Appendix E

Comment Letters

Public comment period: February 24 - April 12, 2010

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Alameda Countywide Clean Water Program (ACCWP)
Program staff comments on Proposed Basin Plan Amendment –
Addition of Water Bodies and Beneficial Uses to the San Francisco Bay Basin Plan

Comments and suggested corrections to Table 2.1:

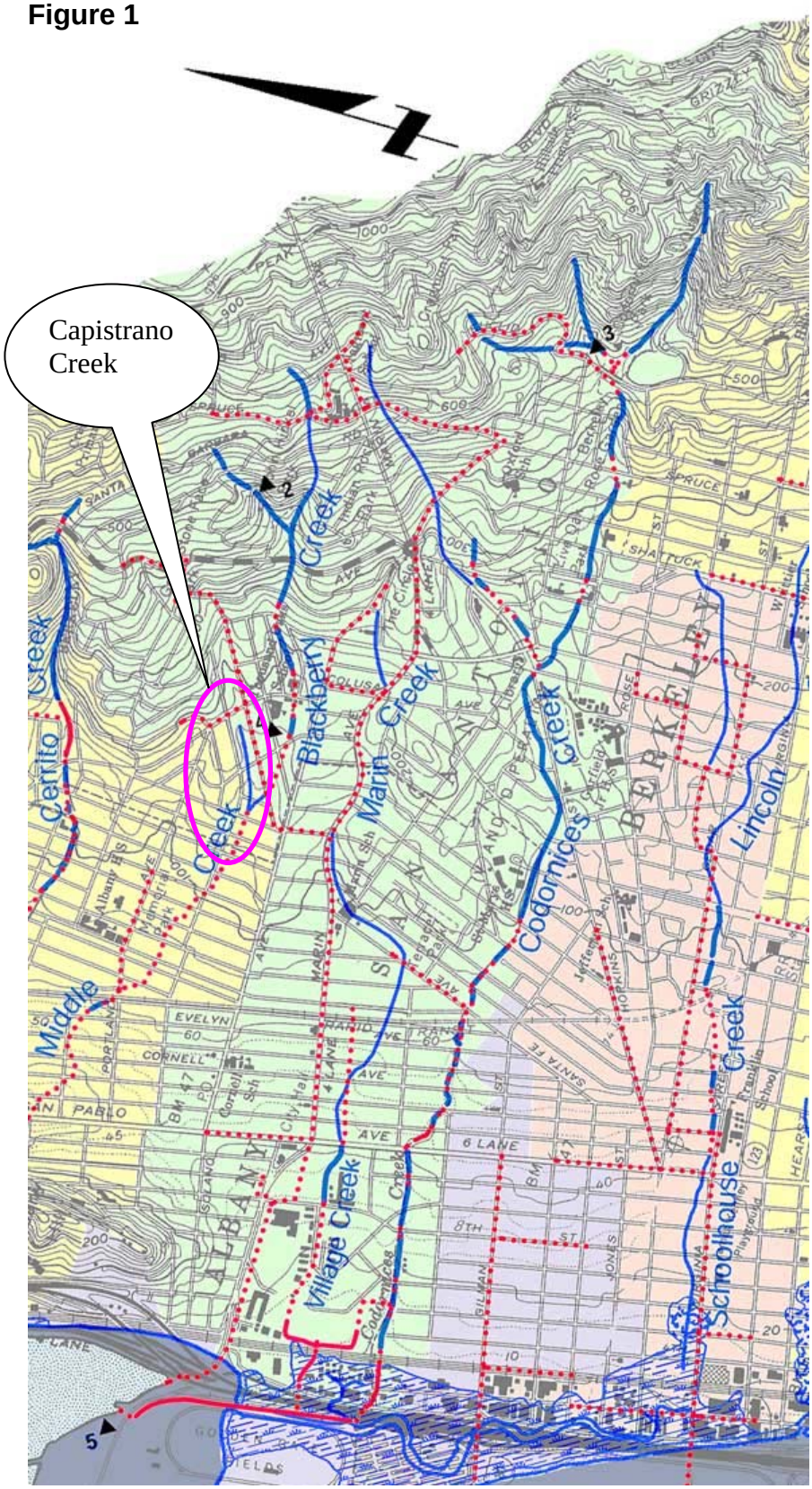
Page	Water Body Name	Comment
7	Capistrano Creek	Not shown on Appendix B map, and there is no information for this water body name in Appendix C (Surface Water Body Beneficial Use Documentation Tables). Apparently this is a local name for a very short creek segment that historically was a side tributary of Middle Creek (see Fig 1 mark-up of Oakland Museum map below). Along with the larger Blackberry branch (which has not been proposed for Basin Plan addition), this drainage was artificially diverted into the culvert system that replaced the historical Marin Creek; the "Marin Creek" culvert has a separate outfall to the tidal mudflats so although it shares a slough-like receiving water with Codornices Creek (triangle feature number 5 in the map) it is dubious whether the Capistrano – Blackberry drainages should be considered tributary to Codornices.
7	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.
9-10	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 also the upper section between Lake Chabot and Upper San Leandro Reservoir which is hydrologically very distinct. While Appendix C sources include information for both portions of the creek, the intervening . 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)
10	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 Creek • Moraga Creek Partly in Contra Costa and Alameda Counties: • Kaiser Creek • Buckhorn Creek • Redwood Creek

10	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
10	Coyote Hills Slough	This water body 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.
10	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.
11	Dry Creek "high in watershed"	GNIS shows 2 Dry Creek names in the Arroyo Mocho watershed, none in Arroyo del Valle.
11	Alamo Canal/Creek – names & hierarchy	First instance of name should be "Alamo Canal"—this is a tributary direct to Arroyo de la Laguna, at same junction as Arroyo Mocho, rather than a tributary to Arroyo Mocho (Fig 2-6b shows label extending too far down Arroyo de la Laguna but is otherwise correct). . Alamo Creek and South San Ramon Creek are both tributaries to Alamo Canal; probably also Dublin Creek. However Martin Canyon Creek is a tributary to "Line J1" which receives several tributaries and then joins Alamo Canal. (Fig 2-6b shows label extending too far down Arroyo de la Laguna but is otherwise correct). Suggest consulting with Zone 7 on present usage.
11	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
13	Canada del Aliso	"Creek" is redundant in name, according to Oakland Museum maps and Geographic Names Information System.

Appendix B, Surface Water Body Maps
In addition to errors noted above,

- Fig 2-5: Codornices Creek is misspelled.
- 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.

Alameda Countywide Clean Water Program (ACCWP)
Program staff comments on Proposed Basin Plan Amendment –
Addition of Water Bodies and Beneficial Uses to the San Francisco Bay Basin Plan
Figure 1



Bay Area Clean Water Agencies
A Joint Powers Public Agency
Leading the Way to Protect our Bay

April 12, 2010

Ms. Janet O'Hara
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Submitted via electronic mail to *johara@waterboards.ca.gov*

RE: Basin Plan Amendment to Add Water Bodies and Beneficial Uses

Dear Ms. O'Hara:

Thank you for the opportunity to provide comments on the draft amendment to the San Francisco Bay Basin Plan (Basin Plan Amendment) to add currently unnamed water bodies and beneficial uses to Table 2-1. In addition to the comments provided herein, we support and incorporate by reference the relevant comments submitted on this Basin Plan Amendment by the City of Sunnyvale on April 9, 2010. BACWA is a joint powers agency whose members own and operate publicly-owned treatment works (POTWs) and sanitary sewer systems that collectively provide sanitary services to over 6.5 million people in the nine county San Francisco Bay Area. BACWA members are public agencies, governed by elected officials and managed by professionals charged with protecting the environment and public health.

BACWA members discharge treated and disinfected municipal wastewater into San Francisco Bay and its tributaries. When a beneficial use has been designated in a Basin Plan and water quality objectives necessary to protect that use are established, municipal agencies that discharge must comply with effluent limits based on those objectives regardless of cost or benefit to water quality.[1] Once a beneficial use has been established for a water body it cannot be changed without completing a Use Attainability Analysis (UAA), or a Basin Plan Amendment, both of which are very time and resource-intensive.[2] Thus, the addition of "new" designated beneficial uses can have substantial implications for POTW operations and infrastructure and the communities that they serve.

The difficulties of remedying inappropriate or unintentional designations have been made clear in the challenges surrounding discharges from the City of Vacaville's municipal wastewater treatment plant. In that case, Vacaville was issued a permit that included limits

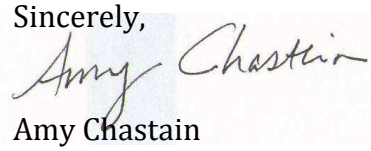
[1] *See Burbank v. SWRCB,* 35 Cal. 4th at 613, 627, n7 *citing* 33 U.S.C. §§1311(a), (b)(1)(B) & (C), 1342(a)(1) & (3).
[2] A UAA, for example, requires a through scientific assessment of the factors affecting attainments of use and includes a detailed consideration of the physical, chemical, biological, and economic use removal criteria described in EPA regulation. 40 C.F.R. 131.10(g) et seq.

derived from water quality objectives to protect, among other uses, municipal and domestic water supply (MUN) and cold freshwater habitat (COLD). In its review of the permit, the State Water Resources Control Board (State Water Board) concluded that these uses were not appropriate for the waterbody, but that to address the inappropriate use designations, the Central Valley Regional Water Quality Control Board had undertake a Basin Plan amendment process.

The staff report accompanying the draft Basin Plan 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."[3] 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."[4] 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. 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 POTW discharge permits.

Sincerely,



Amy Chastain
Executive Director
Bay Area Clean Water Agencies

[3] Staff report at page 1.
[4] Staff report at page 3.

SAN FRANCISCO BAYKEEPER

April 12, 2010

Attn: Jan O'Hara
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Sent via electronic mail: johara@waterboards.ca.gov

RE: Proposed Basin Plan Amendment for the Addition of Surface Water Bodies and Beneficial Uses

Dear Regional Board Members and Staff:

On behalf of San Francisco Baykeeper and our 1,500 members, please accept the following comments on the proposed Basin Plan Amendment calling for the addition of surface water bodies and beneficial uses to Chapter 2 of the Water Quality Control Plan for San Francisco Bay Basin (Basin Plan). 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.[1]

We hope that listing of these bodies will result in the collection of water quality data, which is the next reasonable step in determining whether remedial actions are required to maintain compliance with Water Quality Objectives, specified in Chapter 3 of the Basin Plan.[2] Since the need to address the issue of unlisted and undesignated water bodies within Region 2 has gone on for nearly a decade we hope this action leads not only to the recognition of sensitive water bodies of the state 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 that all un-monitored bodies fail to achieve the specified objectives, thus requiring the development of a program of implementation for achieving these objectives.

Once again, we thank you for your hard work in strengthening the Basin Plan through the recognition of these water bodies and the designation of beneficial uses. We look forward to learning more at the public hearings scheduled for May 12 and June 9, 2010 to understand how the Regional Board will ensure these water bodies do not undergo further degradation.

[1] California Water Code §13241
[2] California Water Code §13242

Sincerely,

Ian Wren, Staff Scientist

San Francisco Baykeeper

CITY HALL • 250 EAST L STREET • BENICIA, CA 94510 • (707) 746-4200 • FAX (707) 747-8120

Public Works & Community Development Department

April 12, 2010

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

Attention: Jan O'Hara

SUBJECT: City of Benicia Comments on Addition of Surface Water Bodies and Beneficial Uses to Chapter Two of the Basin Plan

The City of Benicia appreciates the opportunity to submit the following comments on the Proposed Basin Plan Amendment (BPA) for Addition of Surface Water Bodies and Beneficial Uses to Chapter Two of the Basin Plan. The City has two comments; one regarding Lake Herman and the other regarding Sulphur Springs Creek.

Lake Herman is a balancing reservoir owned by the City. Excess water from the North Bay Aqueduct (primarily Sacramento River water) not used by the drinking water treatment plant is stored in the reservoir along with runoff from the watershed. 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, Suisun Bay, be changed from "E" to "E*" for Lake Herman (page 8) in recognition that Lake Herman is a potable source of supply and that there are in place administrative barriers to full body contact recreational uses.

The proposed BPA would also add the waterbody Sulphur Springs Creek which discharges into and out of Lake Herman "Upper" Sulphur Springs Creek is about 9 miles long and "Lower" Sulphur Springs Creek is about three. Upper Sulphur Springs Creek is dry during

the summer and fall. Water enters "Upper" Sulphur Springs Creek during the wet season when there is flow from the unnamed tributaries in the watershed and when Hiddenbrook development's stormwater retention ponds discharge. The retention ponds are located at the top of the watershed and only discharge intermittently when the ponds exceed capacity. There is no discharge during the summer and fall.

There are two circumstances when water enters "Lower" Sulphur Springs Creek below Lake Herman Dam, one, is when the lake level is manually lowered to about 22' during the wet season through the drain valve, and the second is when Paddy Creek flows. Paddy Creek drains approximately 3-square miles of a watershed subbasin and intersects Sulphur Springs Creek below the Dam; it is dry during a portion of the fall, usually August and September. Otherwise, the water present in the creek downstream of Lake Herman is tidal flow from Suisun Bay.

Since the creek is dry during portions of the summer and fall, 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."

Similarly, the City questions the proposed designation of Sulphur Springs Creek as a COLD habitat. Clearly for the portion of the creek below Lake Herman ("Lower" Sulphur Springs Creek) the only flow in it is generally that from inflow from Suisun Bay, which does not support the COLD beneficial use. There is no evidence provided to support the assignment of COLD to the portion of the creek above Lake Herman ("Upper" Sulphur Springs Creek). The applicability of COLD as stated in Section 4.6 Table 2 (p.11) of the BPA staff report is "*Designated where indicators of cold freshwater habitat are present, such as the presence of steelhead trout, salmon, or other cold water species.*" Given that parts of the creek are dry for portions of the year, it would appear to be unlikely for these types of temperature sensitive organisms to be able to survive upstream of Lake Herman, and therefore for COLD to exist. A fish 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 species listed above.

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).

Thank you for considering our comments and requested changes. If you have any questions regarding the comments, please do not hesitate to contact Vicki Shidell, Water Quality Supervisor, at (707) 746-4338 or e-mail her at vshidell@ci.benicia.ca.us

Sincerely,

Chris Tomasik
Assistant Public Works Director

CT:[VS]: f:\pw\WWTP\ RWQCB Correspondence\ BPA Lake Herman Sulphur Sprg Crk Letter 040810
file: WWTP\CRWQCB Correspondence

cc: Jeff Gregory, Wastewater Treatment Plant Superintendent
Scott Rovanpera, Water Treatment Plant Superintendent
Vicki Shidell, Water Quality Supervisor
David Wenslawski, Water Quality Technician
Brad Harms, Water Quality Technician

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April 12, 2010

Jan O'Hara
San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Comments on the Proposed Region 2 Basin Plan Amendment: Addition of Water Bodies and Beneficial Uses to the San Francisco Bay Basin Plan

Dear Ms. O'Hara:

Contra Costa Water District (CCWD) appreciates this opportunity to provide input to the San Francisco Bay Basin (Region 2) proposed Basin Plan Amendment. CCWD has two comments regarding the listing for Mallard Reservoir. First, Mallard Reservoir is not a surface water of the region and should be removed from the Basin Plan list. Second, CCWD strongly urges the Board to reconsider the staff recommendation to attribute existing REC-1 and REC-2 beneficial uses to all bodies of water. These comments are described in more detail below.

Mallard Reservoir should be removed from the Basin Plan list of surface waters of the region.

CCWD's Mallard Reservoir is listed in the Basin Plan as a surface water of the region. This listing is in error, as Mallard Reservoir is an integral part of CCWD's Bollman Water Treatment Plant and therefore is not a surface water of the region. CCWD has brought this error to the Board's attention in our letter of May 9, 2003, and follow-up letter of June 16, 2003, copies of which are attached, and in our comments to the Board on October 19, 2005 in the context of the Proposed Amendment to the Basin Plan for the San Francisco Bay Region for the 2005 General Update with Non-Regulatory Revisions.

CCWD values the Regional Board's efforts to update and correct the Basin Plan listing of surface waters. This is a step forward in ensuring that discharges to all surface waters are properly regulated to protect water quality. It is appropriate to add surface waters that have been overlooked in past Basin Plans, and it is equally important to use this opportunity to remove previous listings that were made in error. Erroneously listed bodies of water create expectations of activities that are incompatible with the purpose of the facilities and create more oversight work without fulfilling the purpose of the NPDES system, which is to prevent the discharge of pollutants to surface waters.

The Basin Plan defines surface waters of the region as consisting of "non-tidal wetlands, rivers, streams, and lakes (collectively described as inland surface waters), estuarine wetlands known as baylands, estuarine waters, and coastal waters." Mallard Reservoir, however, does not fall under this definition. Mallard Reservoir was designed and constructed to serve solely as the forebay to CCWD's Bollman Water Treatment Plant, and as such it is not an inland surface water, estuarine wetland, estuarine water, or coastal water.

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.

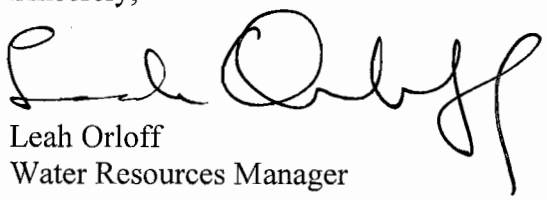
CCWD strongly urges the Regional Board to reconsider the staff recommendation to attribute existing REC-1 and REC-2 beneficial uses to all water bodies.

The proposed REC-1 and REC-2 beneficial use designation for all surface waters in the region originates in an overly broad interpretation of the intent of Section 101(a)(2) of the Clean Water Act (Act). Section 101(a)(2) of the Act declared, in part, that a "goal" for the "Nation's waters" was "where attainable" an interim water quality goal that would provide for recreation "in and on the water" be "achieved by July 1, 1983." Regional Board staff cites this provision of the Act as creating a, "...'rebuttable presumption' that fishable and swimmable uses are attainable." Any suggestion, however, that Mallard Reservoir itself possesses current or prospectively attainable REC-1 attributes may be refuted by California Health and Safety Code section 115825(b), which prohibits all body contact recreation in drinking water reservoirs. Likewise, an appropriate assessment of this water body would also amply demonstrate the absence of current or prospectively attainable REC-2 attributes. While it is widely accepted that one of the overall objectives of the Act is to protect recreational uses, setting an unattainable beneficial use for a water body does not advance this goal.

The proposal to use "E*" for REC-1 in water bodies such as drinking water reservoirs where there is, in fact, no existing REC-1 use runs counter to the stated goal of this amendment, which is to improve the clarity of the Basin Plan. In Mallard Reservoir, for example, the physical, administrative, and legal barriers that have been in place since the reservoir was constructed mean that there is not, and never has been, any body contact recreation. In addition there is not, and never has been, any non-contact recreation in Mallard Reservoir. Further, as a component of the Bollman Water Treatment Plant, Mallard Reservoir has no prospective REC-1 or REC-2 uses. This would be far from clear to a public that sees both REC-1 and REC-2 listed as existing uses of the Reservoir, even with a footnote on REC-1 noting that body contact recreation may be limited. Clarity and reasonableness demand that the "E" designation be removed from beneficial uses that do not, and never have, actually existed. If necessary, the Regional Board should perform a Use Attainability Analysis, pursuant to Title 40 Part 131 of the Federal Code of Regulations to bring about this revision.

If you would like any additional information, or would like to discuss these comments, please call me at (925) 688-8083 or call Shing Kong at (925) 688-8344.

Sincerely,



Leah Orloff
Water Resources Manager

LO/SK:wec

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June 16, 2003

Mr. Thomas Mumley
Planning Division Chief
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Comments to Revised Draft General NPDES Permit for Discharges from Surface Water Treatment Facilities

Dear Mr. Mumley:

This letter is in follow-up to the San Francisco Bay Regional Water Quality Control Board (RWCQB) response to the Contra Costa Water District (CCWD) comment letter dated May 9, 2003. The CCWD letter provided comments on the proposed *Region Wide NPDES Permit for Discharges from Surface Water Treatment Facilities.*

For the record, CCWD wishes to emphasize our opinion that Mallard Reservoir (Mallard), the "receiving water" for our Bollman Water Treatment Plant discharges, should not be listed in the San Francisco Bay Region Water Quality Control Plan (plan). CCWD strongly believes that Mallard was wrongly designated in the plan and should not be subject to the NPDES permit program. As such, CCWD requests that the record preserve our legal rights to appeal this designation to the State Water Resources Control Board.

Should you have any questions or comments, please contact me at (925) 688-8023.

Sincerely,

David A. Omoto
Environmental Compliance Officer

DAO:llc

cc: Ms. Jenny Chen/SF-Bay RWQCB

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May 9, 2003

Ms. Jenny Chen
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Comments to Revised Draft General NPDES Permit for Discharges from Surface Water Treatment Facilities

Dear Ms. Chen:

Contra Costa Water District (CCWD) respectfully submits these comments on the proposed *Region Wide NPDES Permit for Discharges from Surface Water Treatment Facilities* (permit). While CCWD recognizes that the overall intent of the NPDES permit program is to protect the beneficial uses of waters of the United States, we do not believe that the permit, or at least certain provisions in the permit, applies to the Bollman Water Treatment Plant (Bollman). We are submitting comments to this effect on applicability, as well as general permit comments. Our comments are discussed under the following topics:

- Permit Applicability
- Impacts to Beneficial Uses
- General Comments on the Permit

Permit Applicability

CCWD believes that Mallard Reservoir (Mallard), the "receiving water" for Bollman discharges, is not a "water of the United States." Furthermore, Mallard should not be listed in the San Francisco Bay Region Water Quality Control Plan. As such, Mallard should not subject to the NPDES permit program.

In a recent (October 2002) conversation with the San Francisco District-United States Army Corp of Engineers (COE), CCWD sought COE's informal opinion on jurisdiction at Mallard for a pending CCWD maintenance project. 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 Suisan Bay." As such, COE advised CCWD that Mallard was "not a water of the United States and therefore not regulated by COE under Section 404 of the Clean Water Act."

In recognition that the definition of waters of the United States is controversial, there is much value in the COE opinion. The COE opinion, whether it is informal or formal, is based on facts surrounding the construction and operation of Mallard. COE used these facts to conclude that Mallard was not a water of the United States under the federal Clean Water Act. In light of these facts and the COE opinion, CCWD asks the Regional Water Quality Control Board (RWQCB) to review NPDES applicability to Mallard and render an opinion.

Finally, CCWD does not believe that Mallard should be listed in the *San Francisco Bay Region Water Quality Control Plan* (Plan) as a beneficial use body of water. It is a terminal reservoir that does not discharge to waters of the United States. Mallard was constructed and is operated as described above by COE, which opined that it is not a water of the United States. Mallard was specifically constructed to function as a source of agricultural, industrial and municipal water supply. It was never intended to provide other beneficial use designations (i.e., warm water fish habitat, fish spawning, etc.).

CCWD has contacted RWQCB on the procedures to remove a beneficial use body of water from the Plan. We are reviewing these procedures and will attempt to remove Mallard from the plan. CCWD asks RWQCB to allow us a reasonable amount of time to remove Mallard from the list before imposing permit requirements.

Impacts to Beneficial Uses

CCWD believes that the Bollman backwash solids discharges neither historically nor currently impact the beneficial uses of the receiving water.

Mallard was constructed in the 1930's to serve as a source of agricultural and industrial water supply. It receives water from the Sacramento-San Joaquin Delta by way of a pump and gravity flow canal system. Mallard has a capacity of about 3,100 acre-feet and a surface area of about 200 acres. The design of Mallard has not changed since its original construction.

CCWD was formed in 1936 to provide potable (municipal) water, as well as to continue to provide the original industrial and agricultural water supply services. Mallard served and continues to serve as the primary reservoir for these services. We believe that sometime in the 1980's, RWQCB assigned the additional beneficial uses of: fish spawning, warm water fish habitat; and wildlife habitat.

Although Mallard supports vibrant fish spawning, warm water fish, and wildlife habitats (habitat), these were never the intended beneficial uses. Regardless, CCWD works closely with the Department of Fish & Game (DFG) to maintain the habitat at Mallard. All reservoir work, such as slope erosion repair, is conducted through formal DFG approvals and mitigation agreements.

Public access to Mallard is strictly prohibited. Mallard is monitored frequently each day to guard against public access and observe the general state of the reservoir. However, we do allow access to the Audubon Society for their annual bird count. CCWD has received unsolicited praise from the Audubon Society for the health, variety, and numbers of birds observed during their counts.

CCWD has never observed any impacts to Mallard's beneficial uses from Bollman backwash solids discharges. We believe that our cooperative efforts with DFG show our commitment to protect and maintain the existing habitat. We feel that the unsolicited positive testimonials from the Audubon Society support our position that Bollman discharges do not impact habitat.

As a public drinking water utility, CCWD is well aware of the need to protect Mallard water quality. We go to great lengths to protect and preserve Mallard water quality. But there is no evidence to date that demonstrates that Bollman backwash solids discharges impact either habitat or human beneficial uses. Mallard continues to support habitat and provide a safe and reliable source of potable, agricultural and industrial water in spite of these discharges.

Finally, we believe that the capital and operational costs to control backwash solids discharges to a body of water, which has historically had no observable impacts from these discharges, are excessive. CCWD is currently developing a Water Treatment Plant M aster Plan. The draft plan indicates that the capital costs alone to control backwash solids are on the order of $3 million to $4 million.

Given Mallard's history as a vibrant habitat that provides a safe and reliable source of water, CCWD believes that any future capital expenditure to control back wash solids discharges to meet the current needs of the designated beneficial uses is unnecessary. Construction and operation of backwash solids control measures will do little to protect and/or improve beneficial uses that have never been impacted under the current mode of operation. CCWD strongly believes that Bollman backwash solids discharges should not be subject to the permit requirements.

Notwithstanding that Mallard is not a beneficial use body of water, should RWQCB determine that it is, then it might be appropriate to conduct studies that assess and evaluate control technology costs and backwash solids discharge impacts on beneficial uses. If this were the determination by RWQCB, CCWD asks to work closely with you to define acceptable study parameters.

General Comments on the Permit

We believe that the definitions of intermittent and continuous discharges need to be revised to consider frequent, routine discharges. At Bollman, for example, backwash cycles typically discharge for about 25 minutes. By the permit definition, this discharge is an intermittent discharge and subject to sampling during each occurrence

under Table 1 of the Self-Monitoring Program. As we could have up to six backwashes per day, sampling for each backwash would be resource intensive.

Consideration should be given to allow routine "intermittent" discharges, such as backwash operations, to fall under continuous discharge sampling frequencies. One prospect is to consider that if total routine discharge is greater than an hour per day, the discharge would be considered in the continuous category. Our backwash discharges are more the case of an interrupted continuous discharge rather than an unique intermittent discharge.

From a practical standpoint, the variance in water quality from one backwash cycle to the next in a given day, or even from week to week, will be much less than that found from seasonal differences. With this in mind, the needs of the permit will be met with the sampling frequencies outlined for continuous discharge while minimizing the resource impact on the agencies trying to comply with the permit requirements.

To summarize our comments:

- Based on an opinion from COE, CCWD does not believe that Mallard is a water of the United States. Therefore, it is not subject to the NPDES permit program. We request RWQCB's opinion on this matter.
- We will attempt to remove Mallard from the beneficial use body of waters list in the Plan. CCWD asks RWQCB to allow a reasonable amount of time to do so before imposing permit requirements.
- CCWD has never observed any impacts to Mallard beneficial uses from backwash solids discharges. If RWQCB believes otherwise, it might be appropriate to study and assess the costs associated with discharge solids control and impacts to beneficial uses. This study or studies should be undertaken only after both parties agree on an acceptable approach.
- For monitoring and sampling purposes, there must be some parameters for which routine "intermittent" discharges can be considered a "continuous" discharge.

Thank you for this opportunity to submit these comments. Should you have any questions or comments, please contact me at (925) 688-8023.

Sincerely,

David A. Omoto
Environmental Compliance Officer

DAO:llc

CITY OF
SAN JOSE
CAPITAL OF SILICON VALLEY

Environmental Services Department
DIRECTOR'S OFFICE

Submitted via email and hard copy on April 12, 2010

April 12, 2010

Ms. Jan O'Hara
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay Basin – *Addition of Surface Water Bodies and Beneficial Uses*

Dear Ms O'Hara:

The City of San José is submitting comments regarding the proposed amendments to the Basin Plan adding beneficial use designations for several water bodies in the San Francisco Bay Area. 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. Moreover, there are clarifications in water body naming conventions that must be made in order for the recommended beneficial use designations to be valid.

The City is supportive of the Water Board's efforts to designate beneficial uses where appropriate and needed. However, we believe some of the recommended designations are in error or are not supported by appropriate evidence. In addition to our support of comments submitted by SCVURPPP, we would like to draw particular attention to designations proposed for Ross Creek, Canoas Creek, and "Mallard Slough."

Specific Comments and Recommendations:

Ross Creek – 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 no opportunity for migration, nor is there a 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.

Canoas Creek – 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.

Mallard Slough – 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). This

confusion should be rectified before designation of beneficial uses. 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 (SFEI) and the Oakland Museum of California 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.

The designation for "Mallard Slough" (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.

The Appendix B map seems to indicate that the small bypass channel along the northern edge of Pond A18 is Mallard Slough. REC-1 is still not appropriate and REC-2 is questionable for much of this slough since there is no public access and it is far too shallow for boat access from Coyote. Also, if Mallard and Artesian are not the same stretch, then the reference to the SJ/SC WPCP should be removed from the beneficial use table.

Until these discrepancies can be resolved, beneficial uses should not be designated for these tributaries to Coyote Creek.

We appreciate the opportunity to comment on these proposed designations and look forward to working with Water Board Staff to develop clear, well supported beneficial use designations.

Please contact James Downing at (408) 277-2765 if you have questions about these comments.

Sincerely,

John Stufflebean
Director, Environmental Services
City of San José

cc: Bruce Wolfe, SFB Water Board
Tom Mumley, SFB Water Board
SCVURPPP Management Committee

EAST BAY
MUNICIPAL UTILITY DISTRICT

April 12, 2010

Ms. Jan O'Hara
San Francisco Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

RE: Proposed Basin Plan Amendment, Addition of Surface Water Bodies and Beneficial Uses to Chapter Two of the Basin Plan

Dear Ms. O'Hara:

The East Bay Municipal Utility District ("District") appreciates the opportunity to submit comments on the subject proposed Basin Plan amendment.

The District is a publicly-owned utility, created by local voters in 1923, that supplies water and provides wastewater treatment for parts of Alameda and Contra Costa counties on the eastern side of San Francisco Bay. The District's water system serves approximately 1.3 million people in a 331-square-mile area. The water system consists of a network of reservoirs, aqueducts, treatment plants, and distribution facilities that extends from its principal water source, the Mokelumne River Basin in the Sierra Nevada range, to the Bay Area.

The proposed amendments affect several water bodies that are owned and operated by the District for water supply purposes. These water bodies include Briones Reservoir, Lake Chabot, San Pablo Creek, San Pablo Reservoir, Lafayette Reservoir, and Upper San Leandro Reservoir. It is important to recognize that the District's reservoirs are already designated for Municipal Water Supply (MUN), with associated water quality objectives that are consistent with achieving the highest water quality consistent with maximum benefit to the people of the state. The proposed amendments would change the existing designated uses of these water bodies as follows:

- Briones and Upper San Leandro Reservoirs: Change the REC1 designated uses from L (Limited Beneficial Use) to E* (Existing beneficial use, but administrative or physical barriers to full body contact are in place)
- Lake Chabot: Add COMM as an existing beneficial use
- Lafayette Reservoir: Add COMM as an existing beneficial use
- San Pablo Creek: Add FRSH, COLD, RARE, and REC1 as existing beneficial uses
- San Pablo Reservoir: Add COMM as an existing beneficial use

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 REC1 classifications. 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).

The District is also concerned about creating the perception that Lake Chabot, Lafayette Reservoir, and San Pablo Reservoirs may be used as commercial fisheries, when in fact, they are not and will not be used as commercial fisheries in the foreseeable future. Therefore, the District requests that the Regional Board eliminate COMM as a beneficial use for all of the above-listed surface water bodies or include a footnote to provide clarification that there are administrative controls in place to prevent commercial collection of fish, shellfish, or other organisms from these water bodies.

Please call me at (510) 287-0345 if you have any questions concerning these comments.

Very Truly Yours,

John H. Schroeter, P.E.
Manager of Environmental Compliance

Requested changes or additions to the currently proposed "SF Basin Plan"

On page 358 (Rindler Creek) of the proposed Beneficial use Documentation Table, 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.

On page 359, (Blue Rock Springs Creek) is noted as Intermittent, this creeks 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" Though it is discharges into Rindler Creek, this Discharge takes place approx. 2500 Feet above Lake Chabot, should be considered a Tributary to the Mouth of the Lake.
Blue Rock Springs Creek should also be noted as "FRESH".

I have 7 years of involvement in stewardship of these waterways. My advocating for Lake Chabot requires and provides for me an understanding of our greater watershed. My requests noted above are not only to provide "Clarity" for you the Waterboard, but for all others who might refer to the SF Basin Plan. (2.3 Project Objectives)

Thank you,

Doug Darling
Friends of Lake Chabot (Vallejo)
225 Alabama St Vallejo CA 94590
707-373-1766

Santa Clara Valley
Urban Runoff
Pollution Prevention Program

Campbell • Cupertino • Los Altos • Los Altos Hills • Los Gatos • Milpitas • Monte Sereno • Mountain View • Palo Alto
San Jose • Santa Clara • Saratoga • Sunnyvale • Santa Clara County • Santa Clara Valley Water District

Submitted via email and hard copy on April 12, 2010

April 12, 2010

Ms. Jan O'Hara
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Proposed Amendments to the Water Quality Control Plan for the San Francisco Bay Basin – *Addition of Surface Water Bodies and Beneficial Uses*

Dear Jan:

This letter is submitted on behalf of the Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP or Program) regarding the proposed amendments to the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) that would add surface waters and beneficial uses. The SCVURPPP is an association of 13 cities and towns[1] in the Santa Clara Valley, the Santa Clara County and the Santa Clara Valley Water District. Program participants are regulated under a common NPDES permit to discharge municipal stormwater to South San Francisco Bay. Since its inception, SCVURPPP has been a recognized leader in stormwater management and monitoring in the San Francisco Bay region, and continues to be dedicated to improving the quality of our water bodies.

The Program appreciates the opportunity to submit comments regarding the proposed amendments.[2] As a municipal stormwater program, we are very interested in the proposed additions since this amendment could have future ramifications regarding the operation of municipal stormwater conveyance systems. Additionally, we are very familiar with both the current and historical conditions of creeks in the Santa Clara Valley and existing/potential beneficial uses based on the extensive monitoring of creeks/rivers and surveys that the Program has conducted on behalf of municipalities in the South Bay. These data have been previously

[1] Campbell, Cupertino, Los Altos, Los Altos Hills, Los Gatos, Milpitas, Monte Sereno, Mountain View, Palo Alto, San Jose, Santa Clara, Saratoga and Sunnyvale.

[2] In addition to these technical comments, SCVURPPP's counsel will be submitting legal comments under separate cover which are hereby incorporated by reference.

submitted to the Water Board staff as part of SCVURPPP's and the co-permittees annual reports in compliance with the stormwater NPDES permit and are hereby incorporated into the record on this proposed Basin Plan amendment by reference.

The following comments and recommended improvements are provided to the proposed amendments and are consistent with the current state of knowledge regarding existing/potential beneficial uses in water bodies in Santa Clara County. The comments and recommendations are based in part on our review of the cited references contained in the Water Board's Staff Report. In addition, we provide some additional comments and recommendations along with relevant citations.

Santa Clara Basin Specific Comments and Recommendations:

1. **Clarify the Extent of Spatial Coverage for Beneficial Uses Identified in the Surface Water Body Beneficial Use Documentation Tables Contained in Appendix C & Used as Support for Basin Plan Amendment Table 2-1** – The surface water documentation tables in Appendix C broadly identify specific 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[3] and by seasons, especially where they are only based on no or limited data.[4] This would help minimize interpretive problems and avoid significant future expense and burdens that would otherwise be required to modifying 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 and its staff with appropriate 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 the Staff Report (see Appendix C) and which have been purported to have been used to support the recommended use designations contained in the proposed Basin Plan Amendment, and

   2) summarize the analysis and documentation in a sufficient format (such as a table) that (at a minimum) allows Water Board members and the public to understand the degree to

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[3] Use descriptions in the current Basin Plan, should be used to designate the waterbody's downstream segment with a WARM designation, and its upstream segment with a COLD designation. This approach would accommodate, in part, the spatial variation in the stream network. The State of Ohio pioneered this approach in 1978 and since then, it has been adopted by at least twelve other states (Environmental Resources Coalition 2006). It is our understanding that the State of California is also actively exploring this approach (Ode and Schiff 2009).

Environmental Resources Coalition. 2006. Review of Tiered Aquatic Life Uses for Selected States. Presentation to the Missouri Clean Water Forum Tiered Aquatic Life Use Group. http://www.erc-env.org/Tiered%20Aquatic%20Life%20Uses031506.pdf

[4] The definition of Beneficial Uses should provide flexibility to include seasonal considerations. For example, the States of Ohio, Oregon, and Idaho to name several examples (Oregon Department of Environmental Quality 2003) currently allow the Use definition structure to accommodate spatio-temporal variation inherent in the environment

Oregon Department of Environmental Quality. 2003. A description of the information and methods used to delineate the proposed Beneficial Use designations, Attachment H. Oregon Department of Environmental Quality Staff Report. http://www.deq.state.or.us/WQ/standards/uses.htm

which current data either does or does not support the designation of a potential and/or existing 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.

Further, and regardless of whether the above is acted on, we also recommend the following approach be used in Appendix C to better clarify the intended application 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** – In this case, it should be easy to identify in Appendix C 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".)

2. **Lake Lagunita (Reservoir)** – No data are provided to support the proposed COLD use. The rational 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.

3. **Felt Lake (Reservoir)** – No data are provided to support the proposed COLD use. The rational 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.

4. **Adobe Creek** – Based on our review of information in Leidy, R.A., G.S. Becker, B.N. Harvey (2005), and National Marine Fisheries Service steelhead distribution database, we find no data to support the Water Board staff recommendation that COLD, SPWN or MIGR are beneficial uses in this creek. None of the references provided, or information

from field surveys conducted (and previously provided to the Water Board staff) by SCVURPPP[5] provide evidence that Steelhead Trout (*Oncorhynchus mykiss*) 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.

5. **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 all of the other evidence and databases cited in the Staff Report, the COLD use designation recommended by the Water Board staff 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.

6. **Canoas Creek** - Our review of the information presented by GCRCD (2007) as well as the other cited evidence and databases 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.

7. **Canada de Los Osos Creek** – Our review of data cited in Leidy et al. (2005) reference 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 and thus does not provide evidence to support a COLD designation. Therefore, the proposed designation of COLD for Canada de Los Osos Creek should be deleted.

8. **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 SVCURPPP 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, potential and/or existing. Because the proposed listing is not supported by data/information in the record, we strongly recommend that instead of designating these waters based on so-called "presumptive" REC-1 and REC-2 (or WILD) uses, the Water Board instead rely on the Basin Plan's existing "tributary rule" in those situations.[6] We make this recommendation for several reasons: First, the approach provides the Water Board and its staff with the greatest flexibility and thus allows ready activation of the concept of

[5] SCVURPPP (2007) SCVURPPP Monitoring and Assessment Summary Report, Santa Clara Basin Creeks 2002 – 2007. Prepared by EOA, Inc., Program Managers for the Santa Clara Valley Urban Runoff Pollution Prevention Program. 52 pp.

[6] Indeed the Water Board has successfully employed this tributary rule-based approach for approximately 25 years.

"presumptive uses" to particular tributaries and tributary segments where it is appropriate and supported by data in the future.[7] Second, 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 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 in an appropriate and pin-pointed manner 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 in the future.[8]

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 affirmatively 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. These citation reports are available on the SCVURPPP website (WWW.SCVURPPP.ORG) and were previously sent to the Water Board as part of NPDES annual reporting requirements. Because the proposed listing is contradicted by data/information in the record, we request that the proposed REC-1 listing be dropped for these waters and we also recommend that instead of designating them based on so-called "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 pragmatic reasons set forth in comment 8.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 does not support the proposed REC-2 (or REC-1 or WILD) designation. The data/information citation is also provided. The citation reports are available on the SCVURPPP website (WWW.SCVURPPP.ORG) and were previously sent to the Water Board as part of NPDES annual reporting requirements. Because any proposed listing based on so-called presumptive uses is not consistent with data/information in the record, we request that the proposed listings for these waters be dropped.

We trust you find these comments useful and request that you make the changes and improvements suggested above prior to Water Board member consideration of the Basin Plan Amendment.

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[7] The alternative approach entailed in the current version of the proposed Basin Plan amendment would, in effect, lock the Water Board into overly-broad designations that are based on neither data nor analysis of the implications of the future regulatory actions that will be necessitated by them.

[8] Among other things, delisting could necessitate the expenditure of large amounts of resources on use attainability analyses (UAAs), CEQA-related documents, and associated appeals and litigation.

Please contact Chris Sommers at (510) 832-2852 ext. 109 if you have questions. We look forward to continuing to work with you further.

Sincerely,

Adam Olivieri, Dr. PH, P.E.
SCVURPPP Program Manager

cc: Bruce Wolfe, SFB Water Board
Tom Mumley, SFB Water Board
SCVURPPP Management Committee

Attachments:

1- Example Spatial Summary

2- Table 1. Proposed Waterbodies in Santa Clara Basin and Associated Beneficial Uses Where No Information is Available to Support the Proposed REC-1 and REC-2 Designation

3- Table 2. Comments provided by SCVURPPP on Proposed Recreational Uses for Waterbodies in Santa Clara Basin Where Information Exists that Does Not Support the Proposed REC-1 Use Designation.

4- Table 3. Comments provided by SCVURPPP on proposed Recreational Uses for Waterbodies in Santa Clara Basin Where Information Exists that Does Not Support the proposed REC-2 Use Designation.

Attachment 1 – Example Spatial Summary

Surface water body: San Tomas Aquino Creek
County: Santa Clara
Water body type: Perennial Stream, discharges to Guadalupe Slough

BU	Designation	Rationale and/or Source of Information	Spatial Extent Source of Information Pertains
COLD	E	Cold freshwater habitat, based on information in Leidy, R.A., G.S. Becker, B.N. Harvey. 2005, pg. 117.	Identifies coldwater habitat upstream of crossing with Quito Road.

Surface water body: Los Gatos Creek
County: Santa Clara
Water body type: Perennial Stream, tributary to Guadalupe River

BU	Designation	Rationale and/or Source of Information	Spatial Extent Source of Information Pertains
RARE	E	Leidy, R.A., G.S. Becker, B.N. Harvey. 2005, pg. 113. San Jose's Riparian Corridor Policy Santa Clara County Public Parks National Marine Fisheries Service steelhead distribution database	Identifies steelhead presence up to 29,813 linear stream-feet (crossing of San Tomas Expressway)

Attachment 2

Table 1. Proposed Waterbodies in Santa Clara Basin and Associated Beneficial Uses Where No Information is Available to Support the Proposed REC-1 and REC-2 Designation

Waterbody	Waterbody Type	Proposed REC-1	Proposed REC-2	SCVURPPP Comments
San Francisquito Creek	Perennial	E	E	No information
Lake Lagunita	Reservoir	E	E	No information
Los Trancos Creek	Perennial	E	E	No information
Deer Creek	Perennial	E	E	No information
Hale Creek	Intermittent	E	E	No information
Swiss Creek	Intermittent	E	E	No information
Lake Elsman	Reservoir	E	E	No information
Austrian Gulch Creek	Perennial	E	E	No information
Campbell Percolation Pond	Reservoir	L	E	No information
Los Capitancillos Percolation Ponds	Reservoir	E	E	No information
Guadalupe Percolation Ponds	Reservoir	E	E	No information
Calera Creek	Perennial	E	E	No information
Silver Creek	Perennial		E	No information
Fisher Creek	Intermittent		E	No information
San Felipe Creek	Perennial	P	E	No information
Las Animas Creek	Intermittent	E	E	No information
Packwood Creek	Perennial	E	E	No information
Hoover Creek	Perennial	E	E	No information
Otis Canyon Creek	Intermittent	E	E	No information
Canada de Los Osos Creek	Perennial	E	E	No information
Soda Springs Canyon Creek	Perennial		E	No information
San Tomas Aquino Creek – Lower Reaches	Perennial		E	No information

Attachment 3

Table 2. Comments provided by SCVURPPP on Proposed Recreational Uses for Waterbodies in Santa Clara Basin Where Information Exists that Does Not Support the Proposed REC-1 Use Designation.

Waterbody	Waterbody Type	REC-1	SCVURPPP Comments	Citation/ Source
Barron Creek	Intermittent	Not Supported	No public access was observed during field reconnaissance upstream of Foothill Expressway and downstream El Camino Real (this reach is concrete channel protected by fence) ; some access near recreational trail at bypass	SCVURPPP 2005
Adobe Creek	Perennial	Not Supported	No public access was observed during field reconnaissance between El Monte Rd (at Foothill College) and Hidden Villa Farm	SCVURPPP 2005
Bonjetti Creek	Perennial	Limited to Upper Segments	Public access observed during field reconnaissance and sampling events in upper reaches within Sanborn County Park	SCVURPPP 2005
McElroy Creek	Perennial	Limited to Upper Segments	Public access observed during field reconnaissance and sampling events in upper reaches within Sanborn County Park	SCVURPPP 2005
San Tomas Aquino Creek	Perennial	Limited to Upper Segments	Public access observed during field reconnaissance and sampling events in the upper reaches	SCVURPPP 2005
Ross Creek	Perennial	Not Supported	No public access was observed during field reconnaissance and at sampling events; creek is either concrete channel or earthen levee and is fenced off (SCVWD property); no evidence of REC-2 use	SCVURPPP 2009
Canoas Creek	Intermittent	Not Supported	No public access was observed during field reconnaissance and at sampling events; creek is either concrete channel or earthen levee and is fenced off (SCVWD property)	SCVURPPP 2009
Guadalupe Creek	Perennial	Not Supported	Public access and use (trails, small rock dams) was observed during field reconnaissance and sampling events. No recreational activities observed	SCVURPPP 2009

Attachment 3

Waterbody	Waterbody Type	REC-1	SCVURPPP Comments	Citation/ Source
Pheasant Creek	Intermittent	Not Supported	No public access was observed during field reconnaissance; appears to be private land	SCVURPPP 2009
Rincon Creek	Perennial	Limited	Potential public access was observed during field reconnaissance; Open Space District Land	SCVURPPP 2009
Los Capitancillos Creek	Intermittent	Not Supported	Potential public access was observed during field reconnaissance but no rec 1 observed; Open Space District Land	SCVURPPP 2009
Alamitos Creek	Perennial	Limited to Downstream Segments	No public access was observed in reach between Harry Rd and County Park (private ranches and residential area); public access downstream Harry Rd with evidence of REC1 (trails to creek)	SCVURPPP 2009
Arroyo Calero	Perennial	Limited to Downstream Segments	No public access was observed in reach between Harry Rd and Calero Reservoir (private ranchland and SCVWD property); public access downstream Harry Rd with evidence of REC1 (trails to creek)	SCVURPPP 2009
Herbert Creek	Perennial	Not Supported	No public access was observed during field reconnaissance; appears to be private land	SCVURPPP 2009
Barrett Canyon Creek	Perennial	Not Supported	Was not able to obtain access to creek for sampling; privately owned land.	SCVURPPP 2009
Lower Penitencia Creek	Perennial	Not Supported	No public access was observed during field reconnaissance and sampling event; concrete channel protected by fence	SCVURPPP 2008
Upper Penitencia Creek	Perennial	Limited Segments	Public access was observed at all sampling sites between Alum Rock Park and mouth. No public access above Alum Rock Park	SCVURPPP 2006 and 2008
Arroyo Aguague Creek	Perennial	Limited Segments	Public access was observed at all sampling sites between Alum Rock Park and mouth. No public access above Alum Rock Park	SCVURPPP 2006 and 2008

Attachment 3

Citations:

Screening-level Monitoring of Adobe Creek, Matadero/Barron Creek, Calabazas Creek, Sunnyvale East/West Channel and San Tomas Aquino Creek Watershed (SCURPPP FY 04-05 Annual Monitoring Report), Santa Clara Valley Urban Runoff Pollution Prevention Program, Prepared by EOA, Inc., September 15, 2005.

Upper Penitencia Creek Limiting Factors Analysis, Final Technical Report, Santa Clara ValleyUrban Runoff Pollution Prevention Program, Prepared by Stillwater Sciences & EOA, Inc., August 18, 2006.

Monitoring and Assessment Summary Report – *Coyote and Lower Penitencia*, Santa Clara Valley Urban Runoff Pollution Prevention Program, Prepared by EOA, Inc., September 15, 2008.

Monitoring and Assessment Summary Report – *Guadalupe River*, Santa Clara Valley Urban Runoff Pollution Prevention Program, Prepared by EOA, Inc., September 15, 2009.

Attachment 4

Table 3. Comments provided by SCVURPPP on proposed Recreational Uses for Waterbodies in Santa Clara Basin Where Information Exists that Does Not Support the proposed REC-2 Use Designation.

Waterbody	Waterbody Type	Proposed REC-2	SCVURPPP Comments	Citation/ Source
Ross Creek	Perennial	Not Supported	No public access was observed during field reconnaissance and at sampling events; creek is either concrete channel or earthen levee and is fenced off (SCVWD property); no evidence of REC-2 use	SCVURPPP 2009
Canoas Creek	Intermittent	Not Supported	No public access was observed during field reconnaissance and at sampling events; creek is either concrete channel or earthen levee and is fenced off (SCVWD property)	SCVURPPP 2009
Pheasant Creek	Intermittent	Not Supported	No public access was observed during field reconnaissance; appears to be private land	SCVURPPP 2009
Alamitos Creek	Perennial	Not Supported in Reach between Harry Rd and County park	No public access was observed in reach between Harry Rd and County Park (private ranches and residential area); public access downstream Harry Rd with evidence of REC1 (trails to creek)	SCVURPPP 2009
Arroyo Calero	Perennial	Not Supported in Reach between Harry Rd and Calero Reservoir	No public access was observed in reach between Harry Rd and Calero Reservoir (private ranchland and SCVWD property); public access downstream Harry Rd with evidence of REC1 (trails to creek)	SCVURPPP 2009
Herbert Creek	Perennial	Not Supported	No public access was observed during field reconnaissance; appears to be private land	SCVURPPP 2009
Barrett Canyon Creek	Perennial	Not Supported	Was not able to obtain access to creek for sampling; privately owned land.	SCVURPPP 2009

Attachment 4

Waterbody	Waterbody Type	Proposed REC-2	SCVURPPP Comments	Citation/ Source
Lower Penitencia Creek	Perennial	Not Supported	No public access was observed during field reconnaissance and sampling event; concrete channel protected by fence	SCVURPPP 2008
Berryessa Creek	Perennial	Limited to City park	Public access was observed at city park during field reconnaissance and sampling event (trails below road crossing).	SCVURPPP 2008
Arroyo de las Coches	Perennial	Limited to Upper Reaches	Public access was observed during sampling event (trails); County Park in upper reaches only	SCVURPPP 2008
Upper Penitencia Creek	Perennial	Not Supported in Reaches above Alum Rock Park	Public access was observed at all sampling sites between Alum Rock Park and mouth. No public access above Alum Rock Park	SCVURPPP 2006 and 2008
Arroyo Aguague Creek	Perennial	Not Supported in Reaches above Alum Rock Park	Public access was observed at all sampling sites between Alum Rock Park and mouth. No public access above Alum Rock Park	SCVURPPP 2006 and 2008

Citations:

Screening-level Monitoring of Adobe Creek, Matadero/Barron Creek, Calabazas Creek, Sunnyvale East/West Channel and San Tomas Aquino Creek Watershed (SCURPPP FY 04-05 Annual Monitoring Report), Santa Clara Valley Urban Runoff Pollution Prevention Program, Prepared by EOA, Inc., September 15, 2005.

Upper Penitencia Creek Limiting Factors Analysis, Final Technical Report, Santa Clara ValleyUrban Runoff Pollution Prevention Program, Prepared by Stillwater Sciences & EOA, Inc., August 18, 2006.

Monitoring and Assessment Summary Report – *Coyote and Lower Penitencia*, Santa Clara Valley Urban Runoff Pollution Prevention Program, Prepared by EOA, Inc., September 15, 2008.

Monitoring and Assessment Summary Report – *Guadalupe River*, Santa Clara Valley Urban Runoff Pollution Prevention Program, Prepared by EOA, Inc., September 15, 2009.

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April 12, 2010

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Via Email

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

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

Dear Mr. Wolfe:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

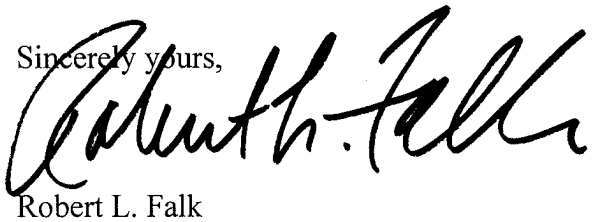
to the proposed project (i.e., Basin Plan amendment as currently proposed). Regulations specific to the State's Water Boards expressly require that "[a]ny standard, rule, regulation, or plan proposed for [Water Board] approval or adoption must be accompanied by a completed Environmental Checklist ...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

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

Conclusion

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

Sincerely yours,



Robert L. Falk

cc: Jan O'Hara
Tom Mumley

Dorothy Dickie
Adam Olivieri
SCVURPPP Management Committee

Mayor Gavin Newsom
Philip A. Ginsburg, General Manager

April 7, 2010

Ms. Jan O'Hara
SF Bay Regional Water Quality Control board
1515 clay Street, Suite 1400
Oakland, CA 94612

Dear Ms. O'Hara:

The San Francisco Recreation & Park Department submits the following comments responsive to your Public Notice regarding your intent to consider an amendment to the Water Quality Control Plan for the San Francisco Bay Basin (the Basin Plan) , specifically the addition of water bodies and beneficial uses to Chapter Two of the Basin Plan. Both comments refer to the beneficial uses proposed for inclusion to water bodies under the jurisdiction of the San Francisco Recreation & Park Deparment in Appendix A of the Proposed Basin Plan Amendment.

Comment 1 – Golden Gate Park lakes
The San Francisco Recreation & Park Department does not concur in designating REC-1 as a beneficial use for Golden Gate Park Lakes as proposed on page 6 of Table 2-1 (Existing and Potential Beneficial Uses of Water Bodies in the San Francisco Bay Region)

Justification: REC-1 as defined in Appendix A is *use of water for recreational activities involving body contact with water where ingestion of water is reasonably possible. These uses include but are not limited to, swimming, wading, water-skiing, skin and scuba diving, surfing, whitewater activities, fishing, and uses of natural hot springs.* 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.

To support and sustain the landscape feature purpose of these lakes, the San Francisco Park Code lists the following prohibition:

Park Code Section 4.02 SWIMMING RESTRICTIONS
No person shall enter, wade or swim in the waters of any lake, pond, pool, tank, fountain or reservoir in an park except where permitted by regulation or special permission of the Recreation and Park Department (Added by Ordinance 603-81, App. 12/18/81)

Further, the San Francisco Park Code expressly prohibits fishing in Golden Gate Park lakes as described in the following citation:

Park Code Section 5.08 DISTURBING ANIMALS, BIRDS, FISH PROHIBITED, EXCEPTIONS

Except as provided in Article 7, Chapter VIII (Police Code) of the San Francisco Municipal Code, it shall be unlawful for any person, including City and County of San Francisco, its officers, employees or agents, to hunt, chase, shoot, trap, discharge or throw missiles at, harass, disturb, taunt, endanger, capture, injure, or destroy any animal in any park, including the bison paddock, and the San Francisco Zoological Gardens, or to permit any animal in such person's custody or control to do so.....The provisions of the Section are intended to prohibit fishing in any park other than fishing in lake Merced pursuant to a license obtained pursuant to Article 8 of this Code or in any other area designated by Commission resolution as a fishing area....

Comment 2 – Islais Creek, non-tidal

The San Francisco Recreation & Park Department does not concur in designating COMM, WARM, or REC-1 as beneficial uses for Islais Creek, non-tidal as proposed on page 8 of Table 2-1 (Existing and Potential Beneficial Uses of Water Bodies in the San Francisco Bay Region). The Department does concur that the proposed REC-2 beneficial use is an appropriate beneficial use

Justification: COMM as defined in Appendix A is *uses of water for commercial or recreational collection of fish, shellfish, or other organisms including, but not limited to, uses involving organisms intended for human consumption or bait purposes.* Islais Creek is hydraulically disconnected from San Francisco Bay. 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. See **Park Code Section 5.08,** excerpted above.

Justification: WARM as defined in Appendix A is uses of water that support warm water ecosystems including, but not limited to, preservation or enhancement of aquatic habitats, vegetation, fish, or wildlife, including invertebrates. 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.

Justification: REC-1 as defined in Appendix A is *uses of water for recreational activities involving body contact with water where ingestion of water is reasonably possible. These uses include, but are not limited to, swimming, wading, water-skiing, skin and scuba diving, surfing, whitewater activities, fishing, and uses of natural hot springs.* 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. See **Park Code Section 4.02**, quoted above.

I appreciate this opportunity to provide substantive agency comment on your proposed amendment to the Basin Plan. Should you have questions or need further clarification, please contact Dennis Kern, the San Francisco Recreation & Park Department Director of Operations, at (415) 831-2709 or dennis.kern@sfgov.org.

Sincerely,

Philip A. Ginsburg
General Manager

Cc:
Jane Lavelle, Public Utilities Commission

SFPUC
WATER
WASTEWATER
POWER

SAN FRANCISCO PUBLIC UTILITIES COMMISSION

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April 12, 2010

Janet O'Hara
California Regional Water Quality Control Board
San Francisco Bay Region
1515 Clay Street, Suite 1400
Oakland, CA 94612

Dear Ms. O'Hara:

Thank you for the opportunity to provide comments on the proposed San Francisco Bay Basin Water Quality Control Plan update regarding addition of surface water bodies and beneficial uses.

The San Francisco Public Utilities Commission (SFPUC) is a department of the City and County of San Francisco that is responsible for wastewater and power services within the City and County of San Francisco boundaries and provides high quality and reliable drinking water to approximately 2.5 million customers throughout the South Bay, Peninsula, and in San Francisco.

The proposed amendments affect several water bodies that are owned and operated by the SFPUC, or are affected by operations of the SFPUC water system. While we appreciate the effort by Water Board staff to improve the clarity and completeness of the Basin Plan by adding surface water bodies and beneficial uses, we are concerned that some of these changes may not provide either, and may result in some level of confusion with the public regarding existing and future beneficial uses. Some of the proposals create potential conflicts between what the Board is trying to achieve and what our existing land and water use policies are trying to achieve. Ironically, our mutual goals remain the same: protection of water quality and the environment.

Specifically, we are concerned about the addition of the new E* reference to REC-1 beneficial uses, defined as "existing beneficial use, but administrative or physical barriers to full body contact are in place." This new reference would include the following SFPUC reservoirs: Pilarcitos Lake, Lower and Upper Crystal Springs Reservoir, San Andreas Lake, San Antonio Reservoir, and Calaveras Reservoir. Note that each of these SFPUC reservoirs are already designated by the Basin Plan as Municipal Water Supply (MUN), with associated water quality objectives that are consistent with achieving the highest water quality consistent with the maximum benefit to the people of the State.

At the same time, this proposed change to the REC-1 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[1]. In addition, according to the California Drinking Water-Related Statutes 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."

Based on these considerations, 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.".

In addition, 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. Activities that are not allowed include:

- Swimming and body contact with the water by humans and domestic animals.
- Boating with the exception of SFPUC maintenance, operations and monitoring activities and in selected emergency storage reservoirs.
- Activities which result in direct public access to reservoirs and tributaries (e.g., fishing, new trails at or near shoreline).
- Hunting
- Fishing
- Camping

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.

Other comments on proposed uses in Table 2-1 and the Water Body Maps are provided in Attachment 1. Specific comments about the Environmental Checklist are provided below.

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[1] The Alameda Watershed Management Plan Final Environmental Impact Report (State Clearing House No. 98082031) was certified August 3, 2000 and the Plan was adopted by the SFPUC on September 26, 2000.
The Peninsula Watershed Management Plan Final Environmental Impact Report (State Clearing House No. 98082030) was certified January 11, 2001 and the Plan was adopted by the SFPUC on June 26, 2001.
These documents are available on the SFPUC's website: sfwater.org

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."

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."

The SFPUC believes that the conflict of the proposed REC-1 and REC-2 designations with the Alameda and Peninsula Watershed Management Plans (Plans) could result in a potentially significant impact. The central concept of these Plans is that maintaining high quality water and protecting water supplies in the long term requires control over watershed activities and preservation of watershed resources. Recreational activities are restricted and permitted only if determined to be compatible with the primary goal of the Plans to maintain and improve source water quality to protect public health and safety. As explained above, many of the recreational activities described in REC-1 and REC-2 designations are not considered compatible with the primary goal of the Plans and are prohibited. Human body contact with water bodies is specifically prohibited.

Please do not hesitate to contact me at (415) 934-5736 with any questions or comments. We would like to work through these issues and come to a mutually agreeable set of solutions.

Sincerely,

Steven R. Ritchie,
Assistant General Manager, Water

c.c. Naomi Feger, RWQCB

Attachment

SFPUC Comments on Basin Plan Amendment
Attachment 1

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. Fishing in Alameda Creek is a good example. While it has been designated as an existing beneficial use, as is the case on private property upstream of the Alameda Creek Diversion Dam, all fishing in Alameda Creek downstream of the dam has recently been banned by CDFG.

Alameda Creek
COMM – The designation should be left as E because there are some fishable areas on private property upstream of the Diversion Dam.

San Mateo Creek
COMM- The designation should be E because there are fishable areas on privately owned property downstream of Crystal Springs Dam.

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.

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

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

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

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

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

Pilarcitos Lake
Pilarcitos Lake should be called Pilarcitos Reservoir.

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.

Appendix B: Water Body Maps
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.

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

SAN MATEO COUNTYWIDE
Water Pollution Prevention Program
Clean Water. Healthy Community.

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April 12, 2010

Janet O'Hara
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Comments on Proposed Amendment to the Water Quality Control Plan for the San Francisco Bay Basin – Addition of Surface Water Bodies and Beneficial Uses

Ms. O'Hara:

This provides comments on the San Francisco Bay Regional Water Quality Control Board (Regional Water Board) staff's proposal to amend the San Francisco Bay Basin (Region 2) Water Quality Control Plan (Basin Plan) regarding Bay Area surface water bodies and their associated beneficial uses. As first adopted in 1975, the Basin Plan did not assign beneficial uses to all of the water bodies that it lists, and many Bay Area water bodies were not listed at all. Regional Water Board staff is therefore proposing to improve the clarity and completeness of the Basin Plan by amending it to add previously unlisted water bodies and beneficial uses. The San Mateo Countywide Water Pollution Prevention Program (SMCWPPP) appreciates this opportunity to comment on the proposed Basin Plan amendment. Our comments are provided below.

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 typical creeks in the Bay Area. The proposed Basin Plan amendment broadly and indiscriminately designates specific beneficial uses throughout an entire water body. We are very concerned about the potential regulatory consequences of such overly 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.[1] Beneficial uses should not be indiscriminately 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.

Support Beneficial Use Designations with Appropriate Rationale and Data Sources

Appendix C to the staff report of the proposed Basin Plan amendment provides documentation of the rationale and/or data sources used to support the proposed beneficial use listings. We believe that two of the types of supporting information presented are 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. In addition, "Water Board staff knowledge" is occasionally used to support various proposed beneficial use designations.

In each instance these 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 ingestion of water is reasonably possible (e.g., swimming or other water contact recreation is feasible and occurs in a creek reach during the warm and dry season of the year, when this type of recreation can reasonably be anticipated to occur).

Example Applications of the Above Comments

To illustrate the application of the above comments in light of available information, we are providing the following examples:

- 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.

---

[1]In 1978 the State of Ohio pioneered a Tiered Aquatic Life Use (TALU) approach to beneficial use designations that considers the spatial variation in potential to support aquatic life within creek systems. At least twelve other states have since adopted similar approaches (Environmental Resources Coalition 2006, *Review of Tiered Aquatic Life Uses for Selected States*. Presentation to the Missouri Clean Water Forum Tiered Aquatic Life Use Group).

- 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.

We appreciate the opportunity to work with you on this important effort. We request Regional Water Board staff reviews and revises the proposed beneficial uses of all San Mateo County creeks in the proposed Basin Plan amendment in accordance with the above comments. Please call me at 415/508-2134 if you have any questions or comments.

Sincerely,

Matthew Fabry
SMCWPPP Coordinator

References Cited

SMCWPPP 2007. *Unified Stream Assessment in Six Watersheds in San Mateo County*. Prepared for the San Mateo Countywide Water Pollution Prevention Program by EOA, Inc. August 2007.

SMCWPPP 2008. *Unified Stream Assessment in Seven Watersheds in San Mateo County*. Prepared for the San Mateo Countywide Water Pollution Prevention Program by EOA, Inc. August 2008.

STOPPP 2002. *Characterization of Imperviousness and Creek Channel Modifications for 17 Watersheds in San Mateo County*. Prepared for the San Mateo Countywide Stormwater Pollution Prevention Program by EOA, Inc. January 2002.

Submitted via email and hard copy on April 9, 2010

Ms. Jan O'Hara
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Re: Proposed Amendments to the San Francisco Bay Basin Plan – *Addition of Surface Water Bodies and Beneficial Uses to Chapter Two of the Basin Plan*

Dear Jan:

The City of Sunnyvale appreciates the opportunity to submit the following comments regarding the proposed amendments to the Water Quality Control Plan for the San Francisco Bay Basin (Basin Plan) Regarding *Addition of Surface Water Bodies and Beneficial Uses to Chapter Two of the Basin Plan.*

The City supports actions to provide additional clarity and consistency within the Basin Plan. The City's comments address two proposed actions; 1) clarification of the limited water contact recreation ("L" REC-1) beneficial use designation and 2) future designations of shellfish harvesting beneficial uses (SHELL) to water bodies.

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).

Similar receiving water user studies were required to be conducted by Sunnyvale and San Jose (and others) during the early to mid-2000's to determine the appropriate level-of-use single sample maximum (SSM) Enterococcus limit to be included in their NPDES permits (along with the 35 cfu/100 mL 30-day geometric mean technology based effluent limit). The Fact Sheet (p. F-20) to Sunnyvale's current NPDES permit (Order No. R2-2009-0061) documents the user survey results:

> "The Discharger has previously conducted a study, from June 2003 to December 2004, and submitted results in a final report, *City of Sunnyvale Water Pollution Control Plant Receiving Water User Survey Confirmation Study,* dated December 23, 2004, demonstrating that the "lightly used" water contact category is conservative for both Moffett Channel and Guadalupe Slough. Therefore effluent limitations for Enterococcus bacteria are protective of water contact beneficial uses of the receiving water."[1]

This BPA staff report (p. 3) notes that Board staff first solicited input on this project on March 31, 2003. Part of that 2003 scoping effort included a memorandum from Board staff to Interested Parties dated March 27, 2003 on the subject of "Definitions of Beneficial Uses and Preliminary Criteria for Their Designation." The Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) provided initial comments on the 2003 proposed amendments to the Basin Plan waterbody list and associated beneficial uses by letter dated June 17, 2003 (copy attached).

Those comments also focused primarily on similar suggested updates to the recreational beneficial use definitions to include subcategories of uses based on degree of contact and seasonal uses. The SCVURPPP letter contained the following definition of Limited Water Contact Recreation and recommended it for inclusion in the Basin Plan. Sunnyvale, as a member of SCVURPPP, continues to support the 2003 recommendation to include this clarifying Limited Water Contact Recreation use definition in the Basin Plan.

[1] While the use determination did not change, the 276 cfu/100 mL "lightly used" SSM limits included in the 2003 permit were removed from the 2009 permit for consistency with subsequent 2004 UPEPA guidance clarifying that the intended use of SSMs was for beach closure decisions. See Fact Sheet p. F-20.

"Limited Water Contact Recreation: Limited Water Contact Recreation beneficial uses are defined as uses in which a limited amount of contact with water is reasonably possible or where Primary Water Contact Recreation is limited by physical conditions. Representative Limited Water Contact Recreation activities include but are not limited to fishing[2] boating, hunting while standing in water, tidepool and marine life study, and other activities involving limited contact with water incident to shoreline activity. Representative conditions where Primary Water Contact Recreation is limited by physical conditions include but are not limited to areas with very shallow water depth, areas in which access to a waterbody is restricted (fenced, signed, etc.) and areas which are highly undesirable for recreation and/or require access via a dangerous route."

The City provided comments on the 2004 and 2009 Basin Plan Triennial Review also recommending in part adoption of the subcategory beneficial use of Limited Water Contact Recreation. The City's May 30, 2008 2009 Triennial Review comments (copy attached) noted that two categories of subcategories of REC had been included in the 1971 Basin Plan:

> *The 1971 Interim Basin Plan included two subcategories of REC beneficial uses (excerpt attached to fax copy of this letter).*
>
> - *Rec 1A – Water contact recreation which involves extensive body contact with the water such as swimming and wading.*
> - *Rec 1B – Water contact recreation which involves limited contact with water, such as fishing and boating.*

Both DPH and USEPA guidance documents support adopting subcategories of the recreational use designation. The October 24, 1990 Memo from Don Womeldoft, Chief of Environmental Management Branch, Department of Health Services to James Baetge, Executive Director, State Water Resources Control Board "*Request for Clarification of Beneficial Use Definitions of State Water Related to Bacterial Standards*" was the basis for the 500 MPN/100 mL median fecal coliform effluent limitation adopted and continued in multiple POTW NPDES permits, since the mid-1980s. This action has allowed for significant reduction in the use of chlorination and dechlorination chemicals, and the production and discharge of disinfection byproducts.

The March 2004 USEPA document "*Implementation Guidance for Ambient Water Quality Criteria for Bacteria*" indicates that states may adopt subcategories of recreational uses. Examples given include "primary contact uses modified to reflect low flow situations or waterbodies significantly impacted by wildlife sources of fecal contamination." EPA defines secondary contact activities as those activities where most participants would have very little direct contact with the water and where ingestion of water is unlikely. Examples given include wading, canoeing, motor boating, and fishing.

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[2] Fishing includes all activities from boats and the shoreline, in-water fishing, bait collection, frog collecting, crayfish fishing, clam harvesting, etc.

USEPA (2004) also noted that for fecal coliform water contact criteria states have "*generally adopted a secondary contact water quality criterion of 1000 cfu/100 mL geometric mean, which is five times the geometric mean values used by many states and authorized tribes to protect primary contract recreation. This water quality criterion has been applied to secondary contact uses and to seasonal recreation uses during the months of the year not associated with primary recreation.*"

The City strongly encourages the RWB to adopt language into this BPA clarifying the definition of and applicability of the Limited Water Contact Recreation beneficial use. There is extensive RWB past precedent for this action, along with supporting DPH and USEPA guidance. This action will provide needed guidance to RWB permit writers in developing consistent permit limits and conditions that will provide the appropriate (i.e. not overly protective) level of protection to the actual existing level of recreational use in given water bodies. The alternative of providing an unnecessary level of protection would come at the cost of requiring excessive use of chemicals to disinfect and dechlorinate the effluent, unnecessary production and discharge of harmful disinfection byproducts such as trihalomethanes, and undesirable public safety concerns associated with chemical handling.

2) Provide for Establishing Subcategories of Shellfish Harvesting Uses

The City recognizes that this BPA is not intended to address shellfish harvesting uses. The BPA Staff Report Table 2 Definitions and Applicability of Beneficial Uses (p. 11) notes under the shellfish harvesting (SHELL) beneficial use applicability column:

> "*The State Board is in the process of evaluating beneficial uses associated with shellfish harvesting, including COMM and SHELL. Therefore, SHELL is not being designated to water bodies at this time, pending completion of the statewide policy effort.*"

The City agrees that it is appropriate to defer designation of SHELL to water bodies until the State Water Board (SWB) finishes it reassessment of the shellfish harvesting beneficial use definition itself. The scoping document for the SWB May 3, 2010 public scoping meeting on this SHELL project states the following:

> "*The focus has to do with evaluating the use, not the status of the shellfish themselves or water quality. This stems from the fact that bacterial indicators for shellfishing are based on public consumption health standards for commercial growers. These standards are very strict and allow for very little flexibility. This effort will evaluate looking at recreational vs. commercial shellfishing uses and whether or not we can differentiate the use.*"

The associated scoping meeting Public Notice states the Project Goals to include in part to:

> *"Better define the geographic extent of recreational shellfish beneficial use" and to "Create flexibility in how shellfish standards for recreational use are implemented by looking at how a Reference System and Antidegradation Approach might apply."*

The City provided comments on this SHELL issue as part of its May 30, 2008 comments (copy attached) on the 2009 Basin Plan Triennial. The City provided additional SHELL designation and implementation related comments in its more recent March 22, 2010 comments regarding the proposed BPA to adopt Enterococcus water quality objectives. A common comment was that updates and refinements to the shellfishing portions of the Basin Plan be consistent with the "National Shellfish Sanitation Program (NSSP), Guide for the Control of Molluscan Shellfish." That guidance specifies that each growing area be correctly classified (based on a sanitary survey, triennial review, and annual review) ranging from Approved to Prohibited. Of particular relevance to POTWs is the NSSP recommendation that:

> *"An area classified as prohibited shall be established adjacent to each sewage treatment plant outfall or any other point source outfall of public health significance."*

It may be some number of years before the SWB 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 RWB 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 BPA included the following recommended clarification. For consistency with the NSSP 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.*

An example of the type of information that could be collected to support this harvesting determination, was the 18 month visual user survey conducted by City staff of potential REC-1 and SHELL activities along Moffett Channel and Guadalupe Slough. As cited in the City's 2009 NPDES permit Fact Sheet (p. F-11):

> *"Although South San Francisco Bay is listed to support shellfish harvesting, according to a City of San Jose report, Alternative Effluent Bacteriological Standards Pilot Study, 2003, representatives from the California Department of Fish and Game have stated that no shellfish harvesting occurs in the San Francisco Bay south of Foster City. In addition, the Shellfish Harvesting (SHELL) beneficial use likely does not exist in Moffett Channel or Guadalupe Slough. Both water bodies are characterized with soft mudflats and subtidal marsh, which are not suitable shellfish habitats. The Discharger's 2003 beneficial use survey of Moffett Channel and Guadalupe Slough found no attempts by the public at shellfish harvesting over a period of 18 months."*

We appreciate the opportunity to provide these comments. If you have any questions, please contact me at (408) 730 - 7268 or Dr. Tom Hall of EOA at (510) 832 – 2852 x110.

Sincerely,

Lorrie Gervin
Environmental Division Manager

Cc: Bruce Wolfe, RWQCB
Naomi Feger, RWQCB
EOA, Inc.
Robert Falk, Morrison & Foerster
Amy Chastain, BACWA

Attachments:

A. SCVURPPP June 17, 2003 Comment Letter on RWB March 27, 2003 "Definitions of Beneficial Uses and Preliminary Criteria for Their Designation"

B. Sunnyvale May 30, 2008 Comment Letter on RWB 2008 (2009) Basin Plan Triennial Review

June 17. 2003

Mr. Steve Moore, Section Leader
Policy and Planning Section
California Regional Water Quality Control Board,
San Francisco Bay Region
1515 Clay Street. Suite 1400
Oakland, CA 94612

Dear Mr. Moore:

The Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPPP) appreciates the opportunity to provide you these initial comments on the proposed amendments to the Basin Plan waterbody list and associated beneficial uses. The comments are based on a memorandum from you to Interested Parties dated March 27, 2003 on the subject of "Definitions of Beneficial Uses and Preliminary Criteria for Their Designation." SCVURPPP understands that there may have been subsequent changes to the information contained in that memo and would appreciate the opportunity to provide additional comments in the future on any such changes

SCVURPPP supports these efforts to update the Basin Plan and encourages Board staff to also consider clarifying and refining some of the definitions of beneficial uses. Our comments below focus primarily on suggested updates to the recreational beneficial use definitions. We understand that these are state-wide definitions. However, as discussed below, we believe that the current REC-l definition does not adequately address the key variable of relative exposure, and hence relative risk to the public. The current definition lumps together high exposure swimming with very low potential exposure uses such as fishing.

As early as 1990, the CA Department of Health Services (DHS) set forth a recommendation[1] that the definitions of Water Contact recreation should be revised to be consistent with the Federal Water Quality Criteria document[2]. Their recommendation was that the uses be classified into three broad categories rather than two with the potential for human exposure as the fundamental difference between uses. The recommended categories were as follows:

- Primary Contact Recreation;
- Limited Water Contact Recreation; and
- Non-contact Water Recreation.

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[1] Memorandum from DHS Environmental Management Branch to James Baetge, Exclusive Director,.SWRCB, October 24, 1990.

[2] Federal Water Pollution Control Administration, Water Quality Criteria: Report of the National Technical Advisory Committee to the Secretary of the Interior, April 1, 1968, Washington. D.C.

This Limited Contact Recreation use has been used as a point of reference over the last several years by Board staff and the Board when developing and adopting alternative bacteriological effluent limits (e.g., 500 MPN/100 mL fecal coliform) for discharges to receiving waters with documented limited contact recreation. The 2002 USEPA guidance document on implementation of bacteriological criteria provides additional example of and rationale for such subcategories of recreational uses.

SCVURPPP supports this general "refined use" concept and its inclusion in the Basin Plan. Some suggested draft definition language is provided below with related rationale.

Primary Water Contact Recreation: Primary Water Contact Recreation beneficial uses are defined as uses that reasonably involve contact with water that include a substantial likelihood of ingesting water. Representative activities include but are not limited to swimming, water skiing, and skin diving.

Limited Water Contact Recreation: Limited Water Contact Recreation beneficial uses are defined as uses in which a limited amount of contact with water is reasonably possible or where Primary Water Contact Recreation is limited by physical conditions. Representative Limited Water Contact Recreation activities include but are not limited to fishing[3] boating, hunting while standing in water, tidepool and marine life study, and other activities involving limited contact with water incident to shoreline activity. Representative conditions where Primary Water Contact Recreation is limited by physical conditions include but are not limited to areas with very shallow water depth, areas in which access to a waterbody is restricted (fenced, signed, etc.) and areas which are highly undesirable for recreation and/or require access via a dangerous route.

Non-contact Water Recreation: Non-contact Water Recreation beneficial uses are defined as uses which involve proximity of water but do not require contact with water. Representative activities include but are not limited to picnicking, sunbathing, hiking, beachcombing, camping, pleasure boating, hunting on land, and sightseeing.

Issues, Caveats, and Qualifying Statements:

Following is a short list of issues related to the recreational uses defined above which would need to be considered if the definitions were to be adopted as part of a revised Basin Plan. These issues could either be accounted for in designating uses, in defining water quality criteria for the uses, and/or as introductory discussion points prior to the definitions in the Basin Plan.

1. *Some recreational activities may require careful consideration to determine the appropriate beneficial use category.* It may be necessary to carefully define some recreational activities with a series of descriptive attributes to determine the

[3] Fishing includes all activities from boats and the shoreline, in-water fishing, bait collection, frog collecting, crayfish fishing, clam harvesting, etc.

appropriate category for that activity. For example, wading by children may either be primary contact or limited contact recreation, depending on the specific situation (wading knee deep in a bay with the potential may be a significantly different activity than "puddle splashing" in several inches of water in a concrete channel), and it may not be immediately obvious whether it would be most appropriate for kayaking to be defined as a primary or limited contact recreation activity.

2. *Primary Contact Recreation can be subcategorized.* The document "Ambient Water Quality Criteria for Bacteria — 1986"[4] set forth the concept that the Primary Contact Recreation use could be subcategorized as follows:

    a. Designated beach area;

    b. Moderate full contact recreation area;

    c. Lightly used full contact recreation area; and

    d. Infrequently used body contact recreation area.

    In that document it was recommended that sampling frequencies and water quality criteria derivation could be related to the intensity of use.

3. *The uses associated with a water body or a section of a waterbody may change temporarily.* Federal regulation allows for seasonal uses, provided that the criteria adopted to protect such uses do not preclude the attainment and maintenance of a more protective use in another season[5]. This seasonal use concept may or may not be appropriate on a broad scale, however the general concept may be appropriate on a short term or seasonal scale under the following types of conditions: high flow, storm events, and/or low flow or limited water conditions. Under these representative or similar conditions, it may be appropriate to temporarily change the use of a waterbody from Primary Water Contact Recreation to Limited Water Contact Recreation, or from Limited Water Contact Recreation to Non-contact Water Recreation.

4. *Issues Related to Water Quality Criteria to Protect Beneficial Uses:*

    a. Water Quality Criteria for the Primary Water Contact Recreation beneficial use should be risk (health) based. Currently US EPA recommends roughly 1 illness per 100 recreation events as a tolerable level of risk for body contact recreation. CA DHS staff is in agreement with this concept, but is the opinion that EPA's tolerable level of risk may not be sufficiently health protective.

    b. Water Quality Criteria for the Limited Water Contact Recreation beneficial use should also be risk-based. To implement this, several issues would need to be agreed upon at a policy level. For example, is the level of risk associated with Primary Water Contact Recreation

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[4] EPA440/5-84-002.

[5] CFR 131.10(f)

appropriate for the Limited Water Contact Recreation beneficial use? If so, the water criteria could be scaled by the expected level of exposure associated with the Limited Water Contact Recreation relative to the primary contact recreation[6] If not, a decision would need to be made relative to the appropriate level of risk associated with this beneficial use.

c. Water Quality Criteria for the Non-contact Water Recreation beneficial use will not be risk (health) based as it is assumed that no human exposure occurs. The criteria will likely be based on aesthetics or other criteria.

In closing, **SCVURPPP** appreciates the opportunity to provide these comments and recommendations. We look forward to continuing to work with you and your staff throughout this Basin Plan Amendment process. If you have any questions, please call.

Sincerely,

Adam Olivieri. Dr. PH, P.E.
Program Manager

cc

[6] During primary water contact recreation, it is assumed that ~50-100ml of water is ingested. Limited Water Contact Recreation likely involves much less water, therefore the concentration of a pathogenic agent could be higher in a Limited Water Contact Recreation waterbody and still result in the same level of risk as a Primary Contact Recreation area.

EOA, Inc.

Eisenberg, Olivieri & Associates
Environmental and Public Health Engineering

May 30, 2008

Sent by Fax and Email

Ms. Naomi Feger
Senior Environmental Scientist
San Francisco Bay Regional Water Quality Control Board
1515 Clay St., Suite 1400
Oakland, CA 94612

SUBJECT: Comments on 2008 Basin Plan Triennial Review

Dear Ms. Feger:

These comments are submitted by EOA on behalf of the City of Sunnyvale. The City appreciates the opportunity to provide input on the priority of issues to be addressed by Basin planning staff. The City recognizes that there are limited staff resources available for this Basin Plan Triennial Review (BPTR) and that some desirable updates will have to be deferred to later years.

One of the two highest priorities for the City is adoption of the Beach Act Water Quality Objectives, and associated implementation guidance, to enable permit limits to routinely be set based on fecal coliform, enterococci, or E.coli instead of total coliform. (A related suggested concurrent Basin Plan change would be to add a new beneficial use of Limited Contact Recreation). The second highest priority is evaluation of the shellfish beneficial use given its potential to impact bacteriological limits. More detailed comments on these two issues are provided below.

Other suggested issues described below are ones the City also commented on during the 2004 BPTR, that made it onto the 2004 issues list, but with relatively low priorities. They are included here to keep them "on the radar screen" to be addressed when resources become available.

Adopt U.S. EPA Beach Act Recreational Contact Standards (Issue 3.1)

The City supports adoption of the Beach Act criteria as water quality objectives consistent with the requirements of Water Code Section 13241. These are numerically the same values that have been included in Basin Plan Table 3-2 but as criteria, not WQOs. The City supports removing total coliform from Table 4-2 (as an outdated and inaccurate indicator organism). The City further supports inclusion in Chapter 4 guidance on how Water Quality Based Effluent Limits (WQBELs) are to be calculated from the bacterial WQOs (i.e. with initial and as appropriate subsequent dilution). Useful background information on this bacterial WQO issue, and how it can be evaluated relative to protection of shellfishing beneficial uses, can be found in the joint effluent and receiving water study conducted by the City of San Mateo and the South Bayside

System Authority (SBSA) in support of changing from total to fecal coliform effluent limits ("Chlorination Reduction Evaluation and Recommendations for Modified Effluent Coliform Limitations," November 1997).

A recommended related Basin Plan change would be to add a sub-category beneficial use of Limited Contact Recreation and to narrow the current definition of Water Contact Recreation (REC-1). REC-1 would then be more technically based and associated with protection of full body contact exposure, such as swimming. Incidental type exposures, such as fishing, with a lower health risk, would then logically fall under Limited Contact Recreation.

The 1971 Interim Basin Plan included two subcategories of REC beneficial uses (excerpt attached to fax copy of this letter).

- Rec 1A – Water contact recreation which involves extensive body contact with the water such as swimming and wading.
- Rec 1B – Water contact recreation which involves limited contact with water, such as fishing and boating.

DOHS and USEPA have supported adopting subcategories of the recreational use designation in guidance documents. The October 24, 1990 Memo from Don Womeldoft, Chief of Environmental Management Branch, Department of Health Services to James Baetge, Executive Director, State Water Resources Control Board "*Request for Clarification of Beneficial Use Definitions of State Water Related to Bacterial Standards*" was the basis for the 500 MPN/100 mL median fecal coliform effluent limitation adopted in several POTW NPDES permits, such as SBSA, since the mid-1980s. This has allowed for significant reduction in use of chlorination and dechlorination chemicals, and production and discharge of disinfection byproducts.

The May 2002 Draft USEPA "*Implementation Guidance for Ambient Water Quality Criteria for Bacteria*" indicates that states may adopt subcategories of recreational uses. Examples given include "primary contact uses modified to reflect low flow situations or waterbodies significantly impacted by wildlife sources of fecal contamination." EPA defines secondary contact activities as those activities where most participants would have very little direct contact with the water and where ingestion of water is unlikely. Examples given include wading, canoeing, motor boating, and fishing.

