Appendix D

Response to Comments

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Proposed Amendment to the Water Quality Control Plan (Basin Plan)

to Add Surface Water Bodies and Designate Beneficial Uses for Surface Water Bodies of the San Francisco Bay Region

RESPONSES TO COMMENTS

July 14, 2010

San Francisco Bay
Regional Water Quality
Control Board

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1. INTRODUCTION

This document provides Water Board staff's responses to written comments on the proposed Basin Plan amendment to add surface water bodies and designating beneficial uses. We include responses to the 16 comment letters we received on the February 24, 2010, version of the Basin Plan amendment and supporting Staff Report. The following entities submitted written comments:

1. U.S. Environmental Protection Agency
2. Santa Clara Valley Urban Runoff Pollution Prevention Program
3. Morrison and Foerster, on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program
4. San Mateo Countywide Water Pollution Prevention Program
5. City of San Jose
6. Alameda Countywide Clean Water Program
7. City of Benicia
8. Friends of Lake Chabot (in Vallejo)
9. San Francisco Baykeeper
10. Bay Area Clean Water Agencies
11. City of Sunnyvale
12. Union Sanitary District
13. Contra Costa Water District
14. East Bay Municipal Utility District
15. San Francisco Public Utilities Commission
16. San Francisco Recreation & Parks Department

While the comments covered a broad range of topics, four themes were repeated by more than one commenter. Comprehensive responses to each of these themes are given in Section 2 below. In Section 3, in the order shown above, each entity's comments are listed, followed by staff's response. Section 4 addresses issues raised during the May 12, 2010, testimony hearing by Board members.

2. RESPONSES TO COMMON COMMENTS

2.1 Designation of Presumptive Beneficial Uses was done too broadly

Commenters representing municipal stormwater permittees object to the broad application of the Clean Water Act Section 101(a)(2) presumptive uses, which provide for water quality for the protection and propagation of fish and wildlife, and for recreation in and on the water. In California, the presumptive uses are WILD, REC-1, and REC-2, which staff proposes to

designate for all surface water bodies, and WARM for all inland surface water bodies. The Commenters' specific comments/concerns regarding the broad designation of these beneficial uses are shown below, followed by staff's response.

2.1.1 Broadly Designating for Presumptive Uses Will Ultimately Lead to a Resource-Consuming De-designation Process. Commenters expressed concerns that they will be required to implement control measures to allow swimming to occur in ephemeral, inaccessible streams, where swimming does not occur, which may then necessitate completion of a Use Attainability Analysis to demonstrate that the use is not attainable. Depending on whether water quality objectives associated with presumptive uses are achieved, the designation of presumptive uses could also translate into the need for the Board to develop and implement numerous TMDLs.

Response: While the comment refers to swimming in ephemeral streams (which have water flowing in them only part of the year), the underlying concern is about meeting water quality objectives associated with REC-1 (swimming and other uses where ingestion of water is likely) in urban creeks. More specifically, municipal stormwater permittees are concerned that, where data show that these water quality objectives are not being met, a Use Attainability Analysis to de-designate the use or a Total Maximum Daily Load (TMDL) to achieve the water quality objective would be required.

Our obligation under the Clean Water Act (CWA) is to establish water quality standards, including beneficial uses, consistent with the statutory goals of the CWA. Beneficial use designations are one part of our water quality standards, and they help us categorize water bodies by what the waters are used for, be it recreation, aquatic life, drinking water or a combination of these uses. These designated uses help direct the level of protection afforded to a water body.

CWA §101(a)(2) states that "wherever attainable…water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved.…" This is known as the "fishable, swimmable" goal of the CWA. This objective has resulted in water bodies throughout the State of California, and much of the nation, being designated with the presumptive beneficial uses of REC-1, REC-2, WILD, and WARM.

By designating uses broadly in this Basin Plan amendment, we are presuming that all streams and rivers are attaining the highest level of recreation and aquatic life uses and should be protected for activities such as fishing and swimming. This concept of assigning all water bodies the highest use designation, unless assessments show that level of protection is not warranted, is referred to as the CWA "rebuttable presumption." This requires designation of presumptive beneficial uses unless it is demonstrated that it is impractical to do so. The demonstration of impracticability required is a use attainability analysis (UAA). In other words, a UAA would be required to be completed in order for us to <u>not</u> designate presumptive uses for waters in our region. Assuming that our creeks and lakes should be protected for swimming and fishing places a high value on these water bodies. We need evidence that the use is not attainable and does not exist that goes beyond one snapshot in time.

Commenters also expressed concern that designating these uses would lead to a potential need to develop TMDLs where water quality objectives are not attained for these uses. Development of a TMDL is a potential outcome of a water body being listed as impaired when it is demonstrated that the water body does not meet water quality standards, i.e., beneficial uses and/or water

quality objectives. We argue that water quality for the proposed additional water bodies and their existing beneficial uses is already protected under the CWA, whether the uses are designated in the Basin Plan or not (40CFR131.3(e)). Designating uses alone does not lead to development of a TMDL.

In the absence of designating uses through this Basin Plan amendment, we would apply the tributary rule in making determinations about beneficial uses. The Basin Plan already states that the beneficial uses of a water body apply to its tributaries; this is known as the tributary rule. Impairment listings could be made based on the relevant beneficial uses and the associated water quality objectives whether or not a specific water body is identified in the Basin Plan. In fact, our Surface Water Assessment and Monitoring Program (SWAMP) does collect data relative to water bodies that are not identified in the Basin Plan, and these data are evaluated to determine impairment status. Many of the additional water bodies included in this amendment are ones that have been or are being monitored by SWAMP.

Finally, we point out that our broad application of presumptive uses is consistent with the approach taken in every region in California and is explicitly supported by the U.S. EPA.

2.1.2 Data Contradict the Presumptive Beneficial Uses. Commenters submitted information to indicate recreational uses are not occurring on specific water bodies. For example, Commenters' information indicates that the proposed REC-1 listing for Lower Penitencia Creek is not supported, because that portion of the creek is concrete lined and fenced. In the absence of stronger evidence to the contrary, Commenters say the presumptive use doctrine is an inappropriate basis on which to designate REC-1 or REC-2 uses for water bodies where there is some evidence that a presumptive use does not exist.

Response: We agree with some of the information submitted by the Commenters, and address individual creeks in our responses in Section 3 of this document. However, the Commenters' information largely presents a snapshot of various creeks' current conditions (2005-2009), and no water quality information is provided. The CWA defines a beneficial use as any use that has existed after 1975 (40CFR131.3(e)), so in most cases we would look for additional historic information to support the Commenters' submittals. We also note that in at least one case, the Commenters' information is contradicted by photographic evidence of public access to a creek, possibly because the Commenters either did not observe the entire water body, or conditions changed since their observations were made. Therefore, in some cases, we disagree with the Commenters' suggested designations.

A related comment is that, as part of implementation of the new municipal regional stormwater permit (MRP), new data on the existence or lack of existence of REC-1, REC-2, and WILD uses in a number of water bodies will become available. This comment refers to the information that will be obtained through the stream surveys required on a total of 18 stream miles (for all 76 stormwater permittees combined) per year starting in 2011. These data, while useful in the context of the MRP, will have the same inherent deficiencies for use in designating beneficial uses as mentioned in the paragraph above: they will present a snapshot of one point in time, and they will not cover an entire water body.

Even where the Commenters' information can be supported, we still must consider the "fishable, swimmable" goal, which seeks to maintain high water quality by applying the presumptive uses

broadly, even where the actual physical use is not attainable. Designation of presumptive uses is discussed in greater length in Section 2.1.1 above.

2.1.3 Continuation of Application of the Tributary Rule is More Appropriate than Enumerating New Presumptive Uses. In those cases where the Water Board has no evidence of the existence of a use in a tributary or tributary segment, Commenters submit 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." Commenters state that under the existing Tributary Rule, the Water Board will be able to apply the "presumptive uses" to specific tributaries and tributary segments it finds in need of additional protection, as it has done successfully for approximately 25 years.

Response: We disagree that the tributary rule, in which a creek (or other water body) is attributed the same beneficial uses as the water body to which the creek discharges, would provide the relief the Commenters seek. The Pacific Ocean, San Francisco Bay, and most rivers and major creeks currently are designated with REC-1; therefore, water bodies discharging to these water bodies would also have the REC-1 use, as would their tributaries. The Commenters state that the Water Board will be able to apply the presumptive uses to specific tributaries found to need additional protection; this implies that the tributary rule would be selectively applied, or some other criteria would be applied for designating uses on a case-by-case basis. We disagree with this suggestion, because we prefer to clearly state beneficial uses in the Basin Plan, which is the objective of the proposed amendment.

In addition, the tributary rule does not always provide the clarity needed to determine which beneficial uses exist on a water body, because it is sometimes unclear which uses would continue upstream. For example, shellfish harvesting, navigation, and estuarine habitat all exist in San Francisco Bay and often exist in adjoining sloughs and may exist in tidal segments of rivers, but would rarely apply further upstream in fresh water conditions. The industrial service supply use is designated for the Bay, but would be inappropriate for most of its tributaries. It is precisely this lack of clarity which has prompted the public to repeatedly over the past decade request that Water Board staff prepare and propose a Basin Plan amendment to clarify the beneficial uses of the surface water bodies in our Region. This Basin Plan amendment is in fact a clarification of the application of the tributary rule.

