

January 15, 2025

Mr. Eric Dubinsky
USEPA Region 9
75 Hawthorne Street
San Francisco, CA 94105

Submitted via email to dubinsky.eric@epa.gov

Re: Comment Letter –USEPA Partial Disapproval of the 2024 California Integrated Report

Mr. Dubinsky:

On behalf of the San Mateo Countywide Water Pollution Prevention Program (SMCWPPP or Program), thank you for the opportunity to comment on the United States Environmental Protection Agency's (USEPA) partial approval of the 2024 California Integrated Report distributed on December 12, 2024. SMCWPPP is a program of the City/County Association of Governments (C/CAG) of San Mateo County, with 22 program member agencies (20 incorporated cities/towns, the County of San Mateo, and the San Mateo County Flood and Sea Level Rise Resiliency District, also known as OneShoreline). SMCWPPP was established in the early 1990s to reduce the pollution carried by stormwater into local creeks, the San Francisco Bay, and the Pacific Ocean. Along with other San Francisco Bay Area public agencies, SMCWPPP member agencies share a common National Pollutant Discharge Elimination System (NPDES) permit to discharge municipal stormwater to receiving water bodies in the San Francisco Bay Area (Order No. R2-2022-0018, referred to as the "MRP").

This comment letter is being submitted to specifically address USEPA's decision to recategorize three receiving waterbodies in San Mateo County¹ for benthic community effects from Category 3² to Category 5³. For the reasons described below, SMCWPPP does not agree with USEPA's recategorization and requests that the three San Mateo County waterbodies remain in Category 3 as initially described in the State Water Resources Control Board's (State Water Board's) Final Integrated Report (2024 Integrated Report), adopted on March 13, 2024.

As indicated in our comments on the Draft 2024 Integrated Report issued by the State Water Board, SMCWPPP recognizes the significant effort of the State Water Board and the Regional Water Quality Control Boards (Regional Water Boards) to compile and analyze the large amount of water quality data during this listing cycle. We appreciate the State and Regional Water Board's efforts and look forward to working with the Water Boards in the future towards protecting and restoring our receiving waters.

As part of the data evaluation conducted to support the Draft 2024 Integrated Report, the State Water Board considered numerous lines of evidence, including benthic macroinvertebrate bioassessment data collected in creeks/streams in San Mateo County. Because the tools necessary to accurately evaluate bioassessment data have not been fully vetted through a scientifically sound process or adopted by the State through a public process, the State Water Board rightly placed the three San Mateo County creeks

¹ USEPA proposes to list the following receiving water segments in San Mateo County (Water Body ID in parentheses) based on bioassessment data: Laurel Creek (CAR2044003319990218111511); Pilarcitos Creek, below Pilarcitos Reservoir (CAR2022201120020530213424); San Mateo Creek, Lower (CAR2044003320090202015405).

² Category 3 – There is insufficient available data and/or information to make a use support determination.

³ Category 5 - Available data and/or information indicate that at least one designated use is not being support or is threatened, and a TMDL is needed.

in Category 3, which acknowledges that there are insufficient available data and/or information to support a 303(d) listing determination for Category 5 based on bioassessment data (i.e., California Stream Condition Index [CSCI] scores).

Based on USEPA's recent letter to the State Water Board on December 12, 2024, it is our understanding that USEPA Region 9 is disapproving the State's decision to include these receiving water segments in Category 3 and is unilaterally recategorizing these receiving water segments on the 303(d) list as Category 5 (i.e., available data and/or information indicate that at least one designated use is not being supported or is threatened and a TMDL is needed). This decision directly impacts SMCWPPP member agencies and will result in an immediate and material impact for the regulated entities, regardless of the priority for the development of TMDLs and if a pollutant has been identified as causing an impairment to a benthic community.

SMCWPPP collected a majority of the San Mateo County bioassessment data evaluated by the State Water Board through the implementation of the MRP and is therefore well versed in the quality of these data. Additionally, through our involvement in the State Water Board's development of biological objectives over the past 15+ years and our review of numerous technical support documents developed by the Southern California Coastal Water Research Project (SCCWRP) on behalf of the State Water Board, SMCWPPP is also very familiar with the development of (and limitations of) the CSCI tool developed by SCCWRP and used by the State and Regional Water Boards to evaluate bioassessment data for the 2024 Integrated Report.

