going through this exercise,
 15 that this agency has wrestled with for the last 25 years,
 16 and I have been in the thick of it. San Lorenzo Creek, a
 17 significant water body in the East Bay, is not in the Basin
 18 Plan, it is ridiculous. And it really puts the Basin Plan -
 19 it questions the credibility and how current the Basin Plan
 20 is. It undermines its regulatory authority to have such
 21 factorable omissions. And I will just remind the Board
 22 members, the issues here are not that controversial, nobody
 23 has really come to this hearing, except for this really
 24 important good discussion about, you know, where should
 25 water contact recreation be designated. I mean, really the

1 narrative, we do not have anybody complaining about the
2 fish, you know, the idea of extending the fishing beneficial
3 use to fresh waters in the region, which by the way, is not
4 in the Basin Plan. Did you know that? So these are really
5 important things to just get the facts sort of straight.
6 And the point I would like to make, too, just to really
7 acknowledge, a shift since 1975 that is geopolitical in
8 relation to the public's relationship with the water bodies
9 of the region, and I think there are pivotal actors in that,
10 Oakland Museum, the Watershed Forums of the Bay Area,
11 whether in Contra Costa, Santa Clara, San Mateo, Marin,
12 Solano, you name it, Alameda. And the geopolitical
13 significance of the creeks, sloughs and lagoons today is a
14 lot different than in 1975. The 1975 Basin Plan, to give
15 you a little historical perspective, really was geared
16 toward regulation of wastewater, sewage and industrial
17 wastewater. So the water bodies on the list really reflect
18 that. And now we have people that identify with their local
19 creeks, but really have a deep sense of hurt that the
20 governing bodies do not recognize, specifically, the name of
21 that creek. And according to Board member Peacock's
22 excellent question about where do you stop, you know, we
23 certainly wrestled with that at our staff level, but what we
24 were faced with was an uneven distribution of water bodies
25 around geographically, and I think you have done a really

1 credible, defensible job of making the density of the water
2 bodies in the Basin Plan more even, and that is a big
3 starting point, but also being responsive to this very
4 personal issue of the name of the place where I live, and
5 where the water goes over the land. And so I would like
6 also the Board members and others to think through how these
7 are implemented before rushing to concern about mandating,
8 you know, public use of swimming and drinking water
9 reservoirs, it is not how they are implemented. There are
10 two legitimate concerns, you know, about - so 303(D)
11 listing, I think staff responded to that, that any kind of
12 impaired water body exercise looks at the whole watershed,
13 so these little pieces of creek are not singled out for
14 separate regulatory requirements. That kind of concern in
15 terms of practice is not warranted because that is not how
16 the agency operates simply because of resources that Board
17 member McGrath brings up. But ultimately discharge
18 requirements that this Board establishes, the real
19 regulatory rubber hitting the road, would have to meet water
20 quality objectives, and those water quality objectives are
21 based back on the beneficial use. That is where the rubber
22 hits the road in terms of this regulatory action, so that is
23 why a Rec 1 use established for Canoas Creek is relevant,
24 because it is upstream of Guadalupe River, which has many
25 locations of public contact. And it is appropriate to set

1 discharge standards based on bacteria standards to meet
2 water quality beneficial uses downstream in that same
3 watershed. So that is how - you are thinking through how it
4 gets implemented, and that is where it goes ultimately. So
5 I think I have touched on that. There is a rebuttable
6 presumption in terms of how we operate, it is legitimate, it
7 does not mandate any kind of land use. And then I would say
8 to Dr. Singh, respectively, it is not appropriate at this
9 time to use current land use to dictate what recreation or
10 such other uses may have in the future. And then I have to
11 finally say, technically, a dry creek has water in it. It
12 has got a hyperene zone that supports riparian vegetation
13 and supports whole ecosystems. So it is incredibly
14 important to protect dry creeks in the State of California.
15 And the fact that - I will let it go. Thank you, Board
16 members.

17 Chair Muller - That is why you are here, good job.
18 Board member McGrath.

19 Mr. McGrath - I really appreciate Steve's comments
20 and one distinction that I would like to see show up in
21 this, and it is a distinction that I hold when I look at
22 when you take out the regulatory tool set, when you take out
23 the coalition building tool set, because they are really
24 different. And preservation of the stream, and the stream
25 function, whether it is riparian, vegetation, sediment

1 transport, you know, the fact that there are kids in there,
2 that is a legitimate regulatory function. Restoration of
3 systems is a different kind of animal, it involves coalition
4 building, funding, you are not going to accomplish it with
5 your regulatory tool box. And I want to see that clear
6 distinction made because people will ask us to restore
7 things with the regulatory tools and they are just not well
8 suited. But I do strongly agree with Steve that we need to
9 get the beneficial uses right.

10 Chair Muller - Very good, thank you. Vice Chair.

11 Dr. Singh - Can I make a comment after hearing all
12 the comments over here? [Inaudible] that quality of
13 discharge into these creeks, even the storm water should not
14 be [inaudible]. My comment was specific, that some of these
15 creeks, we just cannot designate that they are suitable for
16 Rec 1 or Rec 2, or [inaudible] or something like that. You
17 can go to Ross Creek, there is no water, it is full of
18 grass, it is all grasses, and I am very sure some kind of
19 animals are there, even some snakes, so there is no water
20 there, and I am just saying that some animals are probably
21 living in the bushes over there, but the water comes at
22 certain times when there is rain. So I was not trying to
23 say that do not make a designation that this should be used
24 as in all the water bodies for all the beneficial uses, just
25 find [inaudible]. If you want to regulate a discharge and

1 quality of discharge into this, that is a separate issue.
2 But beneficial uses when there is no water [inaudible].
3 So my comment was simply saying that there is a lot more
4 water [inaudible].

5 Chair Muller - Thank you, Board member Singh. We
6 could get into a little House of Commons thing, we could
7 have a little excitement going on here.

8 Dr. Young - Yeah, we could have fun with this.

9 Chair Muller - At least we do not yell at each
10 other. Good discussion. All right, Vice Chair.

11 Dr. Young - We very respectfully disagree and we
12 will go on with it. I would just like to respond to two
13 points. First of all, on the issue of designating E-Star,
14 it seems to me that the staff proposal of how to deal with
15 that is very logical. It is clear to me, at least, what E-
16 Star means, and I think with improving the explanation that
17 is in the documentation, I think that will probably address
18 the problem. Secondly, I also support the staff approach on
19 interpreting a rebuttal presumption for the main surface
20 waters as including Rec 1 and Rec 2, and warm. I did notice
21 and we have been discussing the issue of whether or not that
22 is going to cause unintended consequences and whether or not
23 it is going to make us and others use resources doing
24 numerous use attainability analyses. I think that is a
25 valid question. On the other hand, I noticed that, among

1 all of the commenters that made that comment, not one
2 brought up a specific example, so it is unclear to me
3 whether, you know, as Jim said, this is awfulizing or
4 whether this is a real issue, I would ask you folks to, in
5 your Response to Comments, to provide an explanation that
6 would give us some more clarity as to how common in fact you
7 think this might be, if you think it is going to come up at
8 all in the real world implementation. So that is it. Thank
9 you.

10 Chairman Muller - Thank you. We better move on,
11 we are getting pinched for time here a little bit. So I
12 think you heard loud and clear a number of viewpoints from
13 not only the Board, but also from the regulated community
14 out there, so we will be looking forward for some more
15 updates coming up soon. All right, thank you. We have one
16 more item, Item 8. Are we all right, or what do we need?

17 Mr. Wolfe - Just to wrap up Item 7, we are noting
18 that we recognize there is a lot of work to be done, do not
19 intend to bring that item back in June, however, when we
20 initially put up public notice, we did say we would bring it
21 back in June, so we want it to go on record that it is not
22 going to be in June, it would be July at the earliest, and
23 we will make sure we close the loop on our public notice.