2.1.4 The Water Board could differentiate between degrees or intensities of usage, identifying not only "Existing" but "Limited" and "Potential" uses. Commenters state that designating 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.

Response: We considered designating REC-1 as limited or potential, but determined this is not the best approach. First, the same water quality objectives apply whether the REC-1 use is designated as Existing, Limited, or Potential; thus the statement that "protection for full-body water contact use is not necessary" is not correct. The question, as we see it, is whether the water quality of a given water body must be protected to the level associated with REC-1. If so, the REC-1 use is designated as existing; if not, the use does not exist. To do otherwise, would

require us to define a limited recreation beneficial use and identify appropriate water quality objectives; both of these standards actions are outside the scope of this project.

2.2 Beneficial Uses Should be Designated on a Stream Reach-by-Reach Basis.

Commenters are concerned about the potential regulatory consequences of designating an entire stream with a beneficial use that may apply to only a particular segment(s) and the possible impacts on local agencies. For example, Commenters are concerned that this approach could lead to the misapplication of water quality objectives to segments of water bodies that do not and cannot support a beneficial use designated for an entire water body. This could lead to unwarranted listings of impairment and inappropriate TMDL restoration actions. Inappropriate listings could potentially necessitate burdensome and resource-consuming actions, including delisting or modifying use designations. Such actions could necessitate, among other things, the expenditure of significant resources on use attainability analyses, CEQA-related documents, and associated appeals and litigation.

Response: As in comment 2.1 above, the Commenters are concerned that designating uses for entire water bodies, rather than for each separate reach, will result in resource-intensive TMDLs and Use Attainability Analyses.

The concern expressed in this comment extends beyond the four presumptive uses (responded to in Section 2.1 above) and could apply to cold freshwater habitat (COLD), preservation of rare and endangered species (RARE), fish spawning (SPWN), and fish migration (MIGR) as well. The Commenters request that we pinpoint the reaches of streams where these uses clearly exist at this time. We cannot support the Commenters' request for the reasons provided below.

First, we note that these beneficial uses commonly do occur along an entire stream. For example, fish migration generally occurs along entire streams, from the ocean and Bay to the higher elevations. Species such as rainbow trout often migrate from reservoirs to upstream tributaries, so migration does occur above dams. Fish spawning generally occurs in the higher elevations, but actual spawning locations change as creek conditions change; for example, we have had reports of salmon spawning in the lower portion of the Guadalupe River. Rare and endangered species such as steelhead trout and coho salmon likewise inhabit most stream reaches in their various life stages, while bird and amphibian species inhabit more localized areas, which could change over time.

Second, while we have good information that COLD, RARE, SPWN and MIGR exist in a water body, information indicating *distinct reaches* where these uses exist now or have existed since 1975 is limited or does not exist. To collect such information would be very resource-intensive. Information presented by the Commenters could be a start for the creeks they have addressed, but we would still need to evaluate where each use has existed since 1975, and not just where it exists today. We believe this effort would add very limited added value to the Basin Plan.

As we stated above in Section 2.1, the interests of the Water Board are not well served by collecting data that would assess water quality for a portion of the stream or creek that is not representative of where a use could occur. For some creeks that flow both above and below a dam, we have proposed to list the above- and below-dam segments separately, with distinct beneficial uses.

Finally, we point out that our proposed designation of beneficial uses on an entire-water body basis is consistent with the approach taken in seven other regions in California.

2.3 Beneficial Uses Should be Designated on a Seasonal Basis.

Response: The Commenters who request we designate beneficial uses on a seasonal basis generally refer to intermittent streams, which flow only part of the year, or temporal uses, such as fish spawning. While the Clean Water Act allows states to designate beneficial uses on a seasonal basis, most of California's regional Basin Plans do not do so. Likewise, we disagree that beneficial uses should be designated on a seasonal basis. For presumptive uses, please see our response in Section 2.1.1 above.

First, we disagree that seasonal designations of beneficial uses are warranted in our Region. The Commenters are concerned that the lack of seasonal designations will result in numerous resource-intensive TMDLs and UAAs, which is the same concern expressed and responded to in Sections 2.1 (for presumptive uses) and 2.2 (for other beneficial uses). TMDLs and UAAs become potentially necessary when the quality of water in a water body does not meet applicable water quality objectives; we would not and could not look at the application of water quality objectives when an intermittent stream is dry. Please see Sections 2.1 and 2.2 above for further discussion. Similarly we would not look to collect data to assess water quality related to fish spawning during a time period when the use would not occur.

Second, designating beneficial uses seasonally is impractical. It is common for informed individuals to disagree on whether a creek is perennial or intermittent, often because some creeks flow in wetter years but dry up in years with relatively low precipitation. It is our experience that information upon which to base seasonal use designations is inadequate.

2.4 The designation of E* for REC-1 beneficial uses may create the perception that water supply reservoirs have been or will be used for body contact recreation, which is not allowed.

Commenters state that the E* designation does not improve clarity in the Basin Plan. Also, the California Health and Safety Code and Watershed Management Plans prohibit all body contact recreation in drinking water reservoirs.

Response: Reservoir owner/operators have expressed to us that members of the public desire access to reservoirs for swimming and other recreational activities, which are prohibited in order to protect drinking water quality. We have proposed to designate body contact recreational uses as "E*," with the definition "*the beneficial use exists, and full body contact recreational uses are protected; however, physical or administrative barriers to full body contact recreational uses are in place*."

While it is common across the State for basin plans to designate REC-1 as an existing beneficial use for reservoirs, usually with a footnote or similar notation that public access is limited, we agree with the Commenters that our proposed definition is not as clear as we intended, and could lead the public to incorrectly infer that the E* designation for REC-1 in some way protects their right to swim in these reservoirs. To clarify the meaning of E*, we propose to add the following sentences to the discussion of the water contact recreation beneficial use in Basin Plan Section 2.1.15:

Public access to drinking water reservoirs is limited or prohibited by reservoir owner/operators for purposes of protecting drinking water quality and public health. In some cases, access to reservoir tributaries is also limited. For these water bodies, REC-1 is designated as E, for the purpose of protecting water quality. No right to public access is intended by this designation.*

In addition, in Basin Plan Section 2.2.1, we propose to change the definition of E* in the legend for Table 2-1 to the language below:

Water quality objectives apply; water contact recreation is prohibited or limited to protect public health.

With these clarifications, it is evident that the E* designation for REC-1 does not conflict with the California Health and Safety Code, or any reservoir's Watershed Management Plan, both of which limit or prohibit public access in order to protect drinking water quality.

3. RESPONSES TO WRITTEN COMMENTS

3.1 Comment Letter 1: U.S. Environmental Protection Agency

Comment 1.1. We appreciate the hard work to develop this proposed water quality standards BPA, and your effort to add water bodies and associated designated uses. This proposed amendment, when completed, will result in a more comprehensive, accurate, and protective Basin Plan.

Response: Comment noted.

Comment 1.2. On page 7 of the proposed BPA, Basin Plan Section 2.2.1, proposed new paragraph 6 states, "Designated beneficial uses are often, but not always, present along the entire water body. Specific beneficial uses near or downgradient of discharges will be evaluated by the Water Board during the development of waste discharge requirements, or enforcement orders." At the end of this section, on page 8, it further proposes, "In Table 2.1, beneficial uses are indicated as follows: E - indicates the beneficial use exists throughout, or on a portion of, the water body."

Designated uses (in California, beneficial uses) for Clean Water Act (CWA) 101(a)2, which you have indicated in your Staff Report as the WILD, REC-1, REC-2, and in some cases WARM uses, are presumptively existing uses for all water bodies. If the State believes that a use is not an existing use on the water body or on a portion of the water body, the State must complete a Use Attainability Analysis or UAA and amend its Basin Plan.

The second sentence in proposed paragraph 6 included above conf1icts with this CWA requirement by appearing to give the Water Board discretion during the development of a waste discharge requirement to find that a use does not exist at certain parts of water bodies near or downgradient of discharge points. Similarly, the proposed new definition of "E" for Table 2.1 included above states that a use may only exist "on a portion of a water body. Both of these proposed provisions appear to allow the de-designation of a use on a part of a water body without the requisite UAA analyses and associated water quality standards change to the Regional Board's Basin Plan under CWA 303(c). We suggest you remove or clarify these proposed provisions.

Response: We agree and will delete the sentences in Basin Plan Section 2.2.1, paragraph 6 that say: "Designated beneficial uses are often, but not always, present along the entire water body. Specific beneficial uses near or downgradient of discharges will be evaluated by the Water Board during the development of waste discharge requirements or enforcement orders." In the final paragraph of Basin Plan Section 2.2.2, we will delete the phrase "throughout or on a portion of" from the statement: "E - indicates the beneficial use exists throughout, or on a portion of, the water body."

3.2 Comment Letter 2: Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP)

Comment 2.1. Clarify the Extent of Spatial Coverage for Beneficial Uses

The documentation tables in Appendix C broadly identify beneficial uses throughout an entire water body. This approach can lead to misapplication of water quality objectives to segments of water bodies that do not and cannot possibly support a particular beneficial use. Ideally, beneficial uses should be designated by water body segments and by seasons, especially where they are only based on no or limited data.