Based on the knowledge gained through over 15 years in participating in the development of the CSCI tool and the development and implementation of regional bioassessment programs and benthic community stressor/source identification projects in the San Francisco Bay Area, SMCWPPP member agencies are concerned with USEPA's planned action to include San Mateo County receiving water segments in Category 5 based solely on bioassessment data and associated CSCI scores. As described by the State Water Board in the 2024 Integrated Report, the CSCI is a draft tool that has not been adopted by the State Water Board and has many remaining technical issues that need to be resolved before applying the tool to determine water quality impairments. In short, USEPA's decision to recategorize receiving water segments for benthic community effects from Category 3 to Category 5 is based on the premature and the inappropriate application of the CSCI tool. As justified by the comments provided below, **SMCWPPP requests that USEPA reconsider its decision to move three San Mateo County receiving water segments to Category 5 and return these creeks/streams to Category 3 prior to finalizing the 2024 Integrated Report.** In addition, SMCWPPP supports the comments and requests made by the California Stormwater Quality Association (CASQA) in their letter to USEPA regarding this action by USEPA.

1. The USEPA should defer to the State/Regional Water Boards on 303(d) listings unless necessary to ensure federal requirements are achieved.

The federal Clean Water Act (CWA) puts States in the primary role in water quality planning and water quality standard-setting matters, including 303(d) listing determinations. USEPA holds a secondary role and acts only where necessary to ensure that the federal requirements are met by a State. As described in USEPA's letter to the State Water Board, the State has met federal CWA requirements for the 2024 Integrated Report and therefore USEPA should defer to State determinations absent concrete evidence that federal requirements are not being met. With regards to potential alterations to benthic communities in California creeks/streams, the State Water Board has determined that there is insufficient concrete evidence, and that tools to fully and accurately evaluate benthic alterations are not currently available to support a Category 5 listing. The State Water Board's decision to place the receiving water segments in Category 3, and not Category 5, is justified given the status of the CSCI tool and the

remaining issues associated with the application of the tool that have been well documented over the past decade. USEPA's decision to override the deference to which the State is entitled under the CWA is subjective and not required by the federal CWA. USEPA's decision is discretionary and should be reconsidered.

2. The USEPA decision to override the State Water Board and include receiving water segments on the 303(d) list as Category 5 solely based on bioassessment data and without a corresponding pollutant identified is inconsistent with comments provided by USEPA during the adoption of the State's Listing Policy.

As described in USEPA's letter to the State Water Board on the 2024 Integrated Report, USEPA states that it "does not agree that an association between benthic community alterations and at least one pollutant must be demonstrated as a condition to include a receiving water as impaired for benthic community effects on the 303(d) list." USEPA goes on to state that "if a designated (beneficial) use is not supported and the receiving water is impaired or threatened, the fact that the specific pollutant may not be known does not provide a basis for excluding the water from the section 303(d) list. Waterbodies with biological impairments should be included on the 303(d) list until the pollutant is identified and a TMDL completed, or the State demonstrates that no pollutant(s) cause or contribute to the impairments."

However, the State's *Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List* (Listing Policy) developed two decades ago in close collaboration with USEPA and many other stakeholders only allows 303(d) listings in Category 5 based on biology (e.g., bioassessment results) if an association between benthic community alterations and at least one pollutant is identified. If it is USEPA's position that California is in conflict with the federal CWA by not requiring that receiving water segments be placed on the 303(d) list under Category 5 based solely on bioassessment data, then the USEPA should have stated this position during the public comment period of the Listing Policy in 2003 and 2004, or in 2015 when the Listing Policy was amended. Based on SMCWPPP's review of the public comments received on the Listing Policy in 2004 and 2015, USEPA made no such comments to the State Water Board and was supportive of the Listing Policy as adopted/amended. In fact, USEPA made written comments⁴ on the Listing Policy in 2004 that contradict its decision to reclassify receiving water segments as Category 5 based solely on biology:

"... the Policