

**San Francisco Bay Regional Water Quality Control  
Board**

**2024 Triennial Review**

**Response to Written Comments**

# STAFF RESPONSE TO WRITTEN COMMENTS ON THE 2024 TRIENNIAL REVIEW STAFF REPORT AND TENTATIVE RESOLUTION

The Regional Water Board received four comment letters during the public comment period, which began on September 13 and closed on October 14, 2024. Ecological Rights Foundation submitted three late comment letters (dated November 23, 2024, November 26, 2024, and December 9, 2024; collectively, referred to herein as Comment Letter 5), which were accepted to ensure substantive public involvement. The comment letters were submitted right before the scheduled December 11, 2024, triennial review hearing and necessitated postponing the hearing so that the Regional Water Board could consider these comments.

The Regional Water Board did not receive any additional comment letters during the second public comment period, which began on February 28 and ended on March 31, 2025. The Regional Water Board also made a minor staff-initiated change to the Revised Staff Report, which is described below before addressing stakeholder comments.

The comments from these letters and our responses are presented here. For the full content and context of the comments, please refer to the comment letters. To request a copy of the letters, please contact Gerardo Martinez at (510) 622-1015, or by email at [Gerardo.Martinez@waterboards.ca.gov](mailto:Gerardo.Martinez@waterboards.ca.gov).

Comment letters received:

1. Bay Area Clean Water Agencies (BACWA) (Lorien Fono)
2. San Francisco Baykeeper (Nicole C. Sasaki)
3. San Francisco Baykeeper and Clean Water Action (Ben Eichenberg, Ian Wren, and Andria Ventura)
4. Clean Water Action and San Francisco Baykeeper (Andria Ventura and Ben Eichenberg)
5. Ecological Rights Foundation (Brian Orion and Christopher A. Sproul)

## Staff Initiated Changes

In the Revised Staff Report, we removed the erroneous text on page 6 (shown in double strikethrough): “Appendix B of the Revised Staff Report contains the Regional Water Board’s consideration of new or revised CWA section 304(a) recommended criteria for certain toxic pollutants and an explanation for why, based on its analysis, it is unnecessary to revise the Basin Plan water quality objectives for those pollutants in light of the new or revised recommended criteria (some 304(a) criteria are old ~~and pre-date May 30, 2000~~ but are also reconsidered even though it is not required).”

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

- 1.1. “We are particularly pleased to see that the proposed Basin Plan Amendment to Develop a Nutrient Water Quality Attainment Strategy for San

**Francisco Bay ranked high enough to receive staff resources over the next three years. The score of 50 for this project is, if anything, an underestimate of its importance, based on its score for two of the ten ranking criteria: Staff Resources Invested. The Nutrient Water Quality Attainment Strategy project should receive the maximum number of possible points (10 / 10) for this criterion. As noted on the Regional Water Board's San Francisco Bay Nutrients Project website, the Regional Water Board was responsible for convening the Nutrient Management Strategy (NMS) in 2014, and it has remained actively engaged in the project through the NMS steering committee and planning subcommittees. BACWA is grateful for this leadership, which should be reflected in the project's score. A similar project related to the NMS received the maximum possible points in the 2021 Triennial Review staff report."**

We thank BACWA for their support for this project. This project has been scored according to the same criteria applied to all projects, and the final score and ranking is appropriate. Although a similar project related to the NMS received the maximum possible points for staff resources invested in the 2021 Triennial Review, that project was completed with the conclusion of the Lower South Bay dissolved oxygen report. The project proposed in this Triennial Review is new and substantially different than the project in the previous Triennial Review. The 5 points given to this project for this category were generous in reflecting overall past staff efforts and familiarity with the NMS and some initial effort that our agency has given to this concept in summer and fall 2024 following adoption of the Nutrient Watershed Permit.

- 1.2. "U.S. EPA Priority. The Nutrient Water Quality Attainment Strategy project should receive a score higher than zero for this criterion. BACWA does not presume to speak for U.S. EPA, but notes that U.S. EPA submitted a formal comment letter on the Tentative Order of the Nutrient Watershed Permit that signals support for the proposed project. U.S. EPA's May 8, 2024, letter states, "During this permit term, EPA encourages the Regional Board to continue to work with relevant interested parties so that the development of necessary regulatory approaches can occur to inform the 2029 Nutrients Watershed Permit." BACWA further notes that a similar basin planning project related to the NMS received the maximum possible points (5 / 5) in the 2021 Triennial Review staff report."**

We thank BACWA for the comment. For the 2024 Triennial Review, we asked the U.S. Environmental Protection Agency (U.S. EPA) for their priority Basin Plan amendments, and U.S. EPA staff explained that for triennial reviews, the U.S. EPA focuses only on projects that will address water quality standards (i.e., beneficial uses, water quality objectives/criteria, and anti-degradation). Accordingly, their priorities were Designation of Tribal and Subsistence Fishing Beneficial Uses, Addition of Commercial and Sport Fishing Beneficial Uses to Lakes, and Considering 304(a) Criteria for inclusion in the Basin Plan. Currently, the Nutrient Water Quality Attainment Strategy project is not a water quality

standard project. Therefore, the project did not receive U.S. EPA support and received 0 points.

- 1.3. “BACWA also recommends changes to the project description to be slightly more expansive and better align with Resolution R2-2014-0014 and Order R2-2024-0013. These requested edits are shown below in redline strikeout format.”**

We thank BACWA for the recommended editorial changes to the project description. We have made the editorial changes to be slightly more expansive and better align with Resolution R2-2014-0014 and Order R2-2024-0013.

## **2. Comment Letter 2: San Francisco Baykeeper**

- 2.1. “The purpose of the Triennial Review is to update the Basin Plan in accordance with section 303 of the Clean Water Act and section 13240 of the Water Code. Clean Water Act section 303(c)(2) requires water quality standards be revised “to protect public health or welfare, enhance the water quality and serve the purposes of this Act.” 33 U.S.C. § 1313(c)(2). Similarly, Water Code section 13240 instructs the Regional Board to revise the Basin Plan in conformance with Water Code section 13000 which declares: “activities and factors which may affect the quality of waters of the state shall be regulated to attain the *highest water quality* which is reasonable...” (emphasis added). As discussed below, the REC-1 Study is a step in the wrong direction for achieving these goals. It would move us away from the mandate of state and federal law to have swimmable, drinkable, fishable waters of the highest quality. Determining whether “enough” people use currently polluted waters as a justification to allow further pollution and degradation of those same waters gets the Clean Water Act and Porter-Cologne precisely backwards...Baykeeper respectfully requests the Regional Board remove the REC-1 Study from the Prioritized List of Basin Plan projects.”**

We thank Baykeeper for their comment. The REC-1 Study was not on the initial list of projects proposed by the Regional Water Board. It was added in response to a request by Santa Clara Valley Urban Runoff Pollution Prevention Program (SCVURPP) during the first comment period. Specifically, SCVURPPP requested that a project be added to review the attainability of the Water Contact Recreation Beneficial Use (REC-1) in Santa Clara County creeks and channels.

The Regional Water Board agrees with the commenter that waters of the state shall be regulated “to attain the highest water quality which is reasonable” and that revised water quality standards have to “protect public health or welfare, enhance the water quality and serve the purposes of [the Clean Water Act].” (Wat. Code, sec. 13240; 33 U.S.C. § 1313(c)(2).) The Clean Water Act (CWA) does, however, provide a mechanism to evaluate the attainability of certain beneficial uses like REC-1 through a use attainability analysis (UAA). A UAA is a structured scientific assessment of the factors affecting the attainment of the fishable and swimmable

uses specified in section 101(a)(2) of the CWA. Removing a fishable or swimmable use that is not an existing use must meet one of the criteria described in the U.S. EPA's water quality standards (WQS) regulation at 40 CFR 131.10(g)(1)-(6). Human caused conditions or sources of pollution cannot be a reason for finding a use is unattainable, unless it "cannot be remedied or would cause more environmental damage to correct than leave in place." (40 CFR 131.10(g)(3).)

Our approach to performing the Triennial Review is to request input on the initial list of candidate projects and then to add any projects requested by the public before ranking the projects per our scoring system. We then request comments on the ranking of the projects in the list. We believe this is a transparent, fair, and efficient process for conducting triennial reviews. Therefore, we did not incorporate this comment and did not remove this project from the list. The project, however, garnered a low score.

**2.2. "Alternatively, we ask the Regional Board adjusts the Public Support score for the REC-1 Study to reflect Baykeeper's strong opposition to this project."**

The Triennial Review scoring system described in the revised Triennial Review Staff Report (Revised Staff Report) only adds points for having none, one, two, or three or more comment letters. It does not remove points based on opposition letters. We remind Baykeeper that this project was ranked lowest of all projects and thus is not a Regional Water Board priority.

**3. Comment Letter 3: San Francisco Baykeeper and Clean Water Action**

**3.1. "We thank the San Francisco Bay Regional Water Quality Control Board ("Regional Board") staff for recognizing the importance of the project to Designate Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing Beneficial Uses in the San Francisco Bay Region and to continue incorporating this project in the 2024 Triennial Review. We continue to strongly believe that recognizing that tribal and non-tribal subsistence fishing, as well as tribal cultural uses (collectively referred to as "tribal and subsistence uses"), are occurring in the San Francisco Bay reflects an existing reality. Recognizing tribal and subsistence uses is a key step in working towards protecting the public health of all users of the Bay and other regional waters. This work is tremendously important, long overdue, and should proceed as quickly as possible, as reflected in comments submitted by Clean Water Action which Baykeeper has joined.**

We appreciate the support for this project. We agree the *Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing Beneficial Uses* project is an important Basin Planning project. With receipt of this letter, we are

adding points to project support for this project, so it is now ranked at number one with a total of 66 points.

**3.2. “The Regional Board should develop a Water Quality Attainment Strategy for Nutrient Management in SF Bay that provides an implementation framework and extended compliance schedule.”**

Thank you for your support for this project. With receipt of this letter, we are adding points to project support for this project, it remains ranked fourth with a total of 55 points. We are currently in the initial stages of the project, but we will consider your comments during the development of this project.

**3.3. “We urge the Regional Board to consider the following as you update applicable Basin Plan Implementation Plans to address the harm of eutrophication of San Francisco Bay: Acknowledge that shallow areas of the Lower South Bay, where nutrient point sources are concentrated, regularly exceed existing DO water quality objectives. Recognize that harmful algal blooms and their associated toxins pose serious ecological risks beyond their impact on DO, making a DO-centric approach insufficient for protecting the Bay's beneficial uses. Commit to initiating a public and peer-reviewed TMDL process, or a similar regulatory mechanism, within the next five years. This process should include sub-embayment-specific targets and an implementation plan that prioritizes early action and multi-benefit solutions.”**

The initial work on this project is recently underway and is focused on identifying the necessary scientific and monitoring studies to support the Regional Water Board's regulatory efforts for nutrients in San Francisco Bay. The NMS will almost certainly pursue scientific studies and monitoring efforts aimed at better understand the complex nutrient cycling in Lower South Bay, including consideration of the role of wastewater discharges and shallow margin areas like restored salt ponds. Refining the water quality analysis for San Francisco Bay to include consideration of the direct effects of harmful algal blooms on fish (e.g., toxins, or gill clogging) will also be a priority for the NMS scientific efforts. Consideration of sub-embayment-specific load targets and implementation is also a possible approach that will be evaluated. Likewise, a nutrient TMDL for San Francisco Bay is one of the possible regulatory pathways for the water quality attainment strategy, but a Regional Water Board commitment to that specific pathway as part of this Triennial Review would be premature and inappropriate. The Regional Water Board has already directed staff (through resolution R2-2024-0014) to evaluate the pros and cons of various regulatory strategies (including developing a TMDL) to address the challenges faced by wastewater facilities to achieve Water Quality Based Effluent Limitations in the time frame allowed by California's Compliance Schedule Policy.

**3.4. “We encourage the Regional Board to consider the example set by Washington's Department of Ecology in its 2021 Puget Sound Nutrient**

**General Draft Permit. That permit provides a transparent, water quality-based approach with realistic timelines and science-based load reduction targets.”**

Regional Board Staff has reviewed the 2021 Puget Sound Nutrient General Draft Permit as part of developing the 2024 Nutrient Watershed Permit for San Francisco Bay. While the Puget Sound Permit appears to be a sensible approach to address the water quality challenges in that system and some aspects of the Puget Sound Draft Permit can inform the San Francisco Bay technical analysis and permitting strategy, staff have identified critical differences between Puget Sound and San Francisco Bay nutrient problems and permitting strategies that limit the degree to which the Puget Sound approach can serve as a blueprint for San Francisco Bay. The permitting approach for San Francisco Bay is informed by a critical event (the 2022 algae bloom) and is designed to limit the harm to beneficial uses during such an event. Additionally, the Puget Sound Draft permit includes a finding that implementation of best management practices would be sufficient to protect beneficial uses in that system. In contrast, during the development of the San Francisco Bay Nutrient Watershed Permit, the Board determined that it is not possible for BMPs like monitoring, maintaining current performance, and evaluating nutrients reduction options to be protective of beneficial uses. These actions were already imposed in the past nutrient permit from 2014.

**3.5. “The Regional Board should reopen the polychlorinated biphenyl TMDL to reconsider the impact of varying PCB concentrations. The current PCB TMDL was completed about 15 years ago, and it assumes that San Francisco Bay is all impaired on a similar level. In other words, the PCB TMDL assumes that concentrations of PCBs remain constant throughout the Bay. That is does not reflect the best available science and was a critique of the TMDL raised by commenters at the time the TMDL was adopted. Far from consistent average concentrations of PCBs all around the Bay, the best available science shows that PCB hot spots play a disproportionate role in the Bay’s impairment. Fish move from area to area, consume contaminated food in hot spots, and then travel to other areas of the Bay. Sediment quality objectives must also be reviewed. Region 2 must join other regional water quality control boards in imposing Sediment Quality Objectives. If the Regional Board’s intention is to re-open the PCB TMDL, as we believe it should, the Regional Board must ensure that the TMDL is consistent with Sediment Quality Objectives.”**

The Board does intend to work on revisiting the SF Bay PCB TMDL. It has now been added to Priority Ranking for TMDL Development on page 23 of the Revised Staff Report. The PCBs TMDL used a food web model to establish the linkage between the fish tissue target and the sediment concentration that would need to be achieved in the Bay. This food web analysis does not require the assumption that sediment concentrations remain constant throughout the Bay. The analysis was used to derive the sediment concentration that would be necessary to

achieve the fish tissue target. The original TMDL considered all sources, loadings, and pathways for PCBs and any revision of the TMDL will be informed by the best available science associated with sources, loadings, and pathways. Accordingly, updated sediment concentration data will be used in modeling studies used to estimate the time frame for expected recovery. The Regional Water Board will consider if modifications are needed for the TMDL with respect to sediment quality objectives. However, the food web model used to derive the TMDL fish tissue target to protect human health yielded a sediment concentration of 1 µg/kg. This is 400 times lower than the currently applicable sediment chemistry element of the sediment quality objective of 400 µg /kg. Therefore, the existing TMDL fish tissue target requires (through the food web analysis) a much more stringent sediment quality endpoint than would likely result through the application of sediment quality objectives.

**3.6. “The Triennial Review must include documentation and study for revision of selenium standards that are demonstrably insufficient to protect beneficial uses. We ask that the Regional Board rapidly establish new, science-based selenium objectives that adequately protect designated beneficial uses, and then prioritize the establishment of protective selenium loads.”**

Since the Board adopted the selenium TMDL, it has been closely monitoring the progress of the TMDL and continually reviewing the latest scientific information on the effects of selenium on beneficial uses, particularly aquatic life. We have also collaborated with other agencies to collect more up-to-date fish samples. In addition to that ongoing process, we have, in response to this comment, reviewed the scientific literature and do not find any current evidence of adverse effects to aquatic life from selenium in the Bay.

We did not create a candidate project to revise the selenium water quality standards for several reasons.

- To date, there is no clear evidence of harm or impacts to aquatic life from selenium in San Francisco Bay. We have reviewed the two studies cited by Baykeeper and note that follow-up research subsequent to those have not found deformities or high selenium concentration in Sacramento splittail. This is further discussed in the responses to comments 3.8 and 3.9.
- We do not need to modify the selenium water quality objective for purposes of protecting beneficial uses at this time, because they are being protected. The TMDL includes a fish tissue target that was equivalent to the fish tissue component of the proposed U.S. EPA draft criteria for San Francisco Bay. Fish tissue is the most reliable indicator of whether fish are experiencing selenium toxicity. The TMDL was developed using a multi-stakeholder process relying on the best available science from USGS, coordination with U.S. EPA, and various rounds of public comment and scientific peer-review. It remains protective of beneficial uses.



- We disagree that the Bay's beneficial uses are not being protected and that the current selenium loads have a detrimental effect. This is further discussed in the response to comment 3.10.

U.S. EPA released draft selenium criteria for the San Francisco Bay in 2016 and is consulting with federal resource agencies. U.S. EPA, which must approve any revision to a Board-adopted water quality objective, has asked us not to develop any site-specific selenium objectives ahead of their process. However, it is important to note that because our TMDL fish tissue target is already equivalent to the fish tissue component of the proposed U.S. EPA selenium criteria, no additional implementation actions would be required to meet any revised criteria because the TMDL is already based on a fish tissue target as stringent as the proposed fish tissue criterion. In summary, we do not see evidence that the level of protection afforded by the existing TMDL is insufficient to protect beneficial uses and revision to the selenium water quality objective would not afford any additional protections to aquatic life.

**3.7. “The Regional Board is required to conduct a review of its basin every three years under section 303 of the Clean Water Act and under California Water Code (WC) section 13240. Water quality objectives, such as those in effect for selenium, must be reviewed during the triennial review. Water Code section 13143 states that “[s]tate policy for water quality control shall be periodically reviewed and may be revised.” See also WC § 13240 (basin plans “shall be periodically reviewed and may be revised”). The Clean Water Act also provides that “the State water pollution control agency ... shall from time to time (but at least once each three year period ...) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.” 33 U.S.C. § 1313(c)(1). According to the California Supreme Court, pursuant to the CWA, “[t]he states were to revisit and, if necessary, revise those initial standards at least once every three years—a process commonly known as triennial review. [Citation.] Triennial reviews consist of public hearings in which current water quality standards are examined to assure that they ‘protect the public health or welfare, enhance the quality of water and serve the purposes’ of the Act. [Citation.] Additionally, the CWA directs states to consider a variety of competing policy concerns during these reviews, including a waterway’s ‘use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.’ [Citation.]” *City of Burbank v. State Water Res. Control Bd.*, 35 Cal. 4th 613, 632, (2005). When these review requirements are not met, “the [Regional]Board has failed its duty to allow public discussion—including economic considerations—at the required intervals when making its determination of proper water quality standards.” *Id.*”**

We disagree that we failed in our duty to review water quality objectives such as for selenium. We are complying with all applicable laws and regulations through

the 2024 Triennial Review. As described in the comment, collectively, the statutes require us to review water quality standards and the Basin Plan at least once every three years and update them as appropriate to protect water quality. The commenter cites Water Code section 13240, which is the section that applies to the Basin Plan and states, “[s]uch plans shall be periodically reviewed and **may be** revised” (emphasis added). The Regional Water Board has reviewed the need to revise the selenium water quality objective and finds it is not appropriate at this time for a variety of reasons, the most important being that beneficial uses are being protected. See, e.g., Staff Report, Appendix B. Water Code section 13240 does not mandate revisions to the selenium water quality objective.

The commenter cites to a non-precedential concurring court opinion to suggest that the Regional Water Board “failed its duty to allow public discussion . . . at the required intervals when making its determination of proper water quality standards.” Through this triennial review process, the Regional Water Board is reviewing water quality standards, including for selenium, and has complied with all relevant requirements for soliciting and considering public comments, including at a public hearing.

**3.8. The commenter cites to two 2020 studies that found fish deformities associated with selenium. “This research, coupled with on-going data from the Regional Monitoring Program (RMP) shows that, particularly during dry weather conditions, elevated selenium concentrations consistently exceed water quality standards, as detected from fish tissue. The current North Bay Selenium TMDL imposed a status quo approach to selenium management and merely capped existing loads from Bay Area refineries. This has been shown to be inadequate, particularly in dry years, which are increasingly common and persistent.”**

To date there is no compelling evidence to suggest that the North Bay Selenium TMDL is not protective of fish species at risk from selenium exposure.

The cited 2020 studies<sup>1,2</sup> rely on old fish samples collected in 2010-11 which are not representative of the current conditions in North Bay. Although those samples exhibited spinal deformities linked to high levels of selenium, the analysis of selenium distribution in fish otoliths<sup>3</sup> suggested that the deformities resulted from feeding of young splittail in San Joaquin River rather than from maternal transfer of selenium obtained in the North Bay. The follow-up data collection in 2017 in the North Delta showed uniformly low selenium concentrations and no deformities in

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<sup>1</sup> Stewart, A. R.; Feyrer, F.; Johnson, R. C. Resolving Selenium Exposure Risk: Spatial, Temporal, and Tissue- Specific Variability of an Endemic Fish in a Large, Dynamic Estuary. *Sci Total Environ* **2020**, 707, 135919. <https://doi.org/10.1016/j.scitotenv.2019.135919>.

<sup>2</sup> Johnson, R. C.; Stewart, A. R.; Limburg, K. E.; Huang, R.; Cocherell, D.; Feyrer, F. Lifetime Chronicles of Selenium Exposure Linked to Deformities in an Imperiled Migratory Fish. *Environ. Sci. Technol.* **2020**, 54 (5), 2892–2901. <https://doi.org/10.1021/acs.est.9b06419>.

<sup>3</sup> An otolith is a calcium carbonate structure in the inner ear of vertebrates, including fish.

splittail<sup>1</sup>. Still, in response to concerns about splittail feeding on potentially contaminated prey in San Joaquin River, additional fish sampling was conducted by the USGS in 2022 under extreme drought conditions. Eighteen adult splittails were collected from Suisun Bay and 36 juvenile individuals were collected from various locations in the Sacramento-San Joaquin Delta<sup>4</sup>. All collected fish did not exhibit any spinal deformities that are commonly linked to selenium exposure, which confirms that selenium levels in the Estuary are not impacting sensitive fish.

Further, the TMDL established a cap on selenium loads to North San Francisco Bay based on average selenium concentrations in sturgeon because it is the most sensitive fish species to toxic effects from selenium. To date, average selenium concentrations in sturgeon are well below the protective TMDL numeric target. The TMDL established a cap on selenium loads to North San Francisco Bay to ensure that loads would not increase in the future, and to prevent increases of selenium concentrations in fish and the water column. A load cap was appropriate then, and continues to be appropriate, to ensure ongoing protection of beneficial uses in the Bay. The RMP Status and Trends Reports show that water column concentrations and fish tissue concentrations are met. That said, we continue to work with the Bay RMP to collect fish tissue data, examine selenium trends, and stay up to date on selenium research. In particular, we are evaluating new findings and methodologies, such as those studying selenium deposition in otoliths and have developed detailed monitoring plans for water, clams and fish capable of detecting small changes in selenium loading to the Bay to ensure protection of sensitive fish species.