USEPA noted that states have "*generally adopted a secondary contact water quality criterion of 1000 cfu/100 mL geometric mean, which is five times the geometric mean values used by many states and authorized tribes to protect primary contract recreation. This water quality criterion has been applied to secondary contact uses and to seasonal recreation uses during the months of the year not associated with primary recreation.*"

{Alternate limits for bacteria ranked 4 in the 2004 BPTR and Limited REC-1 ranked 25.}

Evaluation of the Shellfish Beneficial Use for San Francisco Bay (Issue 2.4)

The City agrees with the issue description that there is a need for a "refinement of the spatial and patterns of shellfish harvesting uses" and to "subcategorize the SHELL beneficial use of San Francisco Bay for recreational shellfishing." The City would encourage staff to incorporate in the Basin Plan some of the important historic information in this regard developed by the Water Board's own Shellfish Program in the late 1970's and early 1980's. (Basin Plan Section 5.2.8 Shellfish references Water Board Resolutions No. 74.14, 78-8 and No. 83-10). Multiple shellfish surveys and sanitary surveys were conducted during that time by Water Board staff, Department of Fish and Game, and others. Copies of these reports are available at the UCB Water Resource Center Archives.

The City would also suggest that updates and refinements to the shellfishing portions of the Basin Plan be consistent with the "National Shellfish Sanitation Program, Guide for the Control of Molluscan Shellfish." That guidance species that each growing area be correctly classified (based on a sanitary survey, triennial review, and annual review) as:

- Approved Waters – Growing waters from which shellfish may be harvested for direct marketing;
- Conditionally Approved – Growing waters meeting approved classification standards under predictable conditions. These waters are open for harvest when water quality standards are met (e.g., dry weather), and are closed at other times.
- Restricted Waters – Growing waters from which shellfish may be harvested only if they are relayed or depurated before direct marketing.
- Conditionally Restricted – Growing waters do not meet the criteria for restricted waters if subjected to intermittent microbiological pollution, but may be harvested if shellfish are subjected to a suitable purification process.
- Prohibited Waters – Growing waters from which shellfish may not be harvested for marketing under any conditions. (Section IV.03.D(5)(a) Prohibited Areas states that "An area classified as prohibited shall be established adjacent to each sewage treatment plant outfall or any other point source outfall of public health significance, with the prohibited area subject to several criteria).
- Unclassified Waters – Used by some states for growing waters that are part of a state's shellfish program but are inactive, i.e. there is no harvesting, and the state does not conduct any water quality monitoring or maintain a sanitary survey.

The City sees this as a moderately high priority. Adopting into the Basin Plan the already developed subcategories of uses and procedures of the NSSP should take relatively little "new" effort. The proposed State Water Board supported shellfish survey should be conducted in a manner to provide information to support classification of areas of the Bay by the appropriate subcategory.

Updates of Regulatory Programs

Permit Limit Issues

The City recommends that the Basin Plan be updated to provide more guidance and clarity on certain issues affecting how effluent limits are derived and calculated pursuant to the State Implementation Plan (SIP). Some of the changes are to provide consistency with the SIP, others would be to address issues on which the SIP is either silent or ambiguous. The City realizes that some of the following requested changes could be considered state-wide issues and perhaps could be dealt with through changes to the SIP. Given the local importance of these permitting issues, and challenges associated with getting the SIP appropriately updated in a timely manner, the City recommends that Board staff move ahead with updating the Basin Plan while continuing to encourage SWRCB staff to update the SIP.

The issues described below affect almost every discharger NPDES reissuance. The suggested guidance will help permit writers maintain a high level of consistency between permits over time.

Two interrelated permitting activities include conduct of Reasonable Potential Analyses (RPAs), and calculation of effluent limitations. The Basin Plan should be amended to provide additional guidance on the definition of and selection of background receiving water station location(s) for individual dischargers. This is particularly problematic for shallow water estuarine dischargers. Currently, there are many possible approaches, such as nearest available, "upstream", single versus pooled stations, largest dataset, most recent dataset, etc. It is an issue since it affects the data to be used in and thus the outcome of RPAs, some effluent limit calculations, and how hardness is calculated.

Guidance on derivation and application of metals translators is also needed. Translators are affected by most of the same point of application issues as for background stations selection (above) plus issues such as whether discharger specific or regional/pooled translators should be used.

Guidance on data quality objectives is needed. The SIP often relies on single maximum observed values for decision making. Guidance is needed how to deal with outliers/suspect datapoints, old datasets, number of years of data to use, minimum size datasets, etc. {Low to moderate priority, moderate level of effort. RPA ranked 19 in 2004 BPTR. NPDES editorial changes ranked 12.}

Mixing Zone Policy

Sunnyvale strongly supports development of a sound, technically based mixing zone policy that includes shallow water dischargers. Hydrodynamic modeling tools exist to accomplish this in estuarine conditions. Results from such modeling should be allowed to be used by all dischargers on a case by case basis while the policy is being developed. {Low to moderate priority, moderate to high level of effort. Dilution policy ranked 22 in 2004 BPTR}

Chronic and Acute Toxicity

The Basin Plan sections on toxicity, particularly chronic toxicity, need significant updating. First however, there the City recommends there be a review of a representative cross section of test results, to determine the regulatory value of the data being provided by such testing versus the cost. {Acute toxicity update ranked 25 in 2004 BPTR.}

It is recommended that the equivalent to a "reasonable potential analysis" mechanism be developed and included to provide permit writers a technical and policy basis for determining, based on past performance, whether limits/triggers still need to included when permits are reissued each time. The RPA could also be used to help determine when monitoring frequency changes may be appropriate. {Low to moderate priority, moderate to high level of effort. Toxicity RPA ranked 32 in 2004 BPTR.}

Water Recycling

The City is a long-standing proponent of water recycling. Sunnyvale recommends that the Basin Plan section on water recycling be significantly updated and include language more strongly supportive of all forms of water recycling. Such text changes would give water recycling proponents another tool to help educate water recycling opponents. {Moderate priority, relatively minor level of effort. Water recycling ranked 9 in 2004 BPTR.}

Revisions to New Laws, Plans and Regulations

Many permitting decisions are made based on rulings (Orders) from the SWRCB in response to petitions of RWQCB permitting actions. Other decisions are made based on court rulings on appeals of these SWRCB permit petition rulings. It is recommended that these important SWRCB and court rulings affecting permitting be referenced in Chapter 5 of the Basin Plan. {Low to moderate priority, relatively minor level of effort. This item was included in NPDES Editorial Changes ranked 13 in the 2004 BPTR.}

Tributyltin (TBT) WQO Update

EPA adopted final TBT criteria in December 2003. It is suggested that the Footnotes to Basin Plan Tables 3-3 and 3-4 should be updated to read as shown below to reflect this. The chronic and acute values are not included in the Basin Plan tables since they have not been formally adopted as WQOs pursuant to Water Code Section 13241. However they are used in Reasonable Potential Analyses. The final chronic and acute values of 0.0074 ug/L and 0.42 ug/L are higher than the draft values (but are still based on very limited data, per the Criteria document)

Table 3-3 Footnote "j"
j. Tributyltin is a compound used as an antifouling ingredient in marine paints and toxic to aquatic life in low concentrations. U.S. EPA has published Ambient Aquatic Life Water Quality Criteria for Tributyltin (TBT) – Final (EPA 822-R-03-031, December 2003).

These criteria are cited for advisory purposes.

Table 3-4 Footnote "o"
o. Tributyltin is a compound used as an antifouling ingredient in marine paints and toxic to aquatic life in low concentrations. U.S. EPA has published Ambient Aquatic Life Water Quality Criteria for Tributyltin (TBT) – Final (EPA 822-R-03-031, December 2003). These criteria are cited for advisory purposes.

On behalf of Sunnyvale, I thank-you for the opportunity to provide these comments. We look forward to working with you on this triennial review process. The City encourages you to hold workshops and/or form workgroups to address each of the major issues. If you would like to discuss these comments further, please call.

Sincerely,
EOA, Inc.

Thomas W. Hall, Ph.D.
Managing Environmental Engineer

C: Lorrie Gervin, Sunnyvale
Michele Pla, BACWA
Pete Schafer, San Jose

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April 12, 2010

VIA EMAIL: johara@waterboards.ca.gov; bwolfe@waterboards.ca.gov; wbruhns@waterboards.ca.gov; nfeger@waterboards.ca.gov;

Ms. Jan O'Hara
San Francisco Bay Regional Water
Quality Control Board
1515 Clay Street, Suite 1400
Oakland, CA 94612

Subject: Comments on Proposed Amendment to the Water Quality Control Plan for the San Francisco Bay Basin – Addition of Surface Water Bodies and Beneficial Uses to Chapter Two of the Basin Plan

Dear Ms. O'Hara:

The Union Sanitary District (District) appreciates the opportunity to comment on the proposed revisions to the *Water Quality Control Plan for the San Francisco Bay Basin* (Basin Plan). The District provides wastewater treatment services for the Cities of Fremont, Newark, and Union City; a total population of approximately 334,000. Treated wastewater is normally discharged to San Francisco Bay through the East Bay Dischargers Authority joint outfall, and a smaller portion is discharged on a regular basis to the Hayward Shoreline Marsh (Hayward Marsh).

Discharge to Hayward Marsh provides a net environmental benefit through the creation of both fresh and brackish water habitat for a variety of sensitive aquatic and terrestrial species. The marsh is maintained as a reserve for these sensitive species and, as such, public access is prohibited including a specific prohibition against fishing. The prohibitions are established through placement of signage and fencing and are enforced by East Bay Regional Park District personnel.

The proposed amendments to the Basin Plan include the addition of the Ocean, Commercial, and Sport Fishing beneficial use (COMM) to the Hayward Marsh. COMM is defined in the Basin Plan as, "Uses of water for commercial or recreational collection of fish, shellfish, or other organisms in oceans, bays, and estuaries, including, but not limited to, uses involving organisms intended for human consumption or bait purposes" (Page 10 of the 2007 version). Appendix C of the *Staff Report: Addition of Waterbodies and Beneficial Uses to San*

Francisco Bay Basin Water Quality Control Plan, 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 the above referenced 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.

The District respectfully requests that Regional Water Board staff remove the COMM beneficial use for Hayward Marsh.

Thank you for your consideration of this comment. Please contact Tim Grillo at (510) 477-7561 or tim_grillo@unionsanitary.com with any questions or for additional information.

Sincerely,

Dave Livingston
Treatment and Disposal Services Workgroup Manager
Union Sanitary District

cc: Bruce Wolfe, Regional Water Board
Wil Bruhns, Regional Water Board
Naomi Feger, Regional Water Board
Monica Oakley, Oakley Water Strategies
Matt Graul, East Bay Regional Parks
File

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

March 11, 2010

Naomi Feger
San Francisco Bay Regional Water Quality Control Board
1515 Clay Street
Oakland, CA 94612

Dear Ms. Feger:

Thank you for the opportunity to review and comment on the San Francisco Bay Regional Water Quality Control Board's (Regional Board's) Staff Report entitled, "Addition of Water Bodies and Beneficial Uses to the San Francisco Bay Basin Plan" and associated proposed Basin Plan Amendment (BPA). 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. We have one comment concerning the proposed BPA.

On page 7 of the proposed BPA, at Section 2.2.1, Surface Waters, 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 of the proposed BPA, 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 water quality management plan, or in this case, the Regional Board Basin Plan. UAAs are detailed analyses, and are described at EPA regulations 40 CFR 131.10(g). The second sentence in proposed paragraph 6 included above conflicts 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. For the second sentence of proposed paragraph 6, we suggest "uses near or downgradient of discharges may be evaluated through a Use Attainability Analysis as required by 40 CFR 131.10(g), and if appropriate, amendments to the Basin Plan will be made for these parts of the water bodies." Similarly, for the definition of "E" in Table 2.1, we suggest "E – indicates the beneficial use exists throughout, or on a portion of the water body consistent with an approved water quality standards change pursuant to a Use Attainability Analyses."

Our comments above do not constitute an approval, disapproval or determination by EPA under CWA section 303(c). We will act upon any water quality standards submittal following State adoption and submittal to EPA.

In closing, we are pleased to see the proposed water quality standards Basin Plan Amendment, and believe it will enhance the Board's ability to protect human health and the environment. If you have any questions, please call me at (415) 972-3452 or Diane Fleck at (415) 972-3480.

Sincerely,

Janet Hashimoto

Janet Hashimoto
Manager, Standards and TMDL Office