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Via Email

Bruce Wolfe
Executive Officer
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Comments on Proposed Basin Plan Amendments - Addition of Water Bodies and Designation of Beneficial Uses

Dear Mr. Wolfe:

The following are legal comments submitted to the California Regional Water Quality Control Board, San Francisco Bay Region ("Water Board" or "Regional Board") on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program ("SCVURPPP" or "Program") and its co-permittees concerning the proposed amendments to the San Francisco Bay Region Water Quality Control Plan ("Basin Plan") to add water bodies and designate beneficial uses.[1]

The Program believes that the proposed Basin Plan amendments are not supported by adequate analysis of actual existing or probable uses, and can be much better tailored in the manner suggested below and in the Program's separately submitted technical comments. Further, the Program believes that the analysis set forth in the Staff Report supporting the proposed amendment does not sufficiently consider its implications as is necessary to meet the requirements of sections 13000 and 13241 of the Water Code and the California Environmental Quality Act ("CEQA").

[1] The co-permittees are: Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga, Sunnyvale, Santa Clara County, and the Santa Clara Valley Water District. The Program will be submitting additional non-legal comments under its own letterhead.

In brief, we request that the staff provide the public and members of the Water Board with:

(1) a revised set of proposed designated uses that is based on available evidence of actual existing uses and reasonably attainable potential uses, rather than an unnecessary and potentially extremely burdensome application of "presumptive uses" to virtually all water bodies in the Region;

(2) an evaluation of the likely economic burdens that may be imposed on municipal stormwater dischargers and others under the amendment as proposed or as modified, including an analysis of whether such burdens bear a reasonable relationship to the potential water quality gains; and

(3) a revised CEQA analysis that addresses environmental impacts associated with complying with municipal stormwater requirements associated with addressing the proposed new designated uses and which considers a reasonable range of alternatives to the current proposal, including one or more based on the suggestions contained in SCVURPPP's technical comments.

1. The Proposal to Create Blanket Designations based on "Presumptive Uses" Is Not Justified.

(a) Data Contradict the Use of the Proposed Blanket Approach.

The proposed amendment would presumptively apply the REC-1, REC-2 and WILD beneficial uses to *all* designated water bodies, throughout their entire reach, at all times, regardless of whether staff can point to any evidence that such uses actually exist, extend so far in time or space, or are reasonably attainable. This is not supportable as it is *not* permissible to ignore existing data (such as that pointed to in SCVURPPP's technical comments) which indicates that specific uses – whether presumptive uses or otherwise – actually *do not* exist. (*See Idaho Mining Ass'n v. Browner*, 90 F. Supp. 2d 1078 (D. Idaho 2000)).

With respect to many of the identified REC-1, REC-2, and other uses, for example, the available evidence counters the presumption that such uses exist in certain waterways. The Program's technical comments point to data which show, for instance, that Canoas Creek, an intermittent water body, is either concrete channel or earthen levee, is fenced off on Santa Clara Valley Water District property, and has had no observed public access during field reconnaissance or sampling events. Also, for example, current Program information indicates that the proposed REC-1 listing for Lower Penitencia Creek is not supported since that portion of the creek is concrete lined and fenced to protect the public. Therefore, in the absence of stronger evidence to the contrary, the presumptive use doctrine is an inappropriate basis on which to designate REC-1 or REC-2 uses for this water body (and others where

similar evidence that a use does not exist is uncontradicted in the record). (*See Id.* at 1107) (finding EPA's designation of water body for cold water biota use to be arbitrary and capricious where the only data available indicated that such a use was not attainable).

(b) Broadly Designating for Presumptive Uses Will Ultimately Lead to a Resource-Consuming De-designation Process.

Once uses have been officially designated in the Basin Plan as existing, whether they are in fact or not, the Regional Board is obligated to take action to regulate them fully (including via TMDLs where necessary) or will have to *de-designate* those uses through a subsequent Basin Plan amendment. (*See* State Water Res. Control Bd. Order WQO 2002-0015, In re Waste Discharge Requirements for Vacaville's Easterly Wastewater Treatment Plant, at 15.) Not only are Basin Plan amendments significant efforts, once put into place, a costly use attainability analysis ("UAA") is required to remove designations or even to limit them in terms of their geographical or seasonal scope. (*See* 40 C.F.R. § 131.10(j)). Conducting a UAA and going through a separate Basin Plan amendment process to de-designate *presumptive* uses that never should have reasonably been designated as truly *existing* in the first place is simply not a prudent use of anyone's resources, particularly where there is a dearth of evidence that such uses actually exist or could reasonably be supported. The alternative of designating only those uses for which evidence of actual use exists right now and collecting and assessing data about whether others do or can reasonably be attained (which will occur under the new municipal regional stormwater permit) before taking further action to change the Basin Plan otherwise is a far more sensible and resource-conserving approach.

(c) Continuation of Application of the Tributary Rule is More Appropriate than Enumerating New Presumptive Uses.

In those cases where the Regional Board has no evidence before it of the existence of a use in a tributary or tributary segment, the Program submits that the Board should not designate such uses as "Existing" based on a presumption and should instead rely on the Basin Plan's longstanding "Tributary Rule." Under the existing Tributary Rule, the Regional Board will be able to apply the "presumptive uses" to specific tributaries and tributary segments it finds in need of additional protection, without tying the Board's hands into having to either apply them in every situation and then going through the formal UAA/de-designation process where it concludes that such protection is not necessary because the use does not and cannot reasonably exist.

If the Regional Board does not decide to continue applying the Tributary Rule to address these situations (as it has successfully for approximately 25 years), it could, at a minimum, create more tailored designations of water bodies as the Program's technical comments

suggest (i.e., identifying particular segments where certain uses may be in existence; identifying water bodies that may only exist, and therefore need to have associated uses protected, on a partial extent or seasonal basis). Additionally, the Water Board could differentiate between degrees or intensities of usage, identifying not only "Existing" but "Limited" and "Potential" uses. In particular, designating certain water bodies for "Limited" REC-1 use could, for example, recognize that protection for full-body water contact use is not necessary because such a use is as a practical matter prohibited by physical conditions. We note in this regard that staff have, in fact, recommended to designate some REC-1 uses as "Existing … but administrative or physical barriers to full body contact are in place." However, they do not take this concept far enough and instead appear to have nevertheless applied the full "Existing" designation to a number of water body segments (including several identified in SCVURPPP's technical comments) that do not reasonably support such a full and unrestricted use designation.

In sum, the blanket designation of REC-1, REC-2, and WILD uses as "Existing" in all water bodies based on "presumptive" uses is far broader than necessary to protect *actual* existing uses and reasonably attainable ones and will trigger either burdensome compliance costs, cumbersome and expensive UAA and de-designation processes, or both. A more conservative and tailored approach to use designations that focus on actual and documented existing uses, is limited to the segments and seasons in which they actually occur, with continued reliance on the Tributary Rule until data gaps are filled where such information is unknown would be a far more prudent approach at this time.

2. The Potentially Significant Economic Costs of Sweeping New Use Designations has Not Been Considered as Required by Water Code Sections 13000 and 13241.

Water Code section 13241 directs each Regional Board to, among other things, take into account the economic reasonableness of compliance with its proposed water quality standards, and to consider "past, present and future *probable* uses." Moreover, the Water Board's guiding policy, expressed in Water Code section 13000, is to "attain the highest water quality which is *reasonable*." The Staff Report does not address these requirements and instead appears to disclaim any responsibility to conduct analysis of the economic implications of the proposed Basin Plan amendment by simply stating there would be none. (See Staff Report at 14).

Indeed, it is clear that the Basin Plan amendment, if adopted in its current form, could impose significant compliance costs, especially on public entities subject to stormwater permitting. By identifying REC-1 full body contact uses as "existing" for *all* water bodies, permittees – including public entities operating under stormwater discharge permits – will have to be told to try and implement control measures to allow swimming to occur in even

ephemeral, inaccessible streams or to do a UAA demonstrating that this use would be impossible.[2, 3] Depending on whether water quality objectives ("WQOs") associated with supporting such non-existent uses are achieved, the designation of presumptive uses could also translate into the need for the Board to develop countless TMDLs and then require their implementation in the absence of UAAs and de-designation proceedings. Yet the Staff Report currently fails to recognize the potential for *any* newly designated uses to have *any* costs, let alone analyze whether there is a reasonable relationship between those costs and the water quality gains to be achieved.

The Water Code requires giving due consideration to factors of economic reasonableness precisely to avoid having Regional Boards inappropriately put water quality control plans in place that will require permittees to spend limited public funds on expensive and unnecessary control measures, especially for no real reason. The lack of such analysis renders the Board ill-equipped to make good public policy decisions and makes the Staff Report technically and legally insufficient as an informational document. The Water Board should therefore direct staff to put before it a real and well documented analysis of the likely economic implications of its proposed course of action before voting to amend the Basin Plan as currently suggested.

3. The Proposed Amendment's Impacts and Alternatives Have Not Been Adequately Analyzed Under CEQA.

The Basin Planning process is a certified regulatory program, which allows the Water Board to use a substitute environmental document in place of an Environmental Impact Report ("EIR"). (*See id.* § 15251(g)). This substitute environmental document must include (1) alternatives to the proposed project and mitigation measures that could avoid or reduce any significant environmental impacts, or (2) a statement that because the proposed project would not have any significant or potentially significant environmental impacts, no alternatives or mitigation measures need be addressed. (*See id.* § 15252). Here, the Staff Report simply assumes that the Basin Plan amendments will have no direct or indirect environmental impacts, and therefore erroneously concludes that "an analysis of alternatives is not needed to lessen or mitigate impacts." (Staff Report at 14). There are at least two major flaws with this approach.

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[2] Substantial resources could be required to conduct investigations such as source tracking, video monitoring, bacterial and pathogen speciation, use and exposure assessments, and natural source characterizations, and/or the implementation of BMPs such as enhanced public education programs and wet and/or dry weather pilot and full scale flow diversions.

[3] Several examples where UUAs have been required to de-designate inappropriately established uses can be found on the Santa Ana Watershed Project Authority's website, http://www.sawpa.org (under Latest Postings tab, scroll down to Stormwater Documents).

(a) The Proposed Amendment Is Likely to Cause Significant, if Indirect or Temporal, Environmental Impacts.

First, the Staff Report summarily concludes that the proposed amendments would have "*no* effect on the environment, because the waterbodies and beneficial uses have been in existence and must be protected, whether or not they are named in the Basin Plan." (Staff Report, Appendix D at 1). The Report then contains the required CEQA Environmental Checklist with *all* of the boxes for "No Impact" checked with respect to every potential category. This reflects a lack of any real analysis and simply is not credible. In reality, the proposed amendment, if it has any raison d'etre, will require *new* measures to protect *newly designated uses*, and these measures are likely to have at least some of their own environmental impacts (at least indirect or temporal ones and likely cumulative ones as well). CEQA clearly requires consideration of such impacts. (*See* CEQA Guidelines § 15126.2; *City of Arcadia v. State Water Res. Control Bd.*, 135 Cal. App. 4th 1392, 1424-26 (2006) (disapproving of Los Angeles Regional Board's failure, in preparing a TMDL for trash, to analyze reasonably foreseeable impacts of construction or maintenance of pollution control devices).

(b) Alternatives Must Be Analyzed Regardless of Whether Environmental Impacts Will Be Significant.

Second, the Staff Report neglects to fulfill the Board's duty to evaluate reasonable alternatives to the proposed action. In general, CEQA requires that an EIR evaluate a "range of reasonable alternatives" to the proposed project that would reduce or avoid certain environmental impacts, while still attaining the project's primary goals. (CEQA Guidelines § 15126.6).[4] The agency should consider several factors when assessing whether alternatives are feasible, *including economic viability*. (*Id.* § 15126.6(f)(1)). Additionally, the environmental document must include enough information to allow *meaningful* evaluation, analysis, and comparison with the proposed project. (*Id.* § 15126.6(d)). Such a discussion is necessary to foster informed decision-making and public participation. (*Id.* § 15126.6(a)).

As explained above, the Program believes that, because control measure requirements will inevitably result from them, the proposed amendment is likely to have some significant, even if indirect or temporary, effects on the environment. However, even if *no* significant impacts were to be implicated, the Board's mandate is nevertheless to analyze reasonable alternatives

[4] Although "[t]he guidelines for CEQA implementation do not directly apply to a certified regulatory program's environmental document ..., when conducting its environmental review and preparing its documentation, a certified regulatory program is subject to the broad policy goals and substantive standards of CEQA." *City of Arcadia v. State Water Res. Control Bd.*, 135 Cal. App. 4th 1392, 1422 (2006) (internal quotations omitted; citing 2 Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* § 20.10).

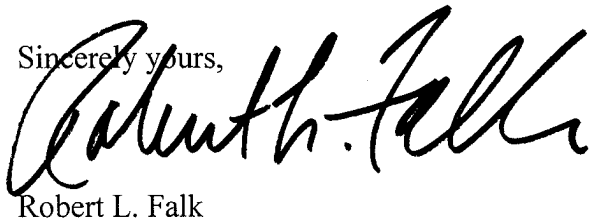
to the proposed project (i.e., Basin Plan amendment as currently proposed). Regulations specific to the State's Water Boards expressly require that "[a]ny standard, rule, regulation, or plan proposed for [Water Board] approval or adoption must be accompanied by a completed Environmental Checklist … and a written report" containing (1) a brief description of the project, (2) "Reasonable alternatives to the proposed activity, and (3) Mitigation measures to minimize any significant adverse environmental impacts …" (27 Cal. Code Regs. § 3777, emphasis added). An alternatives analysis is not only required here, it would be not be prudent for the Water Board to proceed with such a potentially important Basin Plan amendment without one.

In this regard, at a minimum, several potential alternatives appear to be worthy of the Board's consideration. For example, staff could analyze the relative impacts of an alternative that would continue the current Basin Plan's designation of certain "Limited" REC-1 uses (see City of Sunnyvale's separate comments elaborating on this concept). Or, a viable alternative may be to keep the existing Tributary Rule in place when the data on existing uses are insufficient and then filling data gaps before proceeding with a further Basin Plan amendments based on information scheduled to be collected under the municipal regional stormwater permit that documents additional existing or reasonably attainable uses and ties them to certain waterbody segments and/or seasons. These approaches would appear to fall well within the "rule of reason" governing the appropriate range of alternatives that the Regional Board should consider under CEQA (*see* CEQA Guidelines § 15126.6(a)) and are not mutually exclusive. They would, among other approaches, allow the Regional Board and its staff *more* flexibility without imposing unreasonable requirements on local public agencies.

Conclusion

For the reasons set forth above, we urge you to direct the staff to revise the proposed Basin Plan amendment in light of SCVURPPP's technical comments, to analyze a reasonable range of project alternatives, and to delineate and report back to you and the public on the environmental impacts and economic implications of them so that the most appropriate approach can be selected by an adequately informed and thoughtful decision by the Water Board.

Sincerely yours,



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