

Appendix D

Response to Comments

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**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
SAN FRANCISCO BAY REGION**

2021 Triennial Review

Responses to Comments

November 2021

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Staff Responses to Comments on the 2021 Triennial Review Staff Report and Tentative Resolution

We received five comment letters during the public comment period, which began on September 13 and closed on October 13, 2021. The comments from these letters and our responses are presented here. We have also made a small number of staff-initiated changes to the Staff Report, and we describe these changes before providing our responses to stakeholder comments.

Comment letters received:

1. Bay Area Clean Water Agencies (BACWA) (Lorien Fono)
2. Living Rivers Council (LRC)/ Institute for Conservation Advocacy, Research and Education (ICARE) (Chris Malan)
3. San Francisco Baykeeper (Ben Eichenberg)
4. San Francisco International Airport (SFO) (Nupur Sinha)
5. Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) (Adam Olivieri)

Staff-Initiated Changes

In response to strong stakeholder interest and after discussion with Water Board management, we devised a way to provide additional staff resources to support work on the project to *Designate Tribal and Subsistence Fishing Beneficial Uses*. In the draft Staff Report, this project would receive 0.5 PY of Basin Planning resources over three years. We modified the scope and description in the Staff Report for the *Regional Stream Protection Policy* project to free up staff resources to allocate an additional 0.5 PY (for a total of 1.0 PY) of support for the *Tribal and Subsistence Fishing Beneficial Uses* project over three years.

For the *Regional Stream Protection Policy*, we clarify that initial project work will focus on identifying implementation measures to promote connectivity between baylands and tidal portions of creeks. Creek to bayland connectivity is an important climate change resilience strategy because marshes and wetlands must receive an adequate sediment supply in order to accrete rapidly enough to keep pace with sea level rise. In view of the focused initial scope of the *Regional Stream Protection Policy* project, we have clarified the anticipated project work elements and reduced the staffing allocation from 1.0 PY to 0.5 PY for the next three-year period.

We also modified the description of the *Climate Change and Wetland Policy Update* project to mention possible groundwater rise caused by sea level rise, and we included a mention of the Climate Action Team formed at the Water Board to assist in the identification of implementation measures needed to protect beneficial uses. In addition to the changes noted in the previous paragraph, we modified the *Regional Stream Protection Policy* project description to explain several ways in which the project is an

important part of the Water Board's response to climate change. We also noted that, with the streamlined scope and reduced staffing, we do not anticipate completing a Basin Plan amendment for this project during the upcoming three-year period.

The description of the project to *Designate Tribal and Subsistence Fishing Beneficial Uses* was modified to emphasize that the initial work would focus on relationship-building and collaboration with tribes and subsistence fishing communities, followed by collaboration with these communities to collect the high quality data required to designate these new uses. We also point out that, like other complex Basin Planning projects, final designation of waterbodies is likely to take more than three years.

1. Comment Letter 1: Bay Area Clean Water Agencies (BACWA)

1.1. "BACWA appreciates that a review and update of Policy 94-086, 'Use of Wastewater to Create, Restore, and/or Enhance Wetlands,' was included in the Staff Report rather than being removed from the list of candidate projects."

We thank BACWA for the comment supporting this candidate project.

1.2. "It appears that a Basin Plan amendment may not be required to memorialize key outcomes of the Nutrient Management Strategy (NMS) at this time. Instead, alternate forms of documentation may be acceptable, such as via the Nutrient Watershed Permit. ...BACWA's preference would be for Regional Water Board staff to prioritize continued engagement with the NMS process over a Basin Plan amendment."

We thank BACWA for this comment and note that the commenter's interpretation is consistent with Water Board staff's view of the likely project outcome. We clarified this point with an edit to the project description noting that a Basin Plan amendment is not an anticipated project outcome during the next three-year period.

2. Comment Letter 2: Living Rivers Council (LRC)/ Institute for Conservation Advocacy, Research and Education (ICARE)

2.1. "LRC and ICARE strongly urge the Regional Board to place 3.3-Develop Flow Criteria for Selected Bay Area Streams and Rivers as an urgent high priority project." The comment letter then lists number of reasons why a flow project should be conducted.

We appreciate LRC and ICARE's continued advocacy for this project. As noted at the workshop and in the Staff Report, there are not enough Basin Planning resources to support staff work on all projects. This candidate project does address an important water quality concern and its relatively high rank reflects this importance. This project ranked seventh out of 16 projects and, therefore, falls below the tier to which available Basin Planning resources can be applied over the next three years. We understand that this work is important to the commenter, and the outcome of our prioritization process causes frustration. However, we have reviewed the points assigned for the ranking categories for this project, and we

confirmed that we scored the project fairly and consistently with our overall approach for project ranking.

2.2. “The Staff Report places establishing flow criteria in the Basin Plan as a lower priority relying on Napa County’s process to develop a Groundwater Sustainability Plan/GSP, per the Sustainable Groundwater Management Act/SGMA of 2014.”

The Staff Report contains a response to LRC’s comment from its July 6, 2021, letter sent after the Triennial Review workshop suggesting a candidate Basin Planning project to develop a groundwater protection strategy for Napa groundwater basins. The response included in the Staff Report explains that the Water Board’s Groundwater Protection Division is already working with Napa County to follow development of the Napa SGMA Groundwater Sustainability Plan (GSP) and will soon review the plan. Therefore, a Basin Planning project to develop the GSP is not necessary. Staff efforts in reviewing the Napa County GSP are unrelated to how we approached scoring and ranking the *Flow Criteria* candidate project.

2.3. “Politicians and all responsible water agencies entrusted to protect the public trust and indigenous subsistence rights are pointing their fingers in another directions for the other responsible agencies to establish flows...”

Flow criteria are both scientifically and legally complex. We appreciate that the commenter is frustrated that the *Flow Criteria* project has not yet been ranked highly enough to be among those projects included in our Basin Planning workplan. There are many critical water quality issues that need attention in our region. In fact, there are critical water quality issues motivating the need for *all* five highest ranked projects. Unfortunately, we have less than 2 PY per year in Basin Planning resources, so we must focus our attention on a subset of the candidate projects.

3. Comment Letter 3: San Francisco Baykeeper

3.1. “Tribal and subsistence beneficial uses have been given insufficient attention by this Board for many years. Because this is the lowest-ranked priority project, staff anticipates that some parts of this project will be left incomplete, thereby guaranteeing the continuation of historically discriminatory policies. The Board risk (sic) leaving in place oppressive paradigms by focusing on projects which Board staff have been engaged on for years: (1) emphasis on external resources invested benefits projects with strong financial backing, which in turn often leaves out environmental justice issues; (2) emphasis on staff resources invested potentially compounds past mistakes and barriers to participation; and (3) emphasis on input from Water Board divisions is nearly the same as staff resources invested....”

We agree that the *Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing Beneficial Uses* project is an important Basin Planning effort.

We narrowed the scope of another project which makes available an additional 0.5 PY of resources for the project referenced in the comment. With this change, the Water Board can allocate 1.0 PY in Basin Planning resources to work on this project, and we, consequently, expect to make substantial progress in reaching out both to tribes and to disadvantaged communities in the Bay Area. Establishing these relationships is essential to building trust with underserved populations, and we have noted this part of the work in the revised project description.

The Staff Report explains that a variety of criteria are used to rank candidate projects. These criteria have evolved from past Triennial Reviews to respond to current board priorities. We respectfully disagree with the commenter's accusation that our project ranking procedure is biased against projects involving environmental justice concerns. To the contrary, the Water Board is committed to consideration of environmental justice across all program areas. In fact, rather than merely establish "environmental justice" as a ranking criterion (among many), we explained in the Staff Report that we explicitly set aside a portion of our Basin Planning resources to work on efforts promoting environmental justice in our Basin Planning activities. This will guarantee that staff resources are allocated to promoting environmental justice. These "set aside" resources are *in addition to* the 1.0 PY of Basin Planning resources allocated to the *Tribal and Subsistence Beneficial Uses* project, a project which has a clear nexus with environmental justice issues related to tribes and disadvantaged communities. Section 7 of the Staff Report describes in more detail the intended use of these "set aside" resources.

Our approach to project scoring and ranking is designed to favor projects promoting beneficial use protection as well as climate change adaptation and resilience, but our approach also takes into consideration a range of other factors important for determining an intelligent use of Basin Planning resources. We also note that our increased emphasis on climate change-related projects will help ensure environmental justice. Economically disadvantaged communities are more vulnerable to climate change impacts due to lack of resources for community resilience, and they are more severely burdened by housing costs, thereby increasing the risk of displacement. So, our work on climate change simultaneously addresses, at least indirectly, these vulnerabilities.

Project scoring and ranking procedures appropriately take into account past investments of staff effort as well as investments of time and resources from external parties. Recognizing these past investments in our ranking procedures promotes project continuity and ensures success of longer-term Basin Planning projects. Certain projects, because of their complexity, require work over several years and multiple triennial review cycles. Without this consideration of past investments when scoring and ranking projects, it would be nearly impossible to maintain continuity to ensure success on long-term efforts.

The commenter is incorrect in equating investment of past resources with input from Water Board divisions. As stated in section 4.10 of the Staff Report, the purpose of the criterion, *Input from Internal Water Board Divisions*, is to identify Basin Planning projects (not currently being developed) that would facilitate Water

Board program implementation, clarify the Basin Plan, and provide better customer service.

3.2. “..no points were given for a climate nexus, when both fisheries and environmental justice communities are universally regarded as vulnerable to the greatest impact from climate change.... treat tribal and subsistence fishing as a full project deserving of the full attention of Water Board staff.”

There are no points awarded for a climate change nexus because the *Tribal and Subsistence Beneficial Uses* project is not *specifically* an adaptation or policy response to climate change. We recognize that climate change can potentially impact *every* Water Board program area, and one could, therefore, establish a connection between climate change and every candidate project. However, noting all *possible* connections is not the purpose of the climate change ranking criterion. In fact, doing so would undermine its purpose by diluting the degree to which the criterion advantages those projects that *directly* promote an adaptation or policy response to climate change. See also the comment above about how addressing climate change helps ensure environmental justice.

3.3. “Our concerns about selenium were not answered by staff’s reliance on the U.S. Environmental Protection Agency (EPA). As stated in Baykeeper’s July 8 comments, new scientific information demonstrates that the existing objective for selenium is inadequate to protect aquatic life and beneficial uses. The Regional Board has the authority to study and promulgate protective selenium standards and implementation, and the obligation to review water quality objectives, such as those in effect for selenium, every three years.”

We reiterate what we state in the Staff Report that U.S. EPA is currently working on revised selenium criteria that will apply *both* for freshwater *and* San Francisco Bay. We expect the Statewide freshwater criteria to be promulgated in late 2022 and the San Francisco Bay/Delta criteria soon thereafter. Therefore, there are no newly revised selenium criteria for the Water Board to consider as part of this Triennial Review. Water Board staff had initiated a Basin Planning project based on draft selenium criteria prior to U.S. EPA promulgation. We reached out to EPA to explain our project approach, and we learned through these communications with U.S. EPA staff and management that U.S. EPA is currently engaged with the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration (NOAA) on the Endangered Species Act consultations for the freshwater selenium criteria. Accordingly, U.S. EPA requested that the Water Board not undertake at this time a Basin Planning standards project using the draft freshwater criteria.

It is reasonable to apply the same logic to the revised selenium criteria for San Francisco Bay. Moreover, because the San Francisco Bay criteria would apply to the Bay and the Delta, it would be untimely for our Board to consider them just for the Bay without a similar effort for the Delta. Since the criteria would apply to water bodies in two Water Board regions, it would be more appropriate for U.S. EPA or the State Board to consider undertaking the standards action. It

would not be an efficient use of limited Basin Planning resources for the Water Board to develop selenium criteria for San Francisco Bay or freshwater water bodies while U.S. EPA work is still in progress. While this work is being completed, the Water Board should apply its limited Basin Planning resources to the many other important water quality problems that need attention. Once these selenium criteria are promulgated, it may be appropriate for the Water Board to consider them for adoption into the Basin Plan along with relevant implementation provisions.

Clean Water Act section 303(c)(1) requires the Water Board to conduct a triennial review hearing “for the purpose of reviewing applicable water quality standards and, *as appropriate*, modifying and adopting standards.” (33 U.S.C. section 1313, subd. (c)(1) [emphasis added].) The Water Board staff have reviewed the selenium water quality objective, and it is appropriate to sequence any revisions to the objective until after U.S. EPA concludes its promulgation of its selenium criteria. The Porter-Cologne Water Quality Control Act likewise requires a water quality control plan to be reviewed and states it may be revised. (Wat. Code, sec. 13240.) It, however, does not mandate the timing of any revisions.

3.4. “The current (selenium) TMDL requires no reduction in loads and maintains the status quo; this is not consistent with the best available science which indicates that existing conditions pose a significant risk.... during the dry season, White Sturgeon tissue already exceeds the draft EPA criteria as well as the numeric criteria in the TMDL. Especially when coupled with peer-reviewed research papers published in 2020, and referenced in our July 8 letter, this is evidence that the existing status quo approach of the TMDL is deficient and should be re-opened....”

In addition to establishing Basin Planning priorities for the next three years, we also use the Triennial Review to receive stakeholder input on TMDL priorities in our region. In that light, we note the commenter’s suggestion to re-evaluate the selenium TMDL pursuant to U.S. EPA’s selenium criteria promulgation. As previously mentioned, such re-evaluation would be premature prior to promulgation because the draft criteria may be revised through the promulgation process.

The targets of the North Bay Selenium TMDL are tailored to be protective of the most at-risk fish species, such as white and green sturgeon, and the calculation of the protective water column concentration targets take Sacramento splittail into account. To date, there is no compelling evidence to suggest that the TMDL is not protective of sensitive fish species in North San Francisco Bay. The TMDL is based on the best available science, relevant scientific literature and includes numerous conservative approaches and assumptions to establish the numeric targets, which rely on the U.S. EPA criteria developed through a 10-year, scientifically robust process. The desirable conservatism has already been incorporated into the TMDL’s numeric targets, which are based on the EC10 statistical endpoint (concentration at which an effect was observed in 10 percent of the test organisms). The EC10 is a conservative endpoint because it represents the lower end of the range of effect concentrations used nationally. The test

endpoint is based on maternal transfer and reproductive effects in fish that were linked to observed decreases in the sensitive fish populations.

Since average selenium concentrations in sturgeon were below the protective target when the TMDL was developed, the TMDL created a cap on selenium loads to North San Francisco Bay to ensure that loads do not increase in the future, and to prevent increases of selenium concentrations in fish and water column. This is appropriate to ensure ongoing protection of beneficial uses and attainment of the TMDL targets. The occasional exceedances of the target in individual sturgeon caught in the Bay since the development of the TMDL do not constitute an elevated risk, and average concentrations in Bay sturgeon are below those observed in the late 1990s when selenium contamination was widespread. The research on selenium in the Bay is ongoing, and we are evaluating new findings and methodologies, such as those studying selenium deposition in otoliths (part of the inner ear of vertebrates).

3.5. "...the Bay is brackish and marine, (and) Baykeeper's comments were directed at estuarine standards, so EPA's request that the Water Board not proceed with developing selenium objectives in freshwater environments is irrelevant..."

As noted in the response to comment 3.3, U.S. EPA is currently in the process of promulgating selenium criteria applicable for freshwater and, soon thereafter, for San Francisco Bay. Thus, our response (in the Staff Report) was intended to address Baykeeper's July 8, 2021, comment letter, which appeared to request Board action for both freshwater and estuarine selenium criteria. We appreciate the clarification that Baykeeper was only requesting the Board consider revising selenium criteria for estuarine waters in San Francisco Bay.

3.6. "Current standards do not sufficiently protect fish relied upon by subsistence fishermen. Elevated selenium has an impact on subsistence fishing and recreational beneficial uses, so a revised selenium objective and TMDL would necessarily grant greater consideration to impacts on Sacramento Splittail and other sensitive wildlife species. This implicates both the State Board's Draft Resolution and Government Code section 11135's prohibition on discrimination."

We are not aware of evidence that selenium concentrations in Bay fish are negatively impacting fish relied upon by subsistence fishers. The fish species most sensitive to selenium impacts are generally thought to be sturgeon and Sacramento splittail. These two fish species are not among the species most commonly caught and consumed by Bay Area anglers or subsistence fishers. We are likewise not aware of compelling evidence that selenium fish tissue concentrations negatively impact contact or non-contact recreational beneficial uses. Therefore, it is not likely that U.S. EPA's promulgation of revised selenium criteria will substantially impact recreational uses or commercial, recreational, or subsistence fishing.

4. Comment Letter 4: San Francisco International Airport (SFO)

4.1. “The Airport supports the Climate Change and Wetland Policy Update project, which was ranked highest on the list of five projects identified for inclusion in the Basin Plan. This Update project includes the Water Board’s acknowledgement that nature-based solutions cannot be possible for all projects. SFO appreciates this clarification since airports cannot seek nature-based solutions because it is inconsistent with Federal Aviation Administration rules and regulations designed to maintain safe and efficient use of navigable airspace for the traveling public; wetlands and marshes are wildlife attractants, which are incompatible with aircraft operations.”

We appreciate the support for this project. We agree that an intelligent combination of green (e.g., nature-based solutions) and grey infrastructure will be needed to address the challenges of climate change and sea level rise. As we proceed with our Basin Planning work, we will aim to clarify Water Board expectations and permitting approach in this context.

4.2. “The Airport also supports the Update project that would clarify mitigation and monitoring requirements for conversion of one wetland type to another. In current practice, pursuant to the federal Clean Water Act, the Water Board requires the exact type of wetland that is filled be provided as compensatory mitigation (i.e., “like-for-like” mitigation). This makes mitigation for future sea level rise protection projects with open bay water fill nearly impossible as land for mitigation, particularly open water creation, is scarce. Moreover, the creation of open water to compensate for open water fill is not sound policy as sea level rise will inevitably increase open water areas.”

We thank SFO for the support for this future aspect of our climate change work as well as the observations provided on some of the complexities involved in compensatory mitigation decisions. We will be considering these and many other related issues when we reach that part of our anticipated climate change work.

5. Comment Letter 5: Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP)

5.1. “This very important project was ranked as a relatively low priority by staff. ... this project is a very high priority project for municipal stormwater permittees in Santa Clara County and has applicability to all permittees in the San Francisco Bay Area. This project should be ranked higher by the Water Board and resources should be directed towards this high priority project during this triennial review three-year cycle.”

We appreciate the submission of the candidate project. However, we note that this project has been scored according to the same criteria applied to all projects. To demonstrate that the final score and ranking are appropriate, we are providing a detailed accounting of the scoring in each of the ranking categories for this candidate project.

- Water Board Mission (5 points) – High scores in this category are reserved for projects that would meaningfully result in the enhanced protection of beneficial uses. The purpose of this project is to review whether the REC-1 use is attainable in certain waterbodies, which would be in the context of consideration of beneficial use removal or revision. While such a review does not *necessarily* constitute a relaxation of beneficial protection, one would be unlikely to advance a strong argument that this project will *enhance* beneficial use protection in water bodies for which the REC-1 use is removed or modified.
- Climate Change Nexus (0 points) – This project does not directly address an adaptation or policy response to climate change.
- Public Support (3 points) – SCVURPPP offered this as a candidate project and was the only party supporting it. We recognize that this is the first year it appeared as a candidate project, so it may receive more public support in future Triennial Review cycles when it will be available for consideration at the beginning of the process. The commenter asserts that the project is a high priority for Santa Clara Valley stormwater permittees, but we did not receive any communication of support from those permittees. Moreover, additional evidence of stakeholder support would not have substantially changed the ranking of this project by virtue of low scores in most other scoring categories.
- External Resources Invested (0 points) – This refers to external resources invested to date as part of a project the Water Board is working on. If Santa Clara Valley municipalities conduct work on this project, the Water Board would allocate points to this category in future Triennial Review cycles based on documentation of such efforts.
- Staff Resources Invested (0 points) – There are no Water Board staff resources invested in this project to date.
- Implement State Board Policy (3 points) – The project was awarded three out of a possible five points in this category because there is a connection to a State Board Policy. Five points are awarded only to projects where a State Board Policy action *requires* a subsequent Water Board Basin Planning activity, which is not the case for the candidate project submitted by the commenter.
- U.S. EPA Priority (0 points) – U.S. EPA has never mentioned this project as a priority.
- External Resources Likely Available (5 points) – The candidate project was generously awarded the maximum score for this category based on the assumption that municipalities would provide external funds if the project were selected a priority. If such funding is not available, this maximum score would not be warranted.
- Geographic Scope (2 points) – The project received two out of a possible five points because the project's geographic scope is limited to Santa Clara County.

- Input from Water Board Divisions (0 points) – No Water Board division identified this project as a priority.

5.2. “...descriptions justifying the scoring for each ranking criterion are not included and thus stakeholders have no clear understanding of why certain projects were ranked high or low based on the information provided. For example, the Recreational Standards Study meets many of the project selection criteria outlined in the staff report, therefore, should be considered as a high priority project. The Study is consistent with the Regional Water Board’s mission to protect beneficial uses (Ranking Criteria #1) but received only 5 of 20 points for this criterion. The Study also implements State Water Board policy set forth in the recent Bacteria Provisions, but only received 3 of 5 points for this criterion.”

Section 4 of the Staff Report describes in detail the ranking criteria applied as well as the factors that are considered in assigning the category scores. We agreed to a request made by this commenter at the workshop to post the ranking criteria on our website. We also provided, in response to comment 5.1, the rationale for the scores for each criterion. Our planning staff and management carefully consider the scoring for each project and use our collective judgement and experience to arrive at the scores. The San Francisco Bay Regional Water Board’s Triennial Review prioritization process is likely the most transparent, systematic and objective of any used by California Regional Water Boards.