This would help minimize interpretive problems and avoid future expense and burdens that would otherwise be required to modify use(s) (i.e., to de-designate, establish a subcategory, and/or apply seasonal uses) in order to provide clarification and/or provide the Water Board with flexibility in terms of taking associated regulatory actions. We understand that this approach is not without its own burdens. However, because those will be much smaller than the burdens required to correct/clarify use designations after they become part of the Basin Plan, we recommend that the Water Board staff:

1) conduct a thorough spatial evaluation of the references they cite as "evidence and databases" in Appendix C and which have been purported to have been used to support the recommended use designations, and

2) summarize the analysis and documentation in a format (such as a table) that (at a minimum) allows the Water Board and public to understand the degree to which current data does or does not support the designation of a beneficial use in an entire water body.

The above analysis is mostly relevant to uses that apply to coldwater and migratory species (i.e., COLD, RARE, MIGR and SPWN). For example, our preliminary review of references cited by Water Board staff provide clear evidence that COLD, SPWN and MIGR exist in some but not all segments of Stevens Creek below Stevens Creek Reservoir. Specifically, due to the reservoir blocking the migration corridor of migratory species (e.g., Steelhead Trout), the MIGR and SPWN uses do not and cannot exist above the reservoir. In addition, we have attached examples (Attachment 1) that illustrate how we recommend the data and analysis be presented as part of the water body fact sheets presented in Appendix C to clearly describe the spatial extent of uses along with the evidence that is being cited to support the proposed beneficial use designation.

Response: We disagree that the level of precision in designating COLD, RARE, MIGR, and SPWN uses to specific segments of creeks, while of potential interest to some stakeholders, is necessary in the Basin Plan. Regarding Stevens Creek upstream of the reservoir, Leidy reports catching *O. mykiss* (trout) at two separate locations above the reservoir in 1981; thus we conclude that trout migrate and spawn

above the reservoir.[1] For further discussion, please see our response in Section 2.2 above. Regarding seasonal uses, please see our response in Section 2.3 above.

Comment 2.2: We also recommend the following approach be used in Appendix C to better clarify the areas for the proposed use designations and avoid overly broad designations that could require burdensome and resource consuming actions, including the potential need for delisting or limiting use designations in whole or in part:

a) **Where Data Exist –** It should be easy to identify the segment to which the use designation(s) are intended to apply and which of the specific uses are to be activated for future regulation of that segment. See the example in Attachment 1 and the example noted above for Stevens Creek.

b) **Where Data are Limited and/or do not Exist -** In this case, we request that the use not be shown as existing or presumptive. In addition, we request that the use be identified in an alternative manner that does not activate the proposed use designation without further Water Board action. Activation would occur when data become available to support the formal designation that there is an existing use present in the segment in question. (Perhaps such water segments could be identified in Appendix C as "PF = possible future designation in whole or in part; needs further study".)

Response: Part "a) Where Data Exist" of this comment requests that beneficial uses be designated by reach, and Part "b) Where Data are Limited" requests that presumptive uses not be applied broadly. Please see our responses to these issues in Sections 2.1 and 2.2, respectively, above. The Commenter also suggests beneficial use designations could be "activated" in the future when data become available. We disagree with this concept because, as we state in Sections 2.1 and 2.2, the beneficial uses proposed for designation on surface water bodies currently exist on these water bodies.

Comment 2.3: **Lake Lagunita (Reservoir**) – No data are provided to support the proposed COLD use. The rationale provided states "Cold fresh water habitat, based on relationship to other water bodies in the watershed". We request the data be provided to support the use designation, and if no data are available, this proposed use designation should be deleted.

Response: We agree and will not designate the COLD beneficial use for Lake Lagunita.

Comment 2.4: **Felt Lake (Reservoir)** – No data are provided to support the proposed COLD use. The rationale provided states "Cold fresh water habitat, based on relationship to other water bodies in the watershed". We request the data be provided to support the use designation, and if no data are available, the proposed use designation should be deleted.

Response: We agree and will not designate the COLD beneficial use for Felt Lake.

Comment 2.5: **Adobe Creek** – None of the references provided, or information from field surveys conducted by SCVURPPP provide evidence that Steelhead Trout or other coldwater or migratory species are present or were historically present in this water body. Therefore, the proposed COLD, SPWN and MIGR use designations should be deleted.

[1] Leidy, R.A., G.S. Becker, and B.N. Harvey. 2005. *Historical distribution and current status of steelhead/rainbow trout (*Oncorhynchus mykiss*) in streams of the San Francisco Estuary, California*. Center for Ecosystem Management and Restoration, Oakland, CA. http://www.cemar.org/estuarystreamsreport/homepage.html

Response: The National Marine Fisheries Service steelhead distribution database indicates there is steelhead spawning and rearing *habitat* on Adobe Creek; and Leidy also states that some "excellent" fish habitat was noted in a 1988 assessment of upstream reaches. We find this to be adequate evidence that cold freshwater habitat exists. We did not propose to designate SPWN and MIGR on Adobe Creek.

Comment 2.6: **Ross Creek** – We support and encourage groups like Ross Creek Neighbors to continue their work on protecting local water bodies. However, based on our review of information provided by Ross Creek Neighbors, and other evidence cited in the Staff Report, the COLD use designation is not supported. Specifically, the NMFS (2006) citation contained in the Water Board staff report did not identify Ross Creek as supporting Steelhead Trout and the presence of other cold water species has not been documented. Therefore, the proposed designation of COLD for Ross Creek should be deleted.

Response: We agree that the evidence of cold freshwater habitat in Ross Creek is scant and will not designate the COLD beneficial use at this time.

Comment 2.7: **Canoas Creek** - Our review of the information presented by GCRCD (2007) as well as the other evidence identified in the Water Board staff report does not support the COLD use designation in Canoas Creek. Additionally, GCRCD did not request that Canoas Creek be designated for COLD use. Therefore, the proposed designation of COLD for Canoas Creek should be deleted.

Response: We agree that the evidence of cold freshwater habitat in Canoas Creek is scant and will not designate the COLD beneficial use at this time.

Comment 2.8: **Canada de Los Osos Creek** – Our review of data cited in Leidy et al. (2005) indicates that the data describing the presence of Steelhead Trout are from 1940 and are based on the planting of fingerling trout that year. The referenced citation and data do not indicate that the creek has been able to sustain a COLD use. Therefore, the proposed designation of COLD for Canada de Los Osos Creek should be deleted.

Response: We agree that the evidence of cold freshwater habitat in Canada de los Osos Creek is scant and will not designate the COLD beneficial use at this time.

Comment 2.9: **Comments on REC 1 and REC 2 Proposed Designations –** Consistent with our recommendations noted above in Comment 1, we have evaluated the data collected by SCVURPPP and have provided specific recommendations based on that data as discussed below:

a) **No Data/Information Exist to Support a Use Designation** – Table 1 contains a summary of those waterbodies where, to our knowledge, no SCVURPPP data/information are available regarding REC-1 and REC-2 uses. We strongly recommend that instead of designating these waters based on "presumptive" uses, the Water Board instead rely on the "tributary rule." Our reasons are: First, the approach provides the Water Board with flexibility and allows ready activation of the concept of "presumptive uses" to particular tributaries and tributary segments where it is appropriate and supported by data in the future. Second, under the new municipal regional stormwater permit (MRP) new data on the existence of REC-1, REC-2, and WILD uses in a number of these waterbodies and/or their sub-segments and the seasons in which they occur, if any, will become available and can be used to inform the application of the tributary rule until such time as additional/refined use designations can be incorporated into the Basin Plan in an amendment supported with data. Finally, the most important reason to take this approach is not to place the Water Board and numerous local agencies in the position of having to spend significant resources to address the regulatory consequences of or, in

the alternative, de-designate incorrect or overly broad (including spatially or seasonally) use designations.

b) **Data/Information Exist that Do Not Support the Proposed REC-1 Use Designation** - Table 2 contains a summary of waterbodies where data exist that demonstrate that the proposed REC-1 designation is not in existence and unlikely to be supportable given conditions associated with the waterbody segment in question. The data/information citation is also provided. We request that the proposed REC-1 listing be dropped for these waters and we also recommend that instead of designating them based on "presumptive" REC-2 or WILD uses without REC-1, the Water Board instead rely on the Basin Plan's existing "tributary rule" in these situations for the same reasons set forth in comment 9.a above.

c) **Data/Information Exist that Do Not Support the Proposed REC-2 Use Designation** - Table 3 contains a summary of waterbodies where data exist that do not support the proposed REC-2 (or REC-1 or WILD) designation. We request that the proposed listings for these waters be dropped.

Response: In these comments and supporting tables, SCVURPPP provides information on locations where public access was/was not observed on creeks in the Santa Clara Basin. The information was obtained by visual observation during sampling events and stream surveys. The reports cited are dated 2005-2009. SCVURPPP requests that REC-1 and REC-2 not be designated broadly as presumptive uses, but rather that SCVURPPP's information be used to determine whether REC-1 and REC-2 exist.

Regarding (a) *No Data/Information Exist to Support a Use Designation*, for the water bodies listed on this table, we maintain that the Clean Water Act presumptive uses apply. Please see Section 2.1.1 for further discussion of our rationale. Data to be collected in response to MRP requirements is discussed in Section 2.1.2. We discuss the tributary rule in Section 2.1.3.

Regarding (b) *Data/Information Exist that Do Not Support the Proposed REC-1 Use Designation*, SCVURPPP provides information for a limited portion of most of the creeks on this table. Please see Section 2.2 for a discussion of why we do not propose to designate uses on a reach-by-reach basis, and Section 2.1.2 regarding data that contradict the designation of presumptive beneficial uses. For some creeks, SCVURPPP information states that REC-1 use is not supported, but that public access points were observed; we decline to remove the REC-1 use when public access is clearly possible. We considered each of the creeks below, because SCVURPPP's information states REC-1 uses are not supported, and no public access was observed:

- Adobe Creek: According to SCVURPPP's web site, Adobe Creek originates on the northeastern facing slopes of the Santa Cruz Mountains and flows northerly over steep forested terrain until it meets the Middle, West and North Adobe Forks. The drainage area above the confluence of the Adobe Forks is undeveloped open space owned by the Mid-Peninsula Regional Open Space District and the Trust for Hidden Villa[2]. We decline to remove REC-1 because it is highly likely that, since 1975, recreational uses have occurred, or the water quality and quantity has been suitable to allow REC-1 uses to be attained.
- Ross Creek: We decline to remove REC-1 from Ross Creek because we have photographic evidence of children fishing and playing in this creek.
- Canoas Creek: We believe the CWA presumptive uses apply to Canoas Creek as it is a tributary to Guadalupe Creek.
- Pheasant, Herbert and Barrett creeks: We decline to remove REC-1 from these creeks, for which SCVURPPP observed no public access, because SCVURPPP states that these creeks appeared to

[2] http://www.scvurppp-w2k.com/ws_adobe.shtml

flow through private land. Recreational use by private land owners is also considered a beneficial use.

- Lower Penitencia Creek: According to SCVURPPP's web site[3], Lower Penitencia Creek flows from the foothills of the Diablo Range, through undeveloped, unincorporated county land, and continues westerly through largely residential neighborhoods. We decline to remove REC-1 because it is highly likely that, since 1975, recreational uses have occurred, or the water quality and quantity has been suitable to allow REC-1 uses to be attained.

Regarding (c) *Data/Information Exist that Do Not Support the Proposed REC-2 Use Designation*, this table contains the same list of creeks as the previous table in (b) above. We believe that all creeks provide (or *have* provided at any time since 1975) at a minimum, the aesthetic enjoyment that is an element of noncontact recreation, REC-2, and we decline to remove the REC-2 use from any creek.

In addition, for all of the information submitted, as stated in Section 2.1.1 above, a Use Attainability Analysis would be required in order to not designate a presumptive use on these surface water bodies.

3.3 Comment Letter 3: Morrison & Foerster on behalf of SCVURPPP

Comment 3.1. The Proposal to Create Blanket Designations based on "Presumptive Uses" Is Not Justified: 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)).

Response: Please see our response in Section 2.1, particularly Section 2.1.2, and response to comment 3.2 below.

Comment 3.2. 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 water bodies where 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).

Response: Please see our response in Section 2.1, and particularly Section 2.1.2, in which we note that a Use Attainability Analysis would be required to not designate a CWA presumptive use (WILD, REC-1 and REC-2). Please note that COLD is not a CWA presumptive use, and we proposed to designate COLD only where there is clear evidence that cold freshwater habitat exists on the water body.

[3] http://www.scvurppp-w2k.com/ws_lowerpen.shtml

Comment 3.3. 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, 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. 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 more sensible and resource-conserving approach.

Response: Please see our response in Section 2.1, and particularly Section 2.1.1.

Comment 3.4. 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 of the existence of a use in a tributary or tributary segment, the Program submits that the Board should rely on the Basin Plan's longstanding "Tributary Rule." Under the 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 (as it has successfully for approximately 25 years).

Response: Please see our response in Section 2.1, and particularly Section 2.1.3.

Comment 3.5. 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 has, 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.

Response: Please see our response in Section 2.1, and particularly Section 2.1.4.

Comment 3.6. 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).

It is clear that the Basin Plan amendment could impose significant compliance costs, especially on public entities subject to stormwater permitting. 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.

Response: We disagree that the proposed beneficial use designations present a new set of circumstances for stormwater permittees or the Water Board. CWA regulations at 40CFR131.3(e) state that existing uses are those uses attained in the water body on or after November 28, 1975, whether or not they are included in water quality standards. The proposed amendment clarifies the beneficial uses that have existed on surface water bodies in our region on or since that date.

Comment 3.7. The Proposed Amendment's Impacts and Alternatives Have Not Been Adequately Analyzed Under CEQA. 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 requires consideration of such impacts.

Response: Again, we disagree that the proposed beneficial use designations are new uses that will require new measures and likely environmental impacts. The project identifies uses that exist currently or existed on surface water bodies in our Region as of 1975. The purpose of the proposed amendment is to clarify that these are the beneficial uses that we are protecting now and will continue to protect. If control measures are required to attain water quality standards, they would be required whether or not these water bodies and beneficial uses are stated in the Basin Plan.

Comment 3.8. 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. 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 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 not be prudent for the Water Board to proceed with such a potentially important Basin Plan amendment without one.

Response: We disagree that an analysis of alternatives is required under the CEQA. Public Resources Code Section 15252 states that we are required to include a statement in any substitute for an EIR or negative declaration that our review of the project showed that the project would not have significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. A statement to this effect is made in Section 6.0 of the Staff Report.

Comment 3.9. Several potential alternatives appear 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 amendment 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 allow the Regional Board more flexibility without imposing unreasonable requirements on local public agencies.

Response: Please see our responses to the City of Sunnyvale's comments below in Section 3.11 below and in Section 2.1.4 above. Please see our response regarding the tributary rule in Section 2.1.3, and our response regarding the information to be collected under the municipal regional stormwater permit in Section 2.1.2.

3.4 Comment Letter 4: San Mateo Countywide Water Pollution Prevention Program

Comment 4.1. Designate Beneficial Uses for Specific Water Body Segments
Conditions related to aquatic life habitat, recreational use, and many other factors vary widely throughout water bodies, especially among various reaches of creeks in the Bay Area. The proposed amendment broadly and indiscriminately designates specific beneficial uses throughout an entire water body. We are very concerned about the potential regulatory consequences of such broad designations and the possible impacts on local agencies. For example, this approach could lead to the misapplication of water quality objectives to segments of water bodies that do not and cannot support a beneficial use designated for an entire water body. This could lead to

unwarranted listings of impairment under Clean Water Act sections 303(b)/(d) and inappropriate Total Maximum Daily Load (TMDL) restoration actions. Inappropriate listings could potentially necessitate burdensome and resource-consuming actions, including delisting or modifying use designations. Such actions could necessitate, among other things, the expenditure of significant resources on use attainability analyses (UAAs), CEQA-related documents, and associated appeals and litigation.

The Basin Plan amendment should clearly describe the spatial extent of beneficial uses within creeks and other water bodies. Beneficial uses should not be assigned to entire water bodies – they should be designated only for the specific water body segments (e.g., creek reaches) where they apply, based on appropriate supporting data.

Response: Please see our response in Section 2.1.1 regarding broadly designating presumptive uses and Section 2.2 regarding designating beneficial uses on a stream reach-by-reach basis.

Comment 4.2. Support Beneficial Use Designations with Appropriate Rationale and Data Sources. Appendix C to the staff report provides documentation of the rationale and/or data sources used to support the proposed beneficial use listings. We believe that supporting information presented is inappropriate and inadequate. "Clean Water Act 101(a)(2) presumptive use" is used in many instances to support designation of the WARM, WILD, REC-1, and REC-2 beneficial uses. This rationale should be replaced with a reference to site-specific data that show each proposed beneficial use actually exists in a specific water body segment (e.g., creek reach). REC-1 and REC-2 beneficial use designations should be supported by data showing the potential for the public to recreate at the water body segment. Data supporting REC-1 designations should demonstrate the potential for body contact with water where and when ingestion of water is reasonably possible.

Response: This comment objects to CWA presumptive uses being broadly designated. Please see our response in Section 2.1.1 regarding broadly designating presumptive uses and Section 2.2 regarding designating beneficial uses on a stream reach-by-reach basis.

Comment 4.3. Appendix C to the staff report provides documentation of the rationale and/or data sources used to support the proposed beneficial use listings. We believe that supporting information presented is inappropriate and inadequate. "Water Board staff knowledge" is occasionally used to support various proposed beneficial use designations. This rationale should be replaced with a reference to site-specific data that show each proposed beneficial use actually exists in a specific water body segment (e.g., creek reach).

Response: In compiling existing information regarding beneficial uses that exist in our surface water bodies, we consulted knowledgeable individuals from such resource agencies as the California Department of Fish and Game, National Oceanic and Atmospheric Administration, and Resource Conservation Districts. In a very limited number of cases, Water Board staff who have worked for many years in particular watersheds were consulted, for example, for their expertise on the existence of cold freshwater species. We stand by our use of these staff members' expertise.

Comment 4.4. Sanchez Creek (South Bay Basin) – The proposed Basin Plan amendment designates this entire water body with REC-1 and REC-2 beneficial uses. However, site-specific data are not provided in support of these designations; each designation is supported only as a "Clean Water Act 101(a)(2) presumptive use." During the fall of 2007 SMCWPPP (2008) walked the accessible urban reaches of this creek and characterized conditions using the Unified Stream Assessment (USA) protocol. Reaches designated S-1 and S-5 were 99% and 91% modified, respectively, by bed/bank armoring or underground culverting, and recreation sites were not observed during the assessment. Thus REC-1 and REC-2 beneficial uses do not appear to exist in, at a minimum, reaches S-1 and S-5 of this creek. In addition, another reach of Sanchez Creek from El Camino to San Francisco Bay is in an underground culvert (STOPPP 2002) and recreational beneficial uses presumably would not apply.

Response: We appreciate the submission of detailed information regarding specific reaches on this creek, but we are not identifying beneficial uses on a reach-by-reach basis as part of this amendment. The water quality for the accessible reaches of the creek is likely related to the water quality of these other reaches. Please also see responses to the issue of designating presumptive uses in Section 2.1.1 (including the necessity of conducting a Use Attainability Analysis in order to not designate a CWA presumptive use) and the issue of designating beneficial uses on a reach-by-reach basin in Section 2.2. In addition, we would evaluate the entire water body, not just the accessible urban reaches, and whether a beneficial use has been in existence at any time since 1975.

Comment 4.5. Pulgas Creek (South Bay Basin) – The proposed Basin Plan amendment also designates this entire water body with REC-1 and REC-2 beneficial uses. Again, site-specific data are not provided in support of these designations and each designation is supported only as a "Clean Water Act 101(a)(2) presumptive use." During the fall of 2006 SMCWPPP (2007) walked the accessible urban reaches of this creek and characterized conditions using the USA protocol. A reach designated P-1 was 87% modified via bank hardening using a variety of materials, including concrete, sackcrete, gunnite, and stone. Recreation sites were not observed in this reach during the assessment. Thus REC-1 and REC-2 beneficial uses do not appear to exist in, at a minimum, reach P-1 of this creek. In addition, another reach of Pulgas Creek is in an underground culvert that mostly runs along El Camino Real and joins two branches of the creek (STOPPP 2002). As with the above example, recreational beneficial uses presumably would not apply in a culvert.

Response: Please see our responses to the issue of designating presumptive uses in Section 2.1.1 and the issue of designating beneficial uses on a reach-by-reach basin in Section 2.2. In addition, we would evaluate the entire water body, not just the accessible urban reaches, and whether a beneficial use has been in existence at any time since 1975. Thus, we decline to change the proposed designation on segments of Pulgas Creek.

3.5 Comment Letter 5: City of San Jose

Comment 5.1. The City is a member agency in the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) and agrees with and incorporates their comments by

reference. Specifically, we support designating beneficial uses by water body segment, and oppose designating beneficial uses without sufficient supporting evidence.

Response: Please see our responses to SCVURPPP comments in Section 3.2 above. We respond fully to the issue of designating beneficial uses by water body segment in Section 2.2 and to the issue of designating beneficial uses presumptively in Section 2.1.

Comment 5.2. We support the proposed Beneficial Use Designations for the Guadalupe River; however, Ross Creek is primarily an earthen trapezoidal flood control channel, much like Canoas Creek. There is not adequate flow that would support a COLD beneficial use. Moreover, the report cited in the Staff Report did not state that Ross Creek would or could support cold water species. This proposed designation should be deleted.

Response: We agree that the evidence of cold freshwater habitat in Ross Creek is scant and will not designate this beneficial use.

Comment 5.3. Canoas Creek is an engineered flood control channel, similar to Ross Creek, terminated on the upstream end by a storm drain outfall. No opportunity exists in this creek for cold water habitat or migration to such habitat. Information cited in the Staff Report did not suggest that this use was supported in Canoas Creek. This proposed designation should be deleted.

Response: We agree that the evidence of cold freshwater habitat in Canoas Creek is scant and will not designate this beneficial use.

Comment 5.4. There is confusion on the naming of various sloughs in the Lower South San Francisco Bay near the area of the San Jose/Santa Clara Water Pollution Control Plant (Plant). The channel into which the Plant discharges has for many years been referred to as Artesian Slough. This has been carried through in various legal documents including NPDES permits for the Plant's discharge. Maps produced by the San Francisco Estuary Institute and the Oakland Museum refer to this slough as "Mallard Slough," and depict Artesian Slough as an historic slough occupying similar but not identical space in the marsh ("Creek and Watershed Map of Milpitas & North San Jose, 2005," and "Baylands & Creeks of South San Francisco Bay, 2005"). The map attached to the Staff Report as Appendix B depicts Mallard Slough as neither of these, but as the channel now designed as a bypass for Coyote Creek whose connection to the creek is regulated by a gate that is operated by the Santa Clara Valley Water District for management of a restoration area downstream.

Response: We agree that Mallard Slough and Artesian Slough are actually the same water body and will indicate that in Table 2-1 and Appendix C. We will also correct the location of Mallard Slough on the map.

Comment 5.5. The designation for "Mallard Slough" (Appendix C, page 266) describes it as "receiving an NPDES-permitted discharge: San Jose/Santa Clara Water Pollution Control Plant," which would imply that Artesian and Mallard are one and the same. However, it is listed as

MIGR beneficial use for steelhead migration to Coyote Creek and presumptive REC-1, neither of which would be accurate or appropriate.

Response: We agree that MIGR was designated for Mallard Slough in error, based in its incorrect location, and we will not designate this beneficial use. Regarding the statement that REC-1 does not apply, please see our response in Section 2.1.

3.6 Comment Letter 6: Alameda Countywide Clean Water Program (ACCWP)

ACCWP submitted comments and suggested corrections to Table 2-1 and the Surface Water Body Maps in tabular form. Water Board staff responses are shown in the far right-hand column.

Comments and suggested corrections to Table 2-1 and Appendix B, Surface Water Body Maps:

Comment	Water Body Name	Comment	RESPONSE
6.1	Capistrano Creek	Not shown on Appendix B map, and not contained in Appendix C. Apparently this is a local name for a very short creek that historically was a tributary of Middle Creek (see Fig 1 Oakland Museum map below). Along with Blackberry branch (not proposed for Basin Plan), this drainage was artificially diverted to culvert system that replaced historic Marin Creek; whose culvert has a separate outfall to the tidal mudflats so although it shares a slough-like receiving water with Codornices Creek (triangle feature # 5 in map) it is dubious whether the Capistrano – Blackberry drainages should be considered tributary to Codornices.	Capistrano Creek will be added to Figure 2-5 & Appendix C. Thank you for the historic and location information.
6.2	Cerrito Creek – corrections to County assignment	This creek is on the border between Alameda and Contra Costa counties for a substantial portion of its open reaches.	Appendix C will be corrected accordingly.
6.3	San Leandro Creek and sub-water bodies - hierarchy	Formerly listed as Lower San Leandro Creek, the new listing includes both the lower urban portion and the upper Section between Lake Chabot and Upper San Leandro Reservoir which is hydrologically very distinct. It may be appropriate to recognize Upper San Leandro Creek and Grass Valley Creek as tributaries subordinate to Lake Chabot (in the same way that tributaries to Upper San Leandro Reservoir are subordinated to it). However note that Upper San Leandro Creek exists both below and above Upper San Leandro Reservoir (shown but not labeled on Fig 2-6a), as receiving Indian Creek (labeled but not proposed for addition).	San Leandro Creek will remain listed as Upper & Lower San Leandro Creek. Table 2-1, Figs 2-6 & 2-6a, and Appendix C will be corrected accordingly.
6.4	San Leandro Creek and sub-water bodies – corrections to County assignment	Wholly in Contra Costa County: • the portion of Upper San Leandro Creek above Upper San Leandro Reservoir, including Indian Crk • Moraga Creek Partly in Contra Costa and Alameda Counties: • Kaiser Creek	Appendix C county information will be corrected accordingly.

Comment	Water Body Name	Comment	RESPONSE
		• Buckhorn Creek • Redwood Creek	
6.5	San Lorenzo Creek sub-water bodies - hierarchy	Eden Canyon Creek and Hollis Creek are tributaries to the San Lorenzo Creek channel which runs under I-580 (as defined by ACFCWCD, not shown on Fig 2-6a or 2-6b), rather than Palomares Creek	We will make this change in Table 2-1 & Appndix C. The Figures are correct.
6.6	Coyote Hills Slough	This Slough is now incorporated in the Alameda creek flood control channel, i.e. it is the receiving water for Alameda Creek and all of its sub tributaries, should be placed in that hierarchy.	We will make this change in Appndix C.
6.7	Stonybrook Canyon Creek	USGS' Geographic Names Information System (GNIS) indicates the stream is just Stonybrook Creek, while "Stonybrook Canyon" on the map refers to the valley.	The name will be corrected in Table 2-1, Appendix C & Fig 2-6b
6.8	Dry Creek "high in watershed"	GNIS shows 2 Dry Creek names in the Arroyo Mocho watershed, none in Arroyo del Valle.	Because there is conflicting information, we will remove Dry Creek in Arroyo Mocho.
6.9	Alamo Canal/Creek – names & hierarchy	First instance of name should be "Alamo Canal"—this is a tributary to Arroyo de la Laguna, at same junction as Arroyo Mocho (Fig 2-6b shows label extending too far down Arroyo de la Laguna but is otherwise correct). Alamo & South San Ramon Creeks are tribs to Alamo Canal; probably also Dublin Creek. Martin Canyon Creek is a trib to "Line J1" which receives several tribs then joins Alamo Canal. Fig 2-6b label extends too far down Arroyo de la Laguna but is otherwise correct. Suggest consulting with Zone 7 on present usage.	Table 2-1, Fig 2-6b, & Appendix C will be changed accordingly. Zone 7 has been consulted.
6.10	Arroyo de la Laguna and tributaries – corrections to County assignment	Partly in Contra Costa and Alameda Counties: • South San Ramon Creek • Alamo Creek • Tassajara Creek • Cottonwood Creek • Collier Canyon Creek • Cayetano Creek	Appendix C county information will be corrected accordingly.
6.11	Canada del Aliso	"Creek" is redundant in name, according to Oakland Museum maps and Geographic Names Information System.	This will be corrected in Table 2-1, Appendix C and Fig 2-7a
6.12	Codornices Creek	Fig. 2-5: Codornices Creek is misspelled.	Fig 2-5 will be corrected

Comment	Water Body Name	Comment	RESPONSE
6.13	Alameda Creek	Fig. 2-6a: Alameda Creek label to the left of Dry Creek is on Old Alameda Creek, which is now hydrologically distinct from the Alameda Creek main stem; label should go on the Flood Control channel which curves southwestward to meet Coyote Hills Slough.	Fig 2-6a will be corrected.

3.7 Comment Letter 7: City of Benicia

Comment 7.1. Lake Herman is a backup source of raw water supply for the City. The lake is posted with signs prohibiting swimming. Lake Herman has a caretaker residence located at the Dam, which adds a presence to further discourage body-contact recreation. The City therefore requests that the REC-1 designation on Table 2-1 be changed from "E" to "E*" for Lake Herman (page 8).

Response: We agree that REC-1 should be designated as E* for Lake Herman.

Comment 7.2. Sulphur Springs Creek is dry during portions of the summer and fall, so the City requests that the Sulphur Springs Creek Water Body Type designation (page 472 of BPA Appendix C) be corrected to read "Intermittent Stream" instead of "Perennial Stream."

Response: Agreed. We have made the correction to the documentation tables in the Staff Report.

Comment 7.3. The City questions the proposed designation of Sulphur Springs Creek as COLD habitat. … There is no evidence provided to support the assignment of COLD to the portion of the creek above Lake Herman. A survey of the lake performed by the City and the Department of Fish and Game in August 1998 counted and identified over 200 fish, none of which were the (cold water) species listed above.

Response: Our proposal to designate the COLD beneficial use on Sulphur Springs Creek was an error. We agree that COLD is not applicable to this water body.

Comment 7.4. The City understands that WARM is a Clean Water Act presumptive use for inland surface water bodies. However, for intermittent streams such as Sulphur Springs Creek, the City respectfully suggests that it would be more technically correct to designate and assign a refined use of Seasonal WARM (i.e. for when there is water in the creek).

Response: Please see our response in Section 2.3 above.

3.8 Comment Letter 8: Friends of Lake Chabot (Vallejo)

Comment 8.1. On page 358 (Rindler Creek) of the proposed Beneficial Use Documentation Tables, the Water Body Type is proposed as "Intermittent Stream." At this point of Rindler (confluence of Rindler and Blue Rock Springs Creek) it is "Perennial" and should be noted as such.

Response: We will note that Rindler is perennial.

Comment 8.2. On page 359 (Blue Rock Springs Creek) is noted as Intermittent, this creek's headwaters lie within the Blue Rock Springs Creek Golf Course, this creek is fed by ground water, it runs year round, it should be noted as "Perennial."

Response: Agreed. We have made the correction to the documentation tables in the Staff Report.

Comment 8.3: Though (Blue Rock Springs Creek) discharges into Rindler Creek, this discharge takes place approximately 2500 feet above Lake Chabot, should be considered a tributary to the Mouth of the Lake.

Response: The map and tables appear to be correct in depicting Blue Rock Springs Creek as discharging into Rindler Creek approximately a half-mile upstream of Lake Chabot.

Comment 8.4: Blue Rock Springs Creek should also be noted as "FRESH."

Response: Based on the fact that Blue Rock Springs flows to Lake Chabot, the Commenter is correct that FRESH should be a designated beneficial use. We will make that correction.

3.9 Comment Letter 9: San Francisco Baykeeper

Comment 9.1. We commend Regional Board staff for considering the beneficial uses of numerous water bodies listed in the Basin Plan that lack designations, and identifying the beneficial uses of many additional previously unlisted water bodies. While long overdue, this proposed Basin Plan amendment is the first step in protecting these water bodies from further degradation.

Response: Comment noted.

Comment 9.2. We hope that listing of these bodies will result in the collection of water quality data, which is the next step in determining whether remedial actions are required to maintain compliance with Water Quality Objectives. We hope this action leads not only to the recognition of sensitive water bodies within the Basin Plan but also to actions surrounding monitoring, compliance determination and remedial actions, if necessary. In the absence of reliable data for the majority of water bodies listed under the proposed amendment it may be assumed all un-

monitored bodies fail to achieve the specified objectives, thus requiring the development of a program of implementation for achieving these objectives.

Response: Our objective in this project is to identify existing beneficial uses. The Basin Plan amendment does not require any new implementation measures. We disagree that a lack of information about water quality translates into an assessment that water bodies are impaired, requiring a program of implementation.

3.10 Comment Letter 10: Bay Area Clean Water Agencies (BACWA)

Comment 10.1. We support and incorporate by reference the relevant comments submitted on this Basin Plan Amendment by the City of Sunnyvale on April 9, 2010.

Response: Comment noted. Please see our responses to the City of Sunnyvale comments in Section 3.11 below.

Comment 10.2. The staff report accompanying the draft amendment suggests that it is not the Water Board's intent to designate– either directly or indirectly through application of the tributary rule – new beneficial uses. For example, the introduction to the staff report states that "[t]he beneficial uses addressed in this Staff Report are existing uses and the purpose of this amendment is to clarify and provide transparency to the public." Similarly, the staff report states that the main objective of this project "is solely to add clarity to the Basin Plan, not to add any new regulatory standard, requirement, or program." We understand this to mean that this Basin Plan Amendment is essentially a housekeeping measure.

BACWA requests that the Water Board confirm our understanding that this amendment is not intended to effect significant changes in POTW plant operations or infrastructure but is merely intended to articulate uses that are currently being protected.

Response: We stand by the statements made in the Staff Report. The proposed amendment is not intended to effect changes in POTW permit conditions.

Comment 10.3. We also respectfully request that the Water Board ensure that it has reviewed relevant discharge permits to ensure that the proposed amendment will not have inadvertent impacts to POTW discharge permits.

Response: In developing the proposed Basin Plan amendment, we reviewed numerous POTW permits and did not find any case where the amendment would prompt changes in POTW permit conditions.

3.11 Comment Letter 11: City of Sunnyvale

Comment 11.1. **Clarify the Definition of "L" REC-1 in the Basin Plan**
The draft Basin Plan Amendment (BPA) proposes to "*replace the Table 2-1 designation "L" limited, for the water contact recreation beneficial use, as "L" is not defined in the Basin Plan and its meaning is unclear*." (Staff Report p.2) Rather than deleting this useful refinement of the current very broad REC-1 beneficial use designation, the City requests that a specific, rather than implicit definition of Limited Water Contact Recreation ("L" REC-1) be included in the Basin Plan (see example definition below).

This Limited Contact Recreation use has been used as a point of reference over the last approximately 15 years by Water Board staff and the Board when developing and adopting alternative bacteriological effluent limits (e.g., 500 MPN/100 mL fecal coliform) for POTWs with only Limited Water Contact Recreation uses existing in the vicinity of their discharges (e.g., NPDES permits for EBDA, EBMUD, SF SE, SBSA).

The Appendix A Proposed Basin Plan Amendment on page 1 proposes to insert, in part, the following language: *"Beneficial use designations for any given water body do not rule out the possibility that other beneficial uses exist or have the potential to exist. Existing beneficial uses that have not been formally designated in this Basin Plan are protected whether or not they are identified.*"

The Limited Water Contact Recreation beneficial use is an example of a use that exists in various locations in water bodies throughout the Bay although it has not been comprehensively designated in the Basin Plan. This fact is supported by the results of multiple site specific receiving water user studies. These user studies were required by the RWB, to be conducted by POTWs in the vicinity of their outfalls, to document the extent if any of full immersion body contact recreation (with likely ingestion of water) (i.e. REC-1 uses). This verification of the absence of full immersion body contact recreation was part of the NPDES permit approval process for granting limited water contact based effluent limits (e.g., 500 MPN/100 mL fecal coliform technology based effluent limits).

Response: The Commenter is requesting that a subcategory of the REC-1 beneficial use be developed, with associated water quality objectives for pathogens. A project that would accomplish these objectives was included in the 2009 Triennial Review and ranked as a lower priority. The request is outside the scope of this proposed Basin Plan amendment.

Comment 11.2. The City agrees that it is appropriate to defer designation of SHELL to water bodies until the State Water Board finishes it reassessment of the shellfish harvesting beneficial use definition itself. It may be some number of years before the State Board completes its development and adoption of statewide modifications to the SHELL definition and designation. In the interim, the City recommends including some minor Basin Plan modifications to provide needed guidance to Water Board permit writers in developing consistent permit limits and conditions (e.g., harvesting prohibitions) that will provide the appropriate level of protection to the actual existing level, if any, of shellfish harvesting adjacent to POTW outfalls.

As an example, the City's March 22, 2010 comment letter on the Enterococcus Basin Plan amendment included the following recommended clarification. For consistency with the National

Shellfish Sanitation Program prohibited classification for shellfish harvesting areas adjacent to POTW outfalls, the City recommended that the following sentence (underlined) be added to Footnote b to Basin Plan Table 3-1 Water Quality Objectives for Coliform Bacteria (underlined wording from the June 2007 Ocean Plan Amendments Scoping Document Issue 2 Alternative 2 for adoption of a "Fecal Coliform Standard for Shellfish"):

b. Source: National Shellfish Sanitation Program. The standards would not be applicable where shellfish are not harvested for recreational or commercial purposes.

Response: The Commenter is requesting an amendment of Chapter 3 of the Basin Plan, which is outside the scope of the proposed amendment.

3.12 Comment Letter 12: Union Sanitary District

Comment 12.1. The proposed additions to the Basin Plan include the addition of the Ocean, Commercial, and Sport Fishing beneficial use (COMM) to the Hayward Marsh. Appendix C of the Staff Report, page 198, indicates that the decision to add the COMM beneficial use to the Hayward Marsh was based upon information from the East Bay Park District's website (Web address: http://www.ebparks.org/parks/hayward). However, both the citation in Appendix C and language on the East Bay Park District's website indicate that fishing is not allowed in Hayward Marsh. Therefore, it appears that the assignment of the COMM beneficial use to the Hayward Marsh is an error.

Response: Agreed. COMM was assigned in error and will be deleted.

3.13 Comment Letter 13: Contra Costa Water District (CCWD)

Comment 13.1. Mallard Reservoir is not a surface water of the region and should be removed from the Basin Plan list.

Mallard Reservoir was designed and constructed to serve solely as the forebay to CCWD's Bollman Water Treatment Plant. In October 2002, the San Francisco District of the United States Army Corps of Engineers (COE) advised CCWD that Mallard Reservoir is "not a water of the United States and therefore not regulated by COE under Section 404 of the Clean Water Act." COE stated that, "Mallard is a man-made bermed containment constructed on dry land (i.e., uplands) well before 1972. It does not impound any natural drainage, but receives water through a pipeline from Suisun Bay." Mallard Reservoir has concrete liner side panels on approximately 75 percent of the embankment, while another 10 percent is rip-rap and the remaining embankment is composed of berm earthen material.

In light of the above facts, CCWD requests the Regional Board to find that Mallard Reservoir is listed in error as a "surface water of the region" and to remove Mallard Reservoir from the Basin Plan. If Mallard Reservoir is not removed at this time, CCWD requests that the Regional Board provide direction as to the procedure that CCWD should follow to ensure that this error is corrected and Mallard Reservoir is removed from the Basin Plan.

Response: We agree that Mallard Reservoir, which was included in the Basin Plan in 1975, does not impound natural drainage, and receives water only through a pipeline from Suisun Bay. If the pipeline was shut down, the reservoir would have no water inflow. The U.S. Corps of Engineers has informally communicated to the Water Board that Mallard Reservoir is considered non-jurisdictional under Section 404 of the Clean Water Act[4]. In light of this information, we agree to remove this water body and its designated uses from the Basin Plan, Table 2-1.

3.14 Comment Letter 14: East Bay Municipal Utility District (District)

Comment 14.1. The District is concerned about Basin Plan language that creates the perception that its reservoirs may be used for body contact recreation, which may be inferred from current and proposed REC-1 classifications.

Response: Please see our response in Section 2.4 above.

Comment 14.2. The District does not allow body contact recreation in its reservoirs, and the California Department of Public Health supports this prohibition. Therefore, the District requests that the Regional Board apply the E* designation consistently to all of the District's surface water bodies (i.e., include the E* designation for Lake Chabot, San Pablo Reservoir, Lafayette Reservoir, and San Pablo Creek).

Response: Agreed. We will designate the water contact recreation beneficial use (REC-1) as E* for Lake Chabot, San Pablo Reservoir, Lafayette Reservoir, and San Pablo Creek.

3.15 Comment Letter 15: San Francisco Public Utility Commission

Comment 15.1. We are concerned about the new E* for REC-1 beneficial uses. This designation may create the perception that SFPUC reservoirs have been or will be used for body contact recreation, which is not allowed under our Alameda and Peninsula Watershed Management Plans and Final Environmental Impact Reports.

Response: Please see our response in Section 2.4 above.

Comment 15.2. According to California Drinking Water-Related Statures and Regulations (Code of Regulations, Part 10, Chapter 5, Section 115825), "recreational uses shall not, with respect to a reservoir in which water is stored for domestic use, include recreation in which there is bodily contact with the water by any participant."

Response: Please see our response in Section 2.4 above.

[4] Email from K. Galacatos, Regulatory Project Manager, San Francisco District, U.S. Army Corps of Engineers, to J. O'Hara, Water Board staff. June 28, 2010.

Comment 15.3. The SFPUC requests that the Board Staff delete the E* reference, and instead simply footnote the REC-1 beneficial uses with an "*" and indicate in a footnote that, "While it is the goal of the Clean Water Act that all waters of the U.S. be "fishable and swimmable", these reservoirs are for municipal water supply, and it is the policy of the reservoir owner and operator to prohibit water contact recreation for the protection of public health."

Response: We will add clarifying language to the Basin Plan that will accomplish the same goal by saying that REC-1 is designated as E* on municipal water supply reservoirs and it is the policy of the reservoir owner and operator to prohibit water contact recreation for the protection of public health. See Section 2.4 for further details.

Comment 15.4. The proposed designation of SFPUC water bodies in the Alameda and Peninsula Watersheds as REC-1 and REC-2 is in conflict with local policies to protect biological resources in our watersheds. The SFPUC's Alameda and Peninsula Watershed Management Plans do not allow activities that are detrimental to watershed resources. Further, the SFPUC's Peninsula Watershed is a designated State of California Fish and Game Refuge. Section 10771 of the California Fish and Game Code prohibits fishing and hunting under this designation.

Response: Please see our response in Section 2.4 above.

Comment 15.5. Appendix D: Environmental Checklist, Item 4 - Biological Resources: The SFPUC believes that the Environmental Checklist prepared by the RWQCB to support a determination of "no project" under CEQA is in error. The proposed designation of SFPUC water bodies on its Alameda and Peninsula Watershed lands as REC-1 and REC-2 would conflict with "...local policies or ordinances protecting biological resources."

Response: We disagree that REC-1 and REC-2 designations conflict in any way with local policies or ordinance protecting biological resources. The proposed Basin Plan amendment addresses water quality that could support a particular use; it does not create a right of physical access to allow recreational uses of waters where a local policy or ordinance prohibits such uses. Please also see our explanation in Section 2.4 above.

Comment 15.6. Appendix D: Environmental Checklist, Item 10- Land Use and Planning: The proposed designation would conflict with "...any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project (including but not limited to, the general plan, specific plan, local coastal program, or zoning ordinance) adopted for the purpose of avoiding or mitigating an environmental effect."

Response: We disagree that REC-1 and REC-2 designations conflict in any way with any land use plan, policy, or regulation adopted for the purpose or avoiding or mitigating an environmental effect. The proposed Basin Plan amendment addresses water quality that could support a particular use; it does not create a right of physical access to allow recreational uses of waters where a local policy or ordinance prohibits such uses. Please also see our explanation in Section 2.4 above.

Comment 15.7. The decision to generalize when designating beneficial uses for entire streams does not address the fact that specific reaches of streams, especially in situations where there are dams on a stream or portions of streams are on public access versus private property, can have very different beneficial uses.

Response: Please see our response in Section 2.2 above.

Comment 15.8. Alameda Creek: COMM should be left as E because there are some fishable areas on private property upstream of the Diversion Dam.

Response: Commercial and recreational fishing (COMM) was and is proposed as an existing use on Alameda Creek. We note that the California Department of Fish and Game's (DFG) website lists Alameda Creek as a fishing location.

Comment 15.9. San Mateo Creek: COMM should be E because there are fishable areas on privately owned property downstream of Crystal Springs Dam.

Response: The methodology used to determine COMM was based on DFG's web-based list of fishing location. Because San Mateo Creek is not on DFG's web-based list of fishing locations, we will not designate the COMM beneficial use at this time.

Comment 15.10. San Antonio Creek: MIGR - Remove the E designation under current conditions as it does not exist. If steelheads ever do get access to this part of the watershed it can be returned to E.

Response: Because we based the designation of fish migration (MIGR) on San Antonio Creek on information submitted by the San Francisco Public Utilities Commission, we agree to remove this designation.

Comment 15.11. Indian Creek: COMM should be E because there are fishable areas on privately owned property. SPWN should be E because the adfluvial rainbow trout and other fishes spawn there.

Response: The methodology used to determine COMM was based on DFG's web-based list of fishing location. Because Indian Creek is not on DFG's web-based list of fishing locations, we will not designate the COMM beneficial use at this time. We will add the designation of fish spawning use (SPWN) to Indian Creek.

Comment 15.12. La Costa Creek: COMM should be E because there are fishable areas on privately owned property. RARE should be E because California red-legged frogs have been observed there.

Response: The methodology used to determine COMM was based on DFG's web-based list of fishing location. Because La Costa Creek is not on DFG's web-based list of fishing locations, we will not designate the COMM beneficial use at this time. We will add the designation of rare and endangered species habitat (RARE) to La Costa Creek.

Comment 15.13. Calaveras Creek: SPWN should be E because warm water fishes spawn there.

Response: We will add the designation of SPWN to Calaveras Creek.

Comment 15.14. Arroyo Hondo: COMM should be E because there are fishable areas on privately owned property.

Response: The methodology used to determine COMM was based on DFG's web-based list of fishing location. Because Arroyo Hondo Creek is not on DFG's web-based list of fishing locations, we will not designate the COMM beneficial use at this time.

Comment 15.15. San Andreas Lake should be called San Andreas Reservoir.

Response: We will make this name change as requested.

Comment 15.16. Pilarcitos Lake should be called Pilarcitos Reservoir.

Response: We will make this name change as requested.

Comment 15.17. Golden Gate Park Lakes: REC-1 should not be listed as E. There are administrative barriers in place prohibiting body contact (Park Code Section 4.02). The ornamental lakes were not meant for or designed to allow body-contact recreation. Since access to the lakes by water fowl is not restricted there is no control over the contamination of the lakes by these sources. In addition, we anticipate supplying these artificial lakes with recycled water making contact recreation problematic.

Response: We agree and will not add the REC-1 use. These lakes were designed for waterfowl and non-contact recreation and the currently identified beneficial uses reflect this.

Comment 15.18. Appendix B: Water Body Maps in Figures 2-4, 2-4a and 2-6a: Given the small sizes of most of the blue (water) within the City and County of San Francisco boundaries it is unclear which exact water bodies the blue depicts in these areas on the map. Therefore, perhaps Lake Merced should be the only water body on the map. Also, one of the blue areas appears to be Sunset Reservoir, which is a covered reservoir and therefore should not be shown on the map. It is likely that there are more examples of covered reservoirs on the map.

Response: We recognize the Basin Plan maps have a very low resolution; however, this resolution is adequate for the purpose of illustrating the general location of the surface water bodies in the Basin Plan Table 2-1. We will remove Sunset Reservoir, which was included in error, but will retain the other water bodies.

Comment 15.19. Figure 2-4a Vista Grande Canal should not be depicted on the map (south of Lake Merced).

Response: We will remove Vista Grande Canal, which was included in error.

3.16 Comment Letter 16: San Francisco Recreation & Parks Department

Comment 16.1. The SF Recreation & Park Department does not concur in designating REC-1 as a beneficial use for Golden Gate Park Lakes. All Golden Gate Park lakes are man-made and were designed and constructed as landscape water features to enhance the park experience by incorporating water as a visual landscape element – not as an active recreation venue. The lakes were constructed over 100 years ago with clay-lined bottoms to hold water within these man-made water features and to permit naturalistic water edges. The sandy soil beneath the lakes is highly permeable, so the integrity of the clay liner is absolutely critical. Since all of the lakes are shallow, active water contact activity in the lakes would have an immediate and destructive impact on the clay liners. Hence the existing REC-2 beneficial use designation is appropriate – the proposed REC-1 beneficial use is not.

Response: We agree and will not add the REC-1 use. These lakes were designed for waterfowl and non-contact recreation and the currently identified beneficial uses reflect this.

Comment 16.2. The SF Recreation & Park Department does not concur in designating COMM, WARM, or REC-1 as beneficial uses for Islais Creek nontidal. (a) The non-tidal portion of Islais Creek is three miles from the Bay and the reach between the creek and the bay is under a major regional highway. Therefore, there are no fish, shellfish or other organisms that exist in the creek. Additionally, the San Francisco Park Code expressly prohibits the collection of animals from parkland. (b) Islais Creek's streamflow is not sufficient to support fisheries or other warm freshwater habitat. The creek is intermittently dry in the summer months and is hydrologically disconnected from San Francisco Bay and fishery source. (c) Islais Creek is very narrow (one-foot wide in some locations) and not available for swimming, water-skiing, scuba diving and other active recreation activities described in REC-1. Water access is prevented in several locations by fences. Additionally, the San Francisco Park Code prohibits even shallow access to the waterway.

Response: At this time, we will not designate uses for this small portion of Islais Creek. We maintain that presumptive uses generally apply to all water bodies in the Region.

4. RESPONSES TO ISSUES RAISED AT THE MAY 12, 2010 TESTIMONY HEARING

This Section addresses questions raised at the May 12, 2010, Water Board testimony hearing on the proposed Basin Plan amendment. Mr. Bruce Wolfe, Ms. Naomi Feger and Ms. Janet O'Hara answered some questions during the meeting; those questions and Water Board staff's responses are recorded in the testimony hearing transcript and are included in Appendix F of the July 14, 2010 Water Board Package. Staff responses to concerns that required research or further consideration are provided in this section.

Board Member Singh requested that more information be provided to designate beneficial uses, especially for smaller water bodies, some local creeks (for example, Ross Creek and Canoas Creek), and reservoirs. As we note in Section 2.1.1 above, the concept of assigning all water bodies certain "presumptive" beneficial uses, unless assessments show that level of protection is not warranted, is referred to as the Clean Water Act "rebuttable presumption."

We are required to designate presumptive beneficial uses unless it is demonstrated through a Use Attainability Analysis that it is impractical to do so. In other words, further information and analyses are required to not designate presumptive uses. We did provide documentation for the non-presumptive uses, and in doing so, removed the COLD designated use from both Ross and Canoas creeks. We believe the Clean Water Act presumptive uses apply to Canoas Creek as it is a tributary to Guadalupe Creek. As to designating beneficial uses in general for some of the smaller creeks in our Region, these creeks are considered waters of the United States, and it is our responsibility to protect the waters of the United States and designate appropriate uses of those waters. We have addressed the issues raised regarding reservoirs in Section 2.4 above.

Board Member Young requested further detail on the compliance issues brought up in the written comments, for example where REC-1 may be seen as inappropriate. Dr. Young asked that staff's Response to Comments provide more clarity as to how common such compliance issues might be, and how staff would proceed in a situation where beneficial use designations resulted in unintended compliance issues.

These topics are both discussed in Sections 2.1.1 and 2.2 above. We cannot say at this time how common it would be to have compliance issues with a REC-1 designated beneficial use. Designating uses in and of itself does not lead to compliance issues. The CWA provides a rebuttable presumption that the REC-1 use exists and water quality for the proposed additional water bodies is already protected under the CWA for existing uses, whether the uses are designated in the Basin Plan or not (40CFR131.3(e)). We also noted in Section 3.10 above that the proposed amendment is not intended to effect changes in POTW permit conditions.

5. STAFF INITIATED CHANGES

Water Board staff have made a number of insignificant editorial changes to the proposed Basin Plan amendment and Staff Report, intended to clarify or correct the February 24, 2010 draft documents. These changes are shown in underline/strikeout in the revised versions of these two documents (Appendices B and C to the July 14, 2010 Staff Summary Report).

The other more significant staff-initiated changes are described below.

Changes to Table 2-4, Beneficial Uses of Wetland Areas

We have deleted the Bair Island Wetlands, Hayward Shoreline Marsh, Napa-Sonoma Marshes and Pescadero Marsh from the proposed Basin Plan amendment, Basin Plan Table 2-1, "Existing and Potential Beneficial Uses of Water Bodies in the San Francisco Bay Region." These wetlands are already included in Table 2-4, "Beneficial Uses of Wetland Areas." Thus there is no reason to include them in Table 2-1, so we have deleted them.

Removal of Indistinct and Incorrectly-Placed Water Bodies and Beneficial Uses

We have deleted several water bodies and one beneficial use proposed for addition to the Basin Plan because they are not appropriate. These include:

- Bel Marine Keys Lagoon and McAvoy Harbor, because these privately-operated and man-made water bodies are not significantly distinct from the larger water bodies they are connected to.
- Napa Plant Sites, because this restoration area will become a marsh and there is minimal merit in listing it separately.
- Dow Wetlands because it was mistakenly identified in the proposed Basin Plan amendment as being in the San Francisco Bay region when it is instead located in the Central Valley region.
- The proposed beneficial use "preservation of rare and endangered species" (RARE) is removed from Bahia Lagoon because documentation of this use was found to be inadequate.

Removal of Creek Tidal Segments

For three creeks, Petaluma, Tolay and Sonoma, we proposed tidal and non-tidal segments as separate listings with distinct beneficial uses. We have removed the listings for the tidal segments as there was no reason to segment these creeks, for example to be consistent with TMDLs. The designated uses for these waters apply over their entire lengths.

6. REFERENCES

Email from K. Galacatos, Regulatory Project Manager, San Francisco District, U.S. Army Corps of Engineers, to J. O'Hara, Water Board staff. June 28, 2010.

Leidy, R.A., G.S. Becker, and B.N. Harvey. 2005. *Historical distribution and current status of steelhead/rainbow trout (*Oncorhynchus mykiss*) in streams of the San Francisco Estuary, California*. Center for Ecosystem Management and Restoration, Oakland, CA. http://www.cemar.org/estuarystreamsreport/homepage.html

Regional Water Quality Control Board Staff Beneficial Use Recommendations – Memo for the Record. Prepared by J. O'Hara, Water Board staff. June 29, 2010.

Santa Clara Valley Urban Pollution Prevention Program website. Descriptions of Adobe Creek. http://www.scvurppp-w2k.com/ws_adobe.shtml. Accessed the week of June 7, 2010.

Santa Clara Valley Urban Pollution Prevention Program website. Descriptions of Lower Penitencia Creek.http://www.scvurppp-w2k.com/ws_lowerpen.shtml. Accessed the week of June 7, 2010.