**3.9. “Selenium pollution is harming Sacramento Splittail, Green Sturgeon, and White Sturgeon, putting rare fish species at further risk and negatively impacting the Bay’s recreational and subsistence fisheries. Protection of these beneficial uses depends on the productivity of these fish populations and the body burden of toxins in fish that are consumed. Currently, the TMDL and this Board’s implementation of it fail to protect fish, people, and beneficial uses of water.”**

We disagree that the TMDL fails to protect fish, people, and beneficial uses. There is no evidence of harm to any of the fish species listed or evidence of selenium impacts on fisheries or people who eat fish from San Francisco Bay. The North Bay Selenium TMDL and its targets are protective of all sensitive fish in the Bay including Sacramento splittail, and green and white sturgeon. The TMDL is based on the best available science, relevant scientific literature and includes numerous conservative approaches to establish the fish protective targets, which were developed in coordination with the U.S. EPA as they were developing their criteria. In addition, we developed the TMDL through a scientifically robust process involving input from USGS and other worldwide selenium experts. Desirable conservatism has already been incorporated into the TMDL’s numeric

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<sup>4</sup> [Data Portal - Data Package Summary | Environmental Data Initiative \(EDI\)](#)

targets. While establishing criteria for selenium, the U.S. EPA elected to choose the more stringent effect concentration threshold EC10 instead of the EC20, which has historically been used in criteria derivation. The use of the 10 percent effect level makes the criteria and our TMDL more protective than they would otherwise be.

We continue to collect fish samples to ensure that fish are not adversely affected by selenium. For example, in response to concerns about deformities observed in Sacramento splittail samples collected in 2010 (information published in 2020)<sup>1,2</sup>, fish sampling was conducted by the USGS in 2022 under extreme drought conditions. Eighteen adult splittails were collected from Suisun Bay and 36 juvenile individuals were collected from various locations in the Sacramento-San Joaquin Delta<sup>4</sup>. All collected fish did not exhibit any spinal deformities that are commonly linked to selenium exposure, which confirms that selenium levels in the Bay are not impacting sensitive fish or subsistence fisheries. In addition, the splittail data collected in 2017 in the North Delta show uniformly low selenium concentrations and no deformities<sup>1</sup>.

As stated in response to comment 3.8, selenium levels in sturgeon are below the TMDL targets which were designed to protect this sensitive species from harm. There are no other reports of selenium deformities or other impacts to white or green sturgeon in San Francisco Bay.

**3.10. “The Bay’s fish and fisheries and their related beneficial uses are in peril and are not being reasonably protected. Allowing continued selenium discharges to selenium impaired waters further harms them. And continuing to ignore the best available science—that current selenium levels are harmful and must be reduced—by treating an outdated TMDL as the most the Board can do or waiting for indefinitely delayed EPA rules to force the Board into action is not consistent with this Board’s obligations under the Clean Water Act nor with rational, evidence-based, decision-making.”**

We disagree that the Bay’s beneficial uses are not being protected and that the current load of selenium has a detrimental effect on any Bay aquatic life. Additionally, we disagree that recent science shows that the current selenium levels are harmful. As stated above, the selenium TMDL used the best available science to establish protective fish targets, and there is no new evidence to suggest that these targets are not protective of sensitive species. In addition, modeling was used to evaluate the effects of hypothetical changes in point and non-point loads on the dissolved and particulate selenium concentrations in water column and in bivalves to better understand the potential for system-wide transformations. Selenium loads were varied and compared to the existing conditions simulated at different mid-estuary locations. The modeling results showed that reduction of refinery loads by half would result in negligible changes in dissolved and particulate selenium in the Bay and when refinery load was removed completely, the particulate selenium concentrations would only decrease by approximately 3 percent (Tetra Tech 2015). We used an evidence-based

approach in developing this TMDL and capping the load was a scientifically based decision designed to protect the most sensitive fish species, which is sturgeon. The TMDL used a load cap approach for refineries because we achieved major load reductions from refineries from the 1980s-1990s. Subsequent to those reductions, fish tissue was consistently meeting the TMDL target protective of fish. Since the adoption of this TMDL, loads from the refineries varied from 479 to 548 kg/yr (2018-2023) and as a group have not exceeded the TMDL cap of 570 kg. Recently, two refineries (Tesoro and Phillips 66) switched to refining renewable feedstocks instead of petroleum, which has reduced their selenium loads which continue to be below the TMDL wasteload allocations.

#### **4. Comment Letter 4: Clean Water Action and San Francisco Baykeeper**

**4.1. “We write today to call on the San Francisco Bay Regional Water Quality Control Board to not only include the project to designate subsistence fishing (SUB), tribal subsistence fishing (T-SUB), and tribal cultural uses (CUL) as beneficial uses of San Francisco Bay in the new Triennial Review, but to ensure that the project is actually implemented in a timely fashion.”**

We appreciate your comments. As shown in the Revised Staff Report, this project was not only included in the candidate list of projects, but it is ranked first with 66 points and will have a total of 1.0 PY designated over the next three years. We have made substantial progress on this project during the last three years. Regarding CUL, we have received feedback from several Tribes interested in this topic and have built relationships with the Tribes. We have been working collaboratively with the Tribes, and prioritized CUL as a first step after discussions with the tribes. Regarding the SUB beneficial use, during the last three years, we used discretionary funds to develop a subsistence fisher consumption survey which was finalized in May 2024. From February to March 2025, we collaborated with six participants from the Richmond Shoreline Alliance to pilot test and validate the subsistence fisher consumption survey. The participants conducted 28 surveys with anglers in San Francisco Bay. Our next steps include compiling and analyzing the survey results, as well as integrating participant feedback to refine the survey methods. Once these tasks are complete, we plan to seek funding and partners to expand the updated consumption surveys bay wide. Further, our lead staff for this project left the Regional Water Board, and due to statewide budget shortfalls, our agency lost this position. Because this is priority work, we shifted this project work to existing staff and are training them on the project and basin planning. We anticipate proposing a Basin Plan amendment designating the CUL beneficial use to our Board.

**4.2. “It is imperative that decisions about the Bay, especially those related to contaminant mitigation, be based on the true uses of this important water body. Putting off such designations goes against the State Water Resources Control Board’s commitment to “a future where race no longer predicts a person’s access to water or the quality of water resources they receive, ...**

**and where we consistently consider racial equity impacts before we make decisions.”**

Equity is a priority for this Board as stated in our Strategic Workplan and Racial Equity and Environmental Justice Action Plan. This project will be implemented, and the Water Board will be working towards designating tribal and subsistence beneficial uses to protect the human health of all persons in our region.

- 4.3. “Accurate fish consumption data collection among both tribal and non-tribal fishing communities requires extensive trust building, and delays corrode that trust. Given that we have already waited 6 years for a project that is not as technically complex as most of the other proposed priority projects in the Triennial Review, we find ourselves wondering why the staff report indicates that this project, even if finally implemented, will take more than 3 years to complete. Given such limited progress to date, is it surprising that this feels more like a token attempt to appear to be concerned about Environmental Justice, without taking the actions necessary to ensure that all Bay Area residents are treated with equity?”**

We would like to remind the commenter that during the 2018 Triennial Review this project was not ranked in a position to be fully staffed. At that time, we said the amount of work on this project would be dependent on support provided by external parties. We received no explicit financial or partnership support from external parties, so we only took initial planning steps for these projects at that time. We do agree that collecting fish consumption data across an entire region requires “extensive trust building.” To that point, it takes time to build trust with tribal and non-tribal fishing communities throughout the Region. There is not one single entity that can identify all the fishing communities in our region, so we have been working to build trust with multiple community-based organizations that can help us identify and properly survey their local fishing communities. We have approached this project with a stage-wise approach and stated our progress in point 4.1. During the next three years, we are allocating staff time to continue working on the project and ensure that progress is made.

- 4.4. “As organizations committed to protecting the Bay and *all* the communities that depend on it, we do want to see designation of Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing Beneficial Uses in the San Francisco Bay Region included in the 2024 Triennial Review. In addition, this project should be a top priority of the Board and staff, and the surveys required to support the designations should be implemented immediately, and finished within a year. Then the Board should move with expediency to establish the designations assuming, as we anticipate, the data will support them.”**

We agree the *Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing Beneficial Uses* project is an important basin planning project. As shown in Table 3 in the Revised Staff Report, this project is high

priority for the Regional Water Board and is now ranked first with 66 points and will have a total of 1.0 PY designated over the next three years. The timeframe suggested by the commenter is not realistic for this project. As stated in the response to comment 4.1, we conducted pilot surveys from February to March and plan to seek additional funding to expand surveying for populations across San Francisco Bay.

## **5. Comment Letter 5: Ecological Rights Foundation**

### **5.1. Failure to Consider or Adopt Water Quality Standards (WQS) for Priority Toxic Pollutants**

**5.1.1. The Staff Report lists a potential Regional Board project entitled “Consider 304(a) Criteria for Inclusion in Basin Plan” (the “304(a) Criteria Project”) that would involve considering adoption of new or revised water quality objectives for toxic pollutants for which the United States Environmental Protection Agency (“EPA”) has published additional, or more stringent, criteria recommendations. The Staff Report acknowledges that: “Water quality objectives in Basin Plan Chapter 3 or in effect under the federal California Toxics Rule (2000) that are not as protective as the U.S. EPA nationally-recommended criteria need to be updated.”**

Consistent with the CWA section 303(c)(a), the federal regulations at 40 C.F.R. § 131.20(a) provides, “The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.” This review includes consideration of new or revised CWA section 304(a) criteria recommendations published by U.S. EPA. CWA section 303(c)(2)(B) provides “that a state shall adopt criteria for toxic pollutants for which criteria have been published under CWA section 304(a), the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support designated beneficial uses.” The U.S. EPA adopted the 2015 Water Quality Standards Regulatory Revisions rule (80 Fed. Reg. 51020, (August 21, 2015)), which modified 40 C.F.R. § 131.20(a) to require states and tribes to provide an explanation for why they did not adopt new or revised criteria for parameters for which U.S. EPA has published new or updated CWA section 304(a) criteria recommendations.

Appendix B of the Revised Staff Report contains the Regional Water Board’s consideration of new or revised CWA section 304(a) recommended criteria for certain toxic pollutants and an explanation for why, based on its analysis, it is unnecessary to revise the Basin Plan water quality objectives for those pollutants in light of the new or revised recommended criteria (some 304(a) criteria are old but are also reconsidered even though it is not required). Specifically, the Regional Water Board considered 304(a) recommended

criteria for those toxic pollutants for which the Regional Water Board has adopted site-specific objectives or objectives that are unique to the region (hereinafter, collectively referred to as SSOs). Based on the Regional Water Board's analysis and currently available information, these water quality objectives are protective of beneficial uses and do not need to be revised. See Appendix B of the Revised Staff Report for the pollutant-specific analysis of the SSOs. For statewide water quality objectives, the State Water Resources Control Board (State Water Board) is in the process of reviewing federally promulgated water quality standards for California and CWA section 304(a) recommended criteria. The Regional Water Board will rely on the State Water Board's review of CWA section 304(a) criteria recommendations since it is responsible for statewide water quality objectives. The Regional Water Board's and State Water Board's review of 304(a) recommended criteria satisfy the state's review obligation on this issue. The Regional Water Board will coordinate with the State Water Board to ensure that any action to adopt or revise statewide water quality objectives resulting from its CWA 304(a) review supersedes corresponding Basin Plan objectives. The State Water Board has indicated that any statewide standards action it takes following its review of 304(a) criteria will apply to the San Francisco Bay region through the Inland Surface Water and Enclosed Bays and Estuaries Plan. Because Appendix B contains the Regional Water Board's evaluation of the need to adopt or revise water quality objectives based on section 304(a) recommended criteria, the candidate project mentioned in the comment has been removed in the Revised Staff Report since it is no longer necessary.

**5.1.2. The Staff Report identifies seven pollutants not in the CTR (Arsenic, Chloroform, 3-Methyl-4-Chlorophenol, 1,1,1-Trichloroethane, 1,2,4-Trichlorobenzene, Selenium, Zinc) but for which U.S. EPA has established recommended criteria.**

The Regional Water Board's draft September 2024 Triennial Review Staff Report erroneously identified these seven pollutants for which CWA 304(a) criteria are available but that were not included in the California Toxics Rule (CTR). In actuality, the CTR does contain criteria for three of the seven (arsenic, selenium, and zinc). See 65 Fed. Reg. 31682 (May 18, 2000); 40 C.F.R. § 131.38. Chloroform, 3-Methyl-4-Chlorophenol, 1,1,1-Trichloroethane, and 1,2,4-Trichlorobenzene were included in the CTR, but U.S. EPA did not promulgate numeric criteria at that time. Subsequently, U.S. EPA has published 304(a) recommended criteria for these four pollutants.

In 2024, the State Water Board commenced review of state water quality control plans and policies, as well as "federally promulgated water quality standards for California (40 C.F.R. §§ 131.36, 131.37 and 131.38) and Clean Water Act section 304(a) recommended criteria." (See Notice of



Commencement of 2024 Review<sup>5</sup>, dated August 15, 2024, and Fact Sheet on Overview of 2024 Review<sup>6</sup>, dated November 15, 2024). Therefore, for statewide toxic pollutants for which new or updated 304(a) recommended criteria have been published, the Regional Water Board will continue to rely on State Water Board's ongoing and planned statewide efforts to review the recommended CWA 304(a) criteria and the protectiveness of existing statewide water quality objectives.

**5.1.3. The commenter notes that acrolein (CAS No. 107028) is a priority toxic pollutant for which aquatic life criteria for are absent from the CTR, and that in 2009 EPA published CWA section 304(a) recommended criteria for the protection of aquatic life for acrolein (3 micrograms per liter for acute and chronic freshwater values).**

We agree that the CTR does not contain aquatic life criteria for acrolein, and U.S. EPA published CWA section 304(a) recommended criteria for the protection of aquatic life for acrolein. For its triennial review, the State Water Board has created a working draft Comparison Table of the U.S. EPA's California Toxics Rule Criteria, Water Quality Objectives Established by the Water Boards, and U.S. EPA Recommended Clean Water Act section 304(a) Criteria to assist the public in comparing various federal water quality standards and criteria and state water quality objectives.<sup>7</sup> The table includes acrolein and the Regional Water Board will rely on the State Water Board's review of 304(a) recommended criteria for acrolein and any water quality standards action it takes as described in the response to comment 5.1.1 above.

**5.1.4. The Staff Report notes that there are revised water quality criteria that are more stringent than the California Toxics Rule for 64 pollutants. The Staff Report also highlights the issue of whether “the Basin Plan’s objective and implementation provisions (e.g., for NPDES permits) are consistent with the magnitude and averaging period of U.S. EPA’s acute and chronic saltwater criteria for un-ionized ammonia as well as U.S. EPA’s 2013 recommended freshwater criteria.**

Please see the response to comment 5.1.1, which explains that the State Water Board will review all available 304(a) criteria. See also Appendix B of the Revised Staff Report for more information about the scope of the State Water Board's review of 304(a) criteria as well as the Regional Water Board's consideration of 304(a) criteria for ammonia in relation to existing Basin Plan objectives for un-ionized ammonia.

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<sup>5</sup> [https://www.waterboards.ca.gov/plans\\_policies/docs/rev-comm-notice.pdf](https://www.waterboards.ca.gov/plans_policies/docs/rev-comm-notice.pdf)

<sup>6</sup> [https://www.waterboards.ca.gov/plans\\_policies/docs/2024/fact-sheet-review-plans-policies-2024.pdf](https://www.waterboards.ca.gov/plans_policies/docs/2024/fact-sheet-review-plans-policies-2024.pdf)

<sup>7</sup> [https://www.waterboards.ca.gov/plans\\_policies/2024\\_review.html](https://www.waterboards.ca.gov/plans_policies/2024_review.html)

- 5.1.5. The CTR lacks standards for seven pollutants, and EPA has issued CWA section 304(a) recommendations for those pollutants, recommendations for 64 other pollutants more stringent than the CTR criteria, and saltwater and freshwater criteria for ammonia. Therefore, the Basin Plan's objectives need to be updated.**

Please see the response to comment 5.1.2 concerning the seven pollutants mentioned in the comment. As explained in the response to comment 5.1.1 and Appendix B of the Revised Staff Report, the State Water Board will be reviewing the recommended 304(a) criteria for the 64 pollutants more stringent than the CTR. See also the response to comment 5.1.7 for more discussion about the Regional Water Board's obligations to review standards.

- 5.1.6. The version of the Triennial Review Staff Report released in September 2024 included a candidate project to incorporate Clean Water Act (CWA) section 304(a) criteria into the Basin Plan. Staff noted that consideration of the bulk of these 304(a) criteria for adoption as water quality objectives would be most efficiently undertaken by the State Water Board's Division of Water Quality, since the recommended criteria could apply statewide. Staff also noted ongoing and planned efforts to update statewide water quality objectives and also that, once adopted as amendments to existing statewide water quality control plans, the water quality objectives would apply to all waters in the state. Staff therefore concluded that no further work on this issue is needed at this time. This violates the Regional Board's mandatory duties under the law.**

Please see the response to comment 5.1.1 as well as the analysis contained in Appendix B of the Revised Staff Report for the Regional Water Board's consideration of 304(a) criteria. The Revised Staff Report discussion of 304(a) criteria includes revisions consistent with the additional analyses contained in Appendix B. Please see also the response to comment 5.1.7 concerning the obligations of the Regional Water Board during a triennial review.

- 5.1.7. To comply with 33 U.S.C. § 1313(c)(2)(B), the Regional Board, during the triennial review period, necessarily must reach a decision whether or not: (a) the Basin Plan's water quality standards lack any standards for which EPA has published CWA section 304(a) criteria or whether such CWA section 304(a) criteria are more stringent than Basin Plan standards; and (b) whether the discharge or presence of that pollutant, and in amounts permitted by current standards if applicable, could reasonably be expected to interfere with beneficial uses. If the Regional Board finds these two predicates are met, it "shall adopt" new water quality standards for the toxic pollutant addressed in EPA's section 304(a) recommendations. This adoption "shall" occur during the three-year triennial review process during which the decision was made that revisions are necessary...This duty was restated by the California State**

**Water Resources Control Board (“State Board”) in its Continuing Planning Process report.**

The commenter states the Regional Water Board must make two very specific “predicate” decisions under CWA section 303(c)(2)(B) that are not supported by the language of this CWA section or U.S. EPA guidance. This is what the section states:

Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. . . .

Under CWA section 303(c)(2)(B), “shall adopt” is modified by “as necessary to support designated uses” and when toxic pollutants “could reasonably be expected to interfere with designated uses.”<sup>8</sup> This, not what the commenter asserts, is the standard for adopting water quality objectives for toxic pollutants for which there is published 304(a) recommended criteria.

Furthermore, following the 1987 CWA amendments, U.S. EPA issued its 1988 “Guidance for State Implementation of Water Quality Standards for CWA Section 303(c)(2)(B)” (1988 Guidance), which does not align with the commenter’s assertion on predicate decisions. The 1988 Guidance states the following regarding the implementation of CWA section 303(c)(2)(B):

To carry out these new requirements, whenever a State revises its water quality standards, it must review all available information and data to first determine whether the discharge or the presence of a toxic pollutant is interfering or is likely to interfere with the attainment of the designated uses of any stream segment. *If the data indicate that it is reasonable to expect the toxic pollutant to interfere with the use, or it actually is interfering with the use, then the State must adopt a numeric limit for the specific pollutant.* If a State is unsure whether a toxic pollutant is interfering with, or is likely to interfere with the designated use and therefore is unsure that control of the pollutant is necessary to support the designated use, the State should undertake to develop sufficient information upon which to make such a determination. Presence of facilities that manufacture or use the section 307 (a) toxic pollutants or

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<sup>8</sup> While the Regional Water Board and the State Water Board are jointly reviewing updated section 304(a) recommended criteria, we note that CWA section 303(c)(2)(B) does not explicitly speak to updated and revised 304(a) criteria when numeric criteria for toxic pollutants are already in place, as is the case in California for many toxic pollutants.

other information indicating that such pollutants are discharged or will be discharged strongly suggests that such pollutants could be interfering with attaining designated uses. If a State expects the pollutant not to interfere with the designated use, then section 303(1)(2)(B) does not require a numeric standard for that pollutant.

(1988 Guidance, p. 3 (emphasis added).)

As part of its Triennial Review, the Regional Water Board considered published 304(a) recommended criteria for those toxic pollutants for which the Regional Water Board has adopted SSOs in the Basin Plan. Based on the Regional Water Board's analysis and currently available information, the water quality objectives for these toxic pollutants are protective of beneficial uses and do not need to be revised. The discharge or presence of these pollutants in the affected waters is not reasonably expected to interfere with beneficial uses and beneficial uses are being supported. Protective water quality objectives for these pollutants for which there are 304(a) recommended criteria have already been adopted and there is currently no need to adopt new or revised water quality objectives for these pollutants. For other published section 304(a) recommended criteria, the State Water Board is reviewing them in its current triennial review and will take any necessary water quality standards actions for those toxic pollutants to support beneficial uses. The boards are, therefore, satisfying the state's obligations with respect to section 304(a) recommended criteria.

As previously stated, the Regional Water Board does not need to adopt revised SSOs for toxic pollutants due to new or revised section 304(a) recommended criteria. Assuming the Regional Water Board had to, we disagree with the commenter's assertion that water quality objectives for toxic pollutants must be adopted during "each three-year triennial review period." The CWA and its regulations on triennial reviews do not even contain the phrase "triennial review period," much less a mandate that toxic standards be adopted during that "period," itself an ambiguous concept. In fact, the commenter's assertion is wholly inconsistent with U.S. EPA's interpretation of CWA section 303(c)(2)(B). Specifically, U.S. EPA's regulations pertaining to the procedures for review and revision of water quality standards at 40 C.F.R. § 131.20(a) provides:

. . . if a State does not adopt new or revised criteria for parameters for which EPA has published new or updated CWA section 304(a) criteria recommendations, then the State shall provide an explanation when it submits the results of its triennial review consistent with the requirements of CWA section 303(c)(1) . . . .

This regulation clearly provides that new or revised water quality objectives (also known as criteria) for toxic pollutants for which there are new 304(a) criteria do not need to be adopted during a state's triennial review. Instead,

when a state does not adopt such objectives, it must explain its decision for not doing so. U.S. EPA has stated in the preamble to this regulation that it will not even approve or disapprove this explanation, but that it will inform the public and U.S. EPA of the state's *plans* with respect to adopting new or revised water quality criteria. (80 Fed. Reg. 151020, 51029 (August 21, 2015).) Indeed, U.S. EPA expressly states that revisions of water quality standards **follow** a triennial review: "all stakeholders should know how the state or authorized tribe considered the CWA section 304(a) criteria recommendations when determining whether to revise their own WQS **following** a triennial review." (*Ibid.* (emphasis added).) Consistent with this, 40 C.F.R. section 131.20(b) distinguishes public hearings for triennial reviews and for revising water quality standards.

Commenter's broader assertion of a mandatory duty to adopt or revise water quality standards at the same time as a triennial review is contrary to case law. As the Court of Appeal held, under the Porter-Cologne Act section 13143 and CWA section 303(c)(1), the regional water board is "required to conduct a review of its basin plan, but the foregoing statutes do **not** impose a duty to revise or modify it." (*City of Arcadia v. State Water Resources Control Bd.*, (2010) 191 Cal.App.4<sup>th</sup> 156, 175, *as modified on denial of reh'g* (January 20, 2011) (emphasis added).) In addition, reviewing and revising water quality standards at the same time is practically difficult, particularly given the complexity of revising standards. See response to comment 5.5.5.

Please see the response to comment 5.1.8 on the commenter's assertions on the Continuing Planning Process.

**5.1.8. The Continuing Planning Process (CPP) report requires adoption of numeric water quality objectives for toxic substances during a triennial review. The State Water Board's CPP report establishes mandatory legal duties. Alternatively, it is enforceable because it was mandated by the CWA, submitted to EPA, and EPA-approved. Alternatively, it is an enforceable informal rule or policy. Alternatively, if it is not enforceable, it is a reasonable interpretation of the CWA because EPA approved.**

The commenter cites an appendix to the CPP report entitled "Outline of California Water Quality Control Planning" and the State Water Board's paraphrasing in that outline of CWA section 303(c) to argue that the Regional Water Board is required to undertake a rulemaking and adopt numeric water quality objectives for toxic pollutants during a triennial review. Neither the Clean Water Act nor its implementing regulations support the commenter's assertion. The CPP is not a duly adopted regulation under the California Administrative Procedure Act and, as such, has no legally binding effect and cannot be enforced. We disagree that a *report* submitted to U.S. EPA itself has the force of law because it was required and approved by U.S. EPA. We further disagree that an outline merely paraphrasing for brevity CWA section

303(c) reflects the State Water Board's careful and considered interpretation of the law.

**5.1.9. The commenter includes passages from Triennial Review Staff Reports prepared by the Los Angeles Regional Water Quality Control Board during its two most recent triennial reviews to assert that the Los Angeles Regional Board understood it had a mandatory duty to comprehensively consider EPA's new 304(a) criteria and to adopt any necessary modifications to water quality standards during the then-occurring triennial review period.**

The commenter provides an interpretation of what the Los Angeles Regional Water Board (LA Water Board) understood based on passages in that region's Triennial Review Staff Reports. The Regional Water Board is not in a position to comment on what another regional water board intended. Please also see response to comment 5.1.7.

**5.1.10. The commenter presents passages from the legislative history of the 1987 CWA amendment to include CWA section 303(c)(2)(B), 33 U.S.C. § 1313(c)(2)(B), that suggest that the Congressional intent of these amendments was dissatisfaction with the pace of state and EPA progress to adopt numeric criteria for toxics. The comment also restates the view that the Regional Board has a clear mandatory duty, "[w]henever" it conducts a triennial review, to comprehensively review all pollutants for which EPA has published CWA section 304(a) criteria, and it "shall adopt" numeric criteria for those pollutants as necessary to protect beneficial uses. That duty arose almost 40 years ago and it applies today. The Regional Board simply lacks legal authority to refuse to perform this review during the current triennial review period.**

Comment noted on the 1987 CWA amendment legislative history. We note that following the 1987 CWA amendments, in 1992, the U.S. EPA adopted the National Toxics Rule to bring all states into compliance with CWA § 303(c)(2)(B), using then-published 304(a) criteria. (57 Fed. Reg. 60848 (Dec. 22, 1992).) We are aware that 304(a) criteria are periodically updated, and new ones published and that the Regional Water Board must consider them in its triennial reviews. However, states and authorized tribes "are not required to adopt CWA section 304(a) criteria recommendation," but "they are required under the Act and EPA's implementing regulations to adopt criteria that protect applicable designated uses and that are based on sound scientific rationale." (80 Fed. Reg. 51020, 51028 (August 21, 2015).)

Please see the response to comment 5.1.1 concerning the scope of the review of CWA 304(a) criteria performed by the Regional Water Board during the Triennial Review and the scope of review that is being performed by the State Water Board. Please see Appendix B of the Revised Staff Report for details of the review of the Basin Plan's SSOs in relation to CWA 304(a)

criteria. Concerning the portion of the comment about the Regional Water Board's duty to review and adopt standards during a triennial review, please see the response to comment 5.1.7.

**5.1.11. The commenter demands that the Regional Board reject the Staff Report during its December 11, 2024 hearing, and direct staff to modify the Staff Report by December 31, 2024 to provide that the Regional Board shall, during the triennial review period, reach a final agency decision via a duly adopted Resolution of the Regional Board as to whether or not: (a) the Basin Plan's body of water quality standards (in combination with the CTR) lack any standards for which EPA has published CWA section 304(a) criteria or whether such CWA section 304(a) criteria are more stringent than Basin Plan standards; and (b) whether the discharge or presence of the applicable pollutants (and, with respect to any pollutants for which EPA 304(c) criteria are more stringent than current standards in the Basin Plan, whether discharges in amounts permitted by the current standards in the Basin Plan) could reasonably be expected to interfere with beneficial uses. Further, the Staff Report must provide that, if the Regional Board finds these two predicates are met, it "shall adopt" new water quality standards within the three-year triennial review period for the toxic pollutant addressed in EPA's section 304(a) recommendations.**

The December 11, 2024, hearing was postponed to allow time to consider the commenter's letters and for the Regional Water Board staff to review and analyze CWA 304(a) criteria in relation to the Basin Plan's water quality objectives and to review available new information pertaining to attainment of CWA 101(a)(2) uses. The results of these analyses are presented in Appendices B and C of the Revised Staff Report. The Revised Staff Report has also been modified to reflect these two analyses. Please see the response to comment 5.1.1 on the scope and outcome of the analysis of CWA 304(a) criteria and refer to Appendix B of the Revised Staff Report for the details of the analysis. Please also refer to the response to comment 5.1.1 for an explanation of the scope of the State Water Board review underway and how the water quality objectives adopted as a result of that review will apply to the waters of the San Francisco Bay Region. Please see the response to comment 5.1.7 concerning the issue of when standards must be adopted in relation to performance of a triennial review.

**5.1.12. It is untenable for the Regional Board to "pass the buck" wholesale to the State Board as the Staff Report proposes to do with respect to review of existing water quality standards applicable to waters in Region 2 for evaluation of whether they should be revised to reflect CWA section 304(a) criteria. While the CTR generally applies statewide and certain standards in the CTR apply to water segments located in Region 2, there are several toxic pollutants the standards of which have been established by the Basin Plan, including water quality objectives for**

**ammonia and all the toxic pollutants listed in the Basin Plan's Tables 3-3, 3-3A, 3-3B, 3-3C, 3-4, and 3-4A, plus the site specific objectives for copper, nickel, cyanide, and mercury referred to in Chapter 3 of the Basin Plan. Further, neither the Basin Plan nor the CTR establishes water quality criteria/water quality objectives for tributyltin. It is well known that San Francisco Bay has legacy contamination with tributyltin given the widespread use of tributyltin in the shipping industry in San Francisco Bay.**

Appendix B of the Revised Staff Report includes a review of all SSOs in the Basin Plan in relation to available 304(a) criteria. The objectives reviewed include: mercury, copper, nickel, selenium, cyanide, total PAH, and ammonia. Based on the analyses of these SSOs in relation to CWA 304(a) criteria, staff confirmed that the discharge or presence of each pollutant could not reasonably be expected to interfere with designated beneficial uses. As we stated in response to comment 5.1.1, the State Water Board is in the process of reviewing federally promulgated water quality standards for California and Clean Water Act section 304(a) recommended criteria. The Regional Water Board will coordinate with the State Water Board to ensure that any action to adopt or revise statewide water quality objectives resulting from its CWA 304(a) review supersedes corresponding Basin Plan objectives. The State Water Board has indicated that any statewide standards action it takes following its review of 304(a) criteria will apply to the San Francisco Bay region through the Inland Surface Water and Enclosed Bays and Estuaries Plan.

U.S. EPA has published 304(a) criteria in water for protection of aquatic life, *Ambient Aquatic Life Water Quality Criteria for Tributyltin* (EPA 822-R-03-031, December 2003). These criteria have not yet been adopted into the Basin Plan, but the criteria document is cited for informational purposes in footnotes to Basin Plan Tables 3-3 (marine objectives) and 3-4 (freshwater objectives). These 304(a) aquatic life criteria will be reviewed by State Water Board.

Tributyltin data in San Francisco Bay shellfish tissue have been reviewed when preparing California's 303(d) list.<sup>9</sup> None of the 150 samples collected in Mare Island Strait, Central SF Bay, South SF Bay, Lower SF Bay, San Pablo Bay, or Suisun Bay had tissue levels exceeding the OEHHA screening level to protect human health.

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<sup>9</sup> [https://www.waterboards.ca.gov/water\\_issues/programs/tmdl/2023\\_2024state\\_ir\\_reports/apx-b-factsheets/table\\_of\\_contents.shtml#r2](https://www.waterboards.ca.gov/water_issues/programs/tmdl/2023_2024state_ir_reports/apx-b-factsheets/table_of_contents.shtml#r2)



The Bay Protection Toxic Cleanup Program<sup>10</sup> evaluated tributyltin concentrations in sediment at 33 sites throughout San Francisco Bay in the late 1990s. The concentrations were low throughout the Bay and generally below the detection limit of 0.003 ng/g and, when detected, were in the range of 0.07 to 0.22 ng/g. Pacific Drydock in Oakland Inner Harbor was the only site in the San Francisco Bay region with sediment concentrations in the top 10 percent of those found throughout California. Despite the commenter's assertion "that it is well known that San Francisco Bay has legacy contamination with tributyltin given the widespread use of tributyltin in the shipping industry in San Francisco Bay," the data reviewed when preparing the region's 303(d) list does not support the view that tributyltin is a significant water quality problem in San Francisco Bay.

## **5.2. Failure to Reexamine Waterbody Segments That Do Not Have Fishable/Swimmable Beneficial Use Designations**

### **5.2.1. The commenter references the CWA (33 U.S.C. § 1251(a)(2)) and federal regulations (40 C.F.R. § 131.20(a)) to state that, "if any waterbody segment lacks water quality standards meeting these fishable/swimmable designated uses, the state "shall" reexamine these segments "every 3 years to determine" if those uses have become attainable."**

Appendix C of the Revised Staff Report contains a review of new information with respect to attainability CWA section 101(a)(2) uses in the San Francisco Bay Region. Specifically, new information was reviewed to confirm the ongoing applicability of the 2011 Use Attainability Analysis (UAA) that resulted in the de-designation of the water contact recreation use in Hayward Marsh. Additionally, Regional Water Board reviewed new information pertaining to the attainability of the Commercial and Sport Fishing (COMM) beneficial use in 42 waterbodies without this designation, as described in Project 5 in Appendix A of the Revised Staff Report. The new information indicates that the uses are attainable in these waterbodies and thus the Regional Water Board intends to revise its water quality standards by designating the COMM beneficial use for these waterbodies.

The Regional Water Board has re-examined waterbodies lacking CWA § 101(a)(2) uses. There is no other new information currently available beyond the above on the attainability of CWA § 101(a)(2) uses in waters without these uses and no additional new information about the attainability of 101(a)(2) uses was submitted to the Regional Water Board during our initial solicitation to the public for information about the Basin Plan Triennial Review during April

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<sup>10</sup> Hunt, J.W., Anderson, B.S., Phillips, B.M. Newman, J., Tjeerdema, R.S., Taberski, K., Wilson, C.J., Stephenson, M., Puckett, H.M., Fairey, R., Oakden, J. Aug 1998. Sediment Quality and Biological Effects in San Francisco Bay. Bay Protection and Toxic Cleanup Program. Final Technical Report.

and May of 2024. That solicitation specifically invited comments on all Basin Plan water quality standards, which includes beneficial uses and water quality objectives in the Basin Plan. As required, the Regional Water Board will continue to re-examine waters to determine if new information has become available concerning attainability of CWA section 101(a)(2) uses in future triennial reviews.

**5.2.2. “Table 2-1 the Basin Plan omits a commercial and sport fishing (“COMM”) (“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”) designation for numerous water body segments located in Region 2. Additionally, Table 2-1 of the Basin Plan contains numerous waterbody segments where the REC-1 designation is labeled as “E\*” meaning “water contact recreation is prohibited or limited to protect public health.” This designation means that these waterbody segments do not have water quality standards (given that, inter alia, water quality standards by definition include designated beneficial uses) meeting the CWA section 101(a)(2), 33 U.S.C. § 1251(a)(2) uses, because they do not provide for full recreational use in and on the water. Therefore, the Regional Board has a mandatory duty, pursuant to 40 C.F.R. § 131.20(a), to reexamine these waterbody segments to determine whether such water contact and fishing uses are attainable in the numerous waters within Region 2 that the Regional Board has not presently designated as having such beneficial uses, and if so, it “shall revise its standards accordingly.” Id.”**

For the comment regarding designation of the COMM beneficial use in waterbodies in the San Francisco Bay region currently lacking this use, please see the response to comment 5.2.1.

Regarding the “E\*” designation in Table 2-1, the commenter asserts that waterbody segments labeled as “E\*” under the REC-1 designation lack water quality standards. However, this is incorrect. The “E\*” designation is explained in a footnote to Table 2-1 in the Basin Plan as follows: “Water quality objectives apply; water contact recreation is prohibited or limited to protect public health.” This means that while landowners like municipal water districts may prohibit or limit water contact recreation for public health reasons, the water quality objectives still apply. Accordingly, waters with E\* REC-1 beneficial use designations are fully protected as if there were no limitations on water contact recreation.

**5.2.3. The commenter states that the Staff Report does not commit the Regional Board to reexamining or revising water quality standards. They state that past triennial review staff reports have been “completely silent” on reviewing COMM beneficial use designations, “signaling that**

**the Regional Board has never conducted such a review and continues to intends not to.**

The commenter is incorrect. Please refer to Appendix C of the Revised Staff Report for information on examples of past reviews of the COMM use. In this appendix, we explain for example that a Basin Plan amendment adopted by the Regional Water Board in 2010 added approximately 280 waterbodies to the Basin Plan and designated beneficial uses for over 380 waterbodies. These beneficial use designations included 79 COMM designations for waterbodies.

As part of this triennial review, the Regional Water Board will prioritize the “Addition of Commercial and Sport Fishing Beneficial Uses to Lakes and Reservoirs” project. This project will designate the COMM use for 42 lakes and reservoirs in the San Francisco Bay Region where it is not currently designated. Additionally, the Regional Water Board will continue to assess whether there is any new information on fishing in other waterbodies lacking the COMM designation. If new information indicates attainability, COMM will be designated for those waterbodies as well.

**5.2.4. The Regional Board considered and rejected a project called the “Santa Clara Valley Water Contract Recreation (REC-1) Standards Study,” in which the Regional Board would have considered whether or not REC-1 designations are not attainable for waterbody segments within Santa Clara County, with subsequent project phases to consider whether water quality objectives are necessary to protect the REC-1 use for these waters. The fact that the Regional Board rejected this project and likewise failed to propose and adopt a project to perform the reexamination described above with respect to *all* waterbody segments designated REC-1 with an “E\*” designation shows that the Regional Board presently plans to continue to violate the requirements of 40 C.F.R. § 131.20(a) with respect to reviewing REC-1 designations. Moreover, past Regional Board triennial review staff reports have also never indicated a plan to comprehensively review REC-1 beneficial use designations, much less document such completed reviews.”**

The commenter is incorrect. Please see response to comment 5.2.1. The project titled, “Santa Clara Valley Water Contact Recreation (REC-1) Standards Study,” focused on the *de-designation* of REC-1 for waterbody segments within Santa Clara County. This project was not focused on the waterbody segments with the “E\*” designation, and as stated in the previous comment (see response to comment 5.2.2), “water quality objectives apply” to those water body segments.

**5.2.5. EcoRights is currently litigating against the State Board for failing to conduct triennial reviews of statewide water quality control plans and policies. During discussions with State Board counsel, it came to**

**“EcoRights’s attention that the State Board takes the position that the reexamination duty under 40 C.F.R. § 131.20(a) is the sole responsibility of the Regional Water Quality Control Boards, including the Regional Board.”**

We agree it is the Regional Water Board’s duty to re-examine waterbodies lacking CWA §101(a)(2) to determine if any new information has become available indicating the attainability fishable/swimmable uses. The Regional Water Board has performed this duty.

**5.2.6. The commenter demands that the Regional Board reject the Staff Report during its December 11, 2024, hearing and direct Staff to modify the Staff Report by December 31, 2024, to provide that the Regional Board shall, during the triennial review period, perform the necessary review of new information and reexamination of all waterbody segments that are not designated as having COMM beneficial use and all water body segments designated REC-1 with an “E\*” designation to determine whether a COMM and a full REC-1 designation is attainable. The Regional Board should further direct staff to present the modified Staff Report to the Regional Board for review and approval at the Regional Board’s January 2025 meeting.”**

The Regional Water Board has performed its duties related to re-examining waterbodies without fishable/swimmable beneficial use designations. See responses to comment 5.2.1 and 5.2.2.

**5.2.7. The commenter asserts that no waters within Region 2 are designated for recreational or sport fishing for consumption. As such, Region 2’s waters are “waterbody segment[s] with water quality standards that do not include the uses specified in section 101(a)(2) of the Act” under 40 C.F.R. § 131.20(a), triggering the Regional Board’s duty to reexamine those waterbody segments to determine if these uses are attainable, and if so, to so designate the waters. The commenter further demanded that the Regional Board modify the Staff Report to include a review of the new information available for all waterbody segments to identify waterbodies where recreational or sport fishing for consumption is occurring but have not yet been formally designated with COMM, and if such uses are attainable, to adopt such uses for all such waterbodies.**

The commenter is incorrect. In total, 94 waterbodies are designated with the COMM beneficial use. Please see response to comment 5.2.3. regarding the number of waterbodies designated with COMM beneficial use in 2010, and response to comment 5.2.1 regarding the review of new information for waterbodies not designated with the COMM beneficial use.

**5.2.8. During the December 5<sup>th</sup> call with ERF, the Regional Water Board acknowledged that certain waterbodies within the San Francisco Bay**

**Region lacked the commercial and sport fishing (“COMM”) designation. The commenter states that the Regional Board must reexamine these segments every 3 years to determine whether the COMM beneficial use is attainable and if so, revise the Basin Plan to adopt the COMM beneficial use, all by December 31, 2026, citing 40 C.F.R. § 131.20(a). In addition, ERF requests that the Regional Board revise the Staff Report to include a new workplan project to reexamine each waterbody segment without a COMM designation to determine whether the COMM designation is attainable, and if so, to adopt that designation in revisions to the Basin Plan by December 31, 2026.**

The Regional Water Board has re-examined waterbodies missing the COMM use designation for new information indicating attainability of the use. See the Revised Staff Report and response to comment 5.2.1. The Revised Staff Report also includes a high priority project, “Addition of Commercial and Sport Fishing Beneficial Uses to Lakes and Reservoirs.” The Regional Water Board intends to revise its water quality standards by designating the COMM beneficial use for 42 waterbodies.

The Regional Water Board rejects the arbitrary deadline to complete the Basin Plan amendment process to designate the COMM beneficial use. The Regional Water Board anticipates completing the high priority project to designate the COMM beneficial use in lakes and reservoirs prior to the next triennial review hearing.

### **5.3. Failure to Consider Whether There Is Any New Information Available About Tribal Reserved Rights Applicable to State Water**

**5.3.1. The commenter asserts that the Regional Water Board is not in compliance with 40 C.F.R. § 131.20(a) regarding Tribal reserved rights. “Among other duties, 40 C.F.R. § 131.20(a) requires the Regional Board’s triennial review to “include evaluating whether there is any new information available about Tribal reserved rights applicable to State waters that needs to be considered to establish water quality standards consistent with § 131.9.” “... the Regional Board remains in violation of 40 C.F.R. § 131.20(a) given that the regulation requires the Regional Board (1) to complete such evaluation and (2) to document and explain to EPA’s its efforts to so evaluate tribal rights.”**

Effective on June 3, 2024, states are required to evaluate whether there is any new information available about Tribal reserved rights applicable to State waters that needs to be considered to establish water quality standards consistent with 40 C.F.R. section 131.9. (40 C.F.R. § 131.20(a).) Section 131.9 provides that a state must undertake certain actions where a tribal reserved right has been asserted in writing. In addition, the preamble to the 2024 revisions to 40 C.F.R. section 131.20 states, “...EPA added the clause “new information available . . . that needs to be considered” to clarify that

states are not expected to independently evaluate whether there are applicable Tribal reserved rights to consider at every triennial review. Rather, in conjunction with the revisions to 40 CFR 131.9(a), states are expected to evaluate whether a right has been newly asserted since the state's last triennial review or there is new information relevant to the protection of a previously asserted Tribal reserved right.” (89 Fed. Reg. 35717, 35741 (May 2, 2024).)

The Regional Water Board conducted outreach to 33 tribes as part of this Triennial Review solicitation process, and no Tribal reserved right was asserted in writing. The Regional Water Board has not received any new information about Tribal reserved rights to evaluate. The Regional Water Board will continue to engage with U.S. EPA and Tribes to receive relevant information regarding Tribal reserved rights and consider modifications to water quality standards, if a tribal reserve right is asserted in this Region.

The Revised Staff Report has been updated to include this information, specifically in Section 2 (Clean Water Act Requirements of Triennial Review) and Section 4.1 (Tribal Engagement Process).

**5.3.2. “Furthermore, it appears that the Regional Board has never completed this review project. The Regional Board 2 Basin Plan continues to fail to identify Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing as beneficial uses of waters in Region 2’s jurisdiction...Moreover, the just released Staff Report identifies this program as a task that the Regional Board plans to continue to implement in the next three years, thus implying that the Regional Board has never completed a review of beneficial uses to determine whether they should be amended to add additional tribal beneficial uses.”**

The commenter has mistakenly conflated Tribal reserved rights with the project titled, “Designate Tribal Tradition and Culture, Tribal Subsistence Fishing, and Subsistence Fishing Beneficial Uses in the San Francisco Bay Region.” To clarify, this project is not meant to comply with the new Tribal reserved rights requirements in 40 C.F.R. § 131.20(a). The project description states: “The next phases of this project are to 1) add the CUL, T-SUB and SUB definitions into the Basin Plan as they are already approved and have CEQA completed; 2) designate CUL where geographically appropriate based on our collaboration with tribes; and 3) initiate development of tribal subsistence fishing surveys to inform T-SUB beneficial uses and work toward designating T-SUB where appropriate. (Appendix A, pp. A-5 – A-6).” This project received the highest ranking score and will be prioritized over the next three years. Ultimately, the Regional Water Board will continue collaborating with tribes to designate these beneficial uses.

#### **5.4. Failure to Submit the Results of the Triennial Review to EPA**

**5.4.1. The commenter asserts that the Regional Water Board has not complied with the requirement to report the results of the Triennial Review to EPA pursuant to CWA section 303(c)(1) and 33 U.S.C. §1313(c)(1). “The Staff Report does not report the “results” of the Regional Board’s triennial review. All the Staff Report contains is a prioritized list of potential future water quality standard of review projects. Notably and erroneously, this is the approach that the Regional Board has repeatedly taken in all of its past triennial review reports to EPA. The Regional Board’s triennial review reports never actually documented for EPA and the public’s benefit the results of the Regional Board’s actual triennial review actions. The “results” of a triennial review do not consist of a list of future water quality standard review projects, but the *completed* results of water quality standard review projects, including the necessary analyses described above with respect to toxic pollutants and fishable/swimmable beneficial use reexaminations, and the actual adoption of water quality standards if applicable.”**

**The commenter further asserts that previous triennial reviews were workplans without a summary of results. A workplan is prospective and does not constitute the results of a triennial review. A triennial review involves actions on those projects and decisions to adopt new or revised water quality standards. The types of reporting under 40 C.F.R. section 131.20(c) is backwards looking and relates to analyses or projects that are already completed. A new workplan project must be added that reports the results of this Triennial Review to EPA within 30 days of a final Water Board action to adopt revised water quality standards or, if no revisions are made, within 30 days of completion of that review. The Regional Water Board must also send U.S. EPA a detailed and thorough explanation of the results of its prior triennial review by January 13, 2025.**

CWA section 303(c)(1) requires the states to hold public hearings for the purpose of reviewing water quality standards and, as appropriate, modifying and adopting standards. It states that the “[r]esults of such review shall be made available to the [U.S. EPA] Administrator.” (33 U.S.C. § 1313(c)(1).) 40 C.F.R. section 131.20 pertains to state review and revision of water quality standards. Sub-section 131.20(c) states:

The State shall submit the results of the review, any supporting analysis for the use attainability analysis, the methodologies used for site-specific criteria development, any general policies applicable to water quality standards and any revisions of the standards to the Regional Administrator for review and approval, within 30 days of the final State action to adopt and certify the revised standard, or if no revisions are made as a result of the review, within 30 days of the completion of the review.

This sub-section merely requires states to submit the “results” of the water quality standards review during a triennial review. It does not require the submission of those things desired by the commenter. 40 C.F.R. section 130.10(c) pertains to state submittals to U.S. EPA, including water quality standards actions, and it states “the form and content of required State submittals to EPA may be tailored to reflect the organization and needs of the State, as long as the requirements and purposes of the Act, this part and, where applicable, 40 C.F.R. parts 29, 30, 33 and 35, subparts A and J are met.”

We disagree that the Regional Water Board has never reported on the results of its triennial review. The Regional Water Board sends the results of its triennial review to U.S. EPA by sending the Board resolution on the triennial review and its results, the supporting Staff Report, the list of priority projects resulting from the review of all water quality standards, and public participation records. U.S. EPA has always accepted the Regional Water Board’s submittals and never disapproved them as contrary to 40 C.F.R. section 131.20(c). (We note that the commenter complains about the Regional Water Board’s submittals when they are consistent with the State Water Board’s CPP report, which the commenter mistakenly claims has the force of law and is enforceable. The CPP report states, “After considering input by members of the public and others, the Board adopts a priority list of issues and a workplan detailing the resources that will be allocated and the expected time schedule for completing the actions specified on the priority list. Triennial review results are transmitted by the State Board to US EPA.” (CPP Report, p. 34.))

Underpinning the comment is the commenter’s assertion that water quality standards must be adopted and revised concurrently with a state’s triennial review. Hence, it asserts that results of water quality standards actions have to be submitted to U.S. EPA as part of its triennial review results submission. As stated in Comment 5.1.7, states are not required to adopt water quality standards at the same time as they conduct a triennial review. In accordance with 40 C.F.R. section 131.20(c), the Regional Water Board submits the water quality standards actions it takes to U.S. EPA for approval within the required 30 days of final state action. It is redundant to also include that documentation in the triennial review submission. Moreover, CWA section 303(c)(1) clearly states that the states are required to make available the results of its water quality standards *review*—not the results of water quality standards actions.

We decline to add a new workplan to the Staff Report to report the results of this “Triennial Review to EPA within 30 days of a final Water Board action to adopt revised water quality standards or, if no revisions are made, within 30 days of completion of that review.” The Regional Water Board will submit the results of this Triennial Review to U.S. EPA in accordance with CWA section 303(c)(1) and 40 C.F.R. section 131.20(c). It will include the results of its water quality standards review, its review of new information for waters without fishable/swimmable uses, and its explanation of why it is not adopting



revised SSOs for toxic pollutants for which U.S. EPA has published new or updated CWA section 304(a) criteria recommendations, among other things. Separately, the Regional Water Board will comply with the U.S. EPA submission requirements after adopting or revising water quality standards, including any supporting analysis for any use attainability analysis, the methodologies used for site-specific water quality objectives, and any general policies applicable to water quality standards, in accordance with both 40 C.F.R. sections 131.20(c) and 130.10(a)(3). Like section 131.20(c), section 130.10(a)(3), which requires states to submit to U.S. EPA revisions or additions to water quality standards under CWA section 303(c), does not require the submission concurrent with triennial review results submission.

We disagree that the Regional Water Board must send to U.S. EPA “a detailed and thorough explanation of the results of its prior triennial review by January 13, 2025.” 40 C.F.R. section 131.20 does not require the submission of past triennial review results.

### **5.5. Revised Staff Report and Clarification of Triennial Review Cycle Timeline**

#### **5.5.1. The commenter requested revisions to the Staff Report to occur during the week of January 20, 2025. The commenter explained that this is a deadline for a revised Staff Report and workplan, not for all follow up analysis and actions during the triennial review, which the commenter would expect to occur later in the current triennial review process.**

As explained above, the Revised Staff Report has been revised to reflect the Regional Water Board’s analyses of CWA section 304(a) recommended criteria and new information related to fishable/swimmable beneficial uses. Changes to the Revised Staff Report were noticed and distributed for a new round of public comments on February 28, 2025.

#### **5.5.2. The commenter requested that the Regional Board provide, by January 13, 2025, a detailed and thorough report on the results of its prior triennial review process (i.e., the one occurring from approximately January 1, 2021 through December 31, 2023) to EPA to bring itself up to date on compliance with the reporting duty with respect to the last triennial review cycle.**

The Regional Water Board submitted the results of previous triennial review (adopted by the Regional Water Board on November 10, 2021) with a memo to U.S. EPA on December 13, 2021. This submittal, along with submittals for previous triennial reviews prepared by the Regional Water Board, has been accepted by U.S. EPA as satisfying relevant requirements. See response to comment 5.4.1. See also response to comment 5.1.7 on how the CWA does not use the commenter’s framework of a “triennial review period.”

**5.5.3. The commenter requests that the Regional Board clarify the timeline of its triennial review. The commenter requests that the Regional Board agree to adopt a schedule stating that the current three-year triennial review period would extend from roughly January 1, 2024 until roughly December 31, 2026.**

The commenter seeks to commit the Regional Water Board to an artificial time construct not found in either the CWA or its implementing regulations. We decline. This is what the CWA states:

The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

(33 U.S.C. § 1313(c)(1).) The CWA regulations similarly state “[t]he State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards . . . and, as appropriate, modifying and adopting standards. “(40 C.F.R. § 131.20(a).) Thus, neither the CWA or its regulations require a set date-certain triennial review process, other than holding a public hearing at least once every three years.

**5.5.4. The commenter requests that the Regional Water Board revise the Staff Report to incorporate a new workplan project making clear that the Regional Board will perform the following actions during the triennial review period:**

- **Determine whether or not: (a) the Basin Plan lacks any standards for which EPA has published CWA section 304(a) criteria or whether such CWA section 304(a) criteria are more stringent than Basin Plan standards; and (b) whether the discharge or presence of that pollutant, and in amounts permitted by current standards if applicable, could reasonably be expected to interfere with beneficial uses.**
- **If these two predicates are met, adopt new water quality standards for the toxic pollutants addressed in each of EPA’s section 304(a) recommendations before the end of the current triennial review cycle, i.e., by no later than December 31, 2026.**
- **If not adopting such new or revised water quality standards, provide an explanation to EPA when submitting results of triennial review to EPA.**

Appendix B of the Revised Staff Report summarizes the Regional Water Board’s evaluation of CWA Section 304(a) recommended criteria as they

relate to SSOs for toxic pollutants. It also explains why, based on the Regional Water Board's analysis, revising the Basin Plan SSOs for those pollutants is unnecessary. Please see the response to comment 5.1.1 for further details.

We disagree with the commenter's adoption timeline for water quality standards. Please see the response to comment 5.1.7.

Regarding the comment on providing an explanation to the U.S. EPA for the decision not to adopt new or revised water quality standards, the Regional Water Board has reviewed 304(a) criteria in relation to the region's SSOs (see Appendix B of the Revised Staff Report). Based on the Regional Water Board's analysis, it is unnecessary to revise the Basin Plan water quality objectives for those pollutants in light of the new or revised recommended criteria. As we stated in response to comment 5.1.1, the State Water Board is in the process of reviewing federally promulgated water quality standards for California and Clean Water Act section 304(a) recommended criteria. The Regional Water Board will coordinate with the State Water Board to ensure that any action to adopt or revise statewide water quality objectives resulting from its CWA 304(a) review supersedes corresponding Basin Plan objectives. The State Water Board has indicated that any statewide standards action it takes following its review of 304(a) criteria will apply to the San Francisco Bay region through the Inland Surface Water and Enclosed Bays and Estuaries Plan. This information is also included in Section 2 (Clean Water Act Requirements of Triennial Review) of the Revised Staff Report.

**5.5.5. The commenter urges the Regional Board to adopt all EPA section 304(a) criteria throughout Region 2 as a feasible interim step to bring the Basin Plan up to date while the Regional Board is considering potential modifications to the 304(a) criteria (i.e., for site-specific reasons). In formal guidance issued by EPA on December 12, 1988, shortly after 33 U.S.C. § 1313(c)(2)(B) went into effect, EPA specifically discussed this approach and noted that was a legally permissible way to address 33 U.S.C. § 1313(c)(2)(B).**

U.S. EPA, in the 1988 Guidance, suggested the option 1 "blanket adoption" approach suggested by the commenter as one of three potential options available to a state to meet the requirements of the then newly amended CWA section 303(c)(2)(B). It involves adopting statewide numeric criteria in state water quality standards for all CWA section 307(a) toxic pollutants for which U.S. EPA has developed criteria guidance, regardless of whether the pollutants are known to be present in waters. Option 2, which is the option used by California State and Regional Water Boards, is to adopt specific numeric criteria in state water quality standards as necessary to support designated uses where such pollutants are discharged or are present in the affected waters and could reasonably be expected to interfere with designated uses. Leaving aside the question as to whether this "blanket adoption" is an appropriate approach for an individual Regional Water Board to take, rather

than a state as a whole, the 1988 Guidance contains clear language indicating that option 2 is the preferred approach. In fact, in the paragraph immediately following the presentation of the three options available to states to meet the requirements of 33 U.S.C. § 1313(c)(2)(B), the guidance states that “EPA believes that option 2 above most directly reflects the new Clean Water Act requirements and is the option recommended by the agency.” Further, a later passage in the same guidance document states that the “cons” of option 1 (“blanket adoption”) include:

- some priority toxic pollutants may not be discharged in State
- may cause unnecessary monitoring by States
- without variance procedure, could cause unreasonable economic impacts
- might result in “paper standards”
- could halt progress underway to develop criteria for toxics

U.S. EPA also states a concern that “blanket application of 304(a) criteria to all waters under all circumstances may not always be prudent or reasonable.” The Regional Water Board has reviewed 304(a) criteria using option 2 in relation to the region’s SSOs (see Appendix B of the Revised Staff Report). The State Water Board is using the same approach to review the remainder of available 304(a) criteria. Please see the response to comment 5.1.1 for more information on the Regional Water Board’s approach to reviewing 304(a) criteria.

Commenter suggests adopting all recommended CWA section 304(a) criteria even if they may not be appropriate for California or the San Francisco Bay region. This is contrary to the requirement that water quality criteria/water quality objectives criteria “must be based on sound scientific rationale” in 40 C.F.R. section 131.11(a).

Commenter suggests that the Regional Water Board take the above actions as an “interim step” while it considers potential modifications to the 304(a) criteria. First, as the Revised Staff Report explains, the Basin Plan site-specific and unique water quality objectives for toxic pollutants are protective of beneficial uses and do not to be revised. Second, the State Water Board is evaluating the other 304(a) recommended criteria for toxic pollutants.

Third, adopting water quality objectives is no simple undertaking. (See, e.g., “Fact Sheet Summary of California’s Process for Adopting New and Revised Water Quality Objectives and Beneficial Uses.”) The Regional Water Board must comply with numerous laws, including the Porter-Cologne Water Quality Control Act (Wat. Code, §§ 13000 et seq.; “Porter-Cologne”), when adopting or revising a water quality objective.

For example, Porter-Cologne requires compliance with Water Code section 13241, which requires consideration of various factors, including economics and the water quality conditions that could reasonably be achieved through the coordinated control of all factors affecting water quality. It also requires the adoption of a program of implementation for the water quality objective. Porter-Cologne requires a public process for amending the Basin Plan to adopt new or revised water quality objectives and the amendment must be approved both by the Regional Water Board and the State Water Board in separate public hearings after considering and responding to public comments. The Regional Water Board must also comply with federal CWA requirements for state adoption and revision of water quality standards and public participation requirements. (See, e.g., 40 CFR Parts 131 and 25.)

The Regional Water Board must also comply with external peer review requirements when adopting a water quality objective. (Health & Safety Code § 57004.) The Regional Water Board must also comply with the California Environmental Quality Act (CEQA), including special requirements that require an environmental analysis of the reasonably foreseeable environmental impacts of the methods of compliance with the new water quality objective, an analysis of reasonably foreseeable mitigation measures, and an analysis of reasonably foreseeable alternative means of compliance. (Pub. Resources Code §§ 21000 et seq., § 21159.) The CEQA process includes consultation with other public agencies and Native American tribes, a public comment process, and responses to comments, as well as substantive duties to identify, disclose, and mitigate significant environmental impacts and analyze alternatives to the proposed standards action.

The Regional Water Board must also comply with tribal and disadvantaged community outreach requirements and evaluate and make findings on the impacts on these communities. (Wat. Code, §§189.7 and 13149.2) The Regional Water Board must also comply with the California Administrative Procedure Act, under which the standards of necessity, authority, clarity, consistency, reference and nonduplication must be met. (Gov. Code, § 11353, subd. (b)(4).)

These are just some examples of what is involved to adopt or revise water quality objectives, with the complexity of the analyses and obligations increasing the more water quality objectives there are for modification or adoption.

## **5.6. Adoption of All Other Water Quality Standards As “Appropriate”**

**5.6.1. The commenter asserts that the Regional Water Board is required by law to adopt all water quality standards found to be “appropriate” during the triennial review process. The CWA and EPA’s regulations state that the “purpose” of the hearings and review of applicable WQS, (i.e., triennial review) is to determine whether or not modifying or adopting**

such standards is “appropriate.” 33 U.S.C. § 1313(c)(1); 40 C.F.R. § 131.20(a). The State Water Resources Control Board (“State Board”) summarized these requirements in its Continuing Planning Process report (“CPP Report”).

*Triennial reviews are comprehensive and include a public hearing to identify issues to be addressed including, but not limited to, the appropriateness of the water quality standards. The review identifies standards that need to be revised, and affirms those standards that are appropriate and require no revision. Information on continuing or new water quality problems, impairment of beneficial uses, or violation of water quality objectives may come from monitoring data, compliance inspections, discharger reports, and public suggestions. Changes in State or federal laws and regulations may also dictate the need for a Plan amendment. The State or regional board evaluates all available information and determines whether revisions to water quality standards or implementation plan[s] are needed and the nature of any necessary revisions.*

The CPP Report makes clear that, at a minimum, during a triennial review period, the Water Board must make a determination whether new or revised standards are “appropriate.”

Under the CWA, the term “appropriate” is in reference to the mandate in 33 U.S.C. § 1313(c)(1) and 33 U.S.C. § 1313(c)(2)(A). These provisions make clear that water quality standards must be “appropriate” based on the finding that they are sufficient to “protect the public health or welfare, enhance the quality of water and serve the purposes” of the CWA and based on various policy concerns, including a water quality standard’s “use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes.” The Regional Board necessarily must reach a final decision as to the “appropriateness” of new or revised water quality standards under these principles and if it finds new or revised standards are “appropriate,” it must adopt such standards within the then-current triennial review period.

The commenter also points to Los Angeles Regional Water Board’s triennial review staff report to support its assertion: “The Los Angeles Regional Board made clear its view that within each three-year triennial review cycle, it was required to reach a final decision and actually adopt new or revised water quality standards, if appropriate.”

The commenter misconstrues the “as appropriate” clause in CWA section 303(c)(1) and 40 CFR section 131.20(a). The former section provides that a state:

shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

(33 U.S.C. § 1313(c)(1). The latter section similarly provides:

The State shall from time to time, but at least once every 3 years, hold public hearings for the purpose of reviewing applicable water quality standards adopted pursuant to §§ 131.9 through 131.15 and Federally promulgated water quality standards and, as appropriate, modifying and adopting standards.

(40 CFR § 131.20(a).) The “as appropriate” clause does not modify “reviewing applicable water quality standards” but rather “modifying and adopting standards.” In other words, the clause “as appropriate” pertains not to the review of standards as the commenter believes, but to the modification or adoption of standards. The CWA and its regulations instruct the Regional Water Board to hold public hearings at least once every three years to review all applicable water quality standards and vests in the board discretion to modify and adopt water quality standards as appropriate. As U.S. EPA stated in the preamble to its water quality standards regulations, “States are responsible, within the guidelines of Section 303(c) of the Act and the Water Quality Standards Regulation, for setting water quality standards. U.S. EPA does not believe it is appropriate to specify particular administrative mechanisms States must use in that process. Ensuring such administrative uniformity would be disruptive to the States without yielding any significant environmental benefit.” (48 Fed. Reg. 51400, 51412 (November 8, 1983).)

The commenter further argues that if the Regional Water Board finds new or revised water quality standards is “appropriate,” the Board must adopt such standards during the “triennial review period.” This appears at odds with the commenter’s own argument for adopting new or revised water quality standards for toxic pollutants (e.g., when the discharge of the toxic pollutant or its presence in waters could reasonably be expected to interfere with designated uses, not when it is “appropriate,” a more general standard). And it most certainly is at odds with the federal regulations at 40 CFR section 131.20(b), which allows states and tribes not to adopt new or revised water quality objectives for parameters for which U.S. EPA has published new or updated section 304(a) recommended criteria but instead explain their decision. Likewise, it is at odds with *City of Arcadia*. For the comment that the Regional Water Board must adopt new water quality standards within the “triennial review period,” see response to comment 5.1.7.

With respect to the CPP Report, see response to comment 5.1.8. The commenter argues the CPP Report *requires* that the Regional Water Board to determine the appropriateness of all water quality standards, but the report

also states, “Triennial reviews are comprehensive and include a public hearing to identify issues to be addressed, which **may** include appropriateness of water quality standards . . . .” (CPP Report, p. 8 (emphasis added).) In any case, the Regional Water Board is conducting a comprehensive review of all water quality standards and, as appropriate, modifying and adopting standards. It solicited comments on all water quality standards and considered all available information on the need to adopt or revise them. It has scheduled a public hearing for the purpose of reviewing all applicable water quality standards. As of this writing, those water quality standards that need to be modified or adopted are included in Appendix A of the Staff Report. The Regional Water Board also reviewed CWA section 304(a) recommended criteria in relation to SSOs and determined the objectives are protective and do not need to be revised. The State Water Board is currently reviewing other section 304(a) criteria as part of its triennial review. The Regional Water Board will coordinate with the State Water Board to ensure that any action to adopt or revise statewide water quality objectives resulting from its CWA 304(a) review supersedes corresponding Basin Plan objectives. The State Water Board has indicated that any statewide standards action it takes following its review of 304(a) criteria will apply to the San Francisco Bay region through the Inland Surface Water and Enclosed Bays and Estuaries Plan. Jointly, the Regional Water Board and State Water Board are satisfying the state’s obligations with respect to 304(a) criteria.

The commenter’s argument that the Regional Water Board is mandated to make a final decision on the appropriateness of all water quality standards is also counter to U.S. EPA’s preamble for the 2015 revisions to 40 CFR section 131.20 on triennial reviews, where U.S. EPA stated:

Some states and authorized tribes target specific WQS during an individual triennial review to balance resources and priorities. The final rule does not affect states’ or authorized tribes’ discretion to identify such priority areas for action. However, the CWA and U.S. EPA’s implementing regulation require the state or authorized tribe to hold, at least once every three years, a public hearing for the purpose of reviewing applicable WQS, not just a subset of WQS that the state or authorized tribe has identified as high priority. In this regard, states and authorized tribes must still, at a minimum, seek and consider public comment on all applicable WQS.

(80 Fed. Reg. 51020, 51029 (August 21, 2015).) In other words, states and tribes have discretion to target specific standards so long as they hold a hearing to seek and consider public comment on all applicable water quality standards.

Lastly, the commenter cites the LA Water Board’s staff report to support its argument that the Regional Water Board must reach a final decision on the appropriateness of all water quality standards and adopt new or revised water quality standards, if appropriate, during a triennial review. The commenter



overlooks the fact that in the same report, the LA Water Board expressly acknowledged *City of Arcadia* and stated the board is required to review its basin plan (i.e., water quality standards) in a triennial review, but “neither federal nor state law impose a duty to revise or modify it.” (LA Water Board Staff Report, p. 4.) The LA Water Board went on to recognize that “[e]ven when changes are appropriate and lawful . . . the process of modifying water quality standards is resource intensive, and typically limited by staffing and budgetary constraints. As such, the triennial review process assists in identifying the most important or compelling projects and allows states to prioritize those as resources allow.” (*Id.* at p. 5.) It also rightly recognized that even where a triennial review identifies new scientific information or methodologies affecting water quality standards, “it may be premature to modify standards while scientific understanding is actively evolving and new methodologies are being developed and tested.” (*Ibid.*)

**5.6.2. The commenter requests that the Staff Report should be revised to call for a new workplan project consistent with these concepts and the CPP Report, i.e., including:**

- That the triennial review will be “comprehensive,” and include “a public hearing to identify . . . the appropriateness of the water quality standards”; that the review will identify “standards that need to be revised”; and that the review will “affirm those standards that are appropriate and require no revision.”
- That the triennial review will result in adoption, by no later than Dec. 31, 2026, of all new or revised water quality standards found to be “appropriate” during the triennial review.

We decline to add such a workplan for completion by the arbitrary deadline for the reasons set forth in responses to comments 5.6.1 and 5.1.7.

**5.7. Meeting**

**5.7.1. “EcoRights further requests that Regional Board staff contact us as soon as possible to set up a meeting to discuss an amicable resolution of our objections to the Regional Board’s unlawful approach to its triennial review obligations. If the Regional Board staff do not so contact us and the Regional Board fails to adopt the resolution that we request above at its December 11, 2024 hearing, EcoRights will interpret this as the Regional Board declining to rectify its ongoing violations of its Clean Water Act triennial review duties. In such circumstance, EcoRights will plan to initiate litigation pursuant to California Code of Civil Procedure section 1085 to seek a writ of mandate to compel the Regional Board to comply with its mandatory duties as set forth above.”**

This letter was received on Saturday, November 23, 2024. The Regional Water Board responded to ERF on Monday, November 26, 2024. A meeting

with ERF representatives was scheduled and held on December 5, 2024, to further discuss the concerns outlined in the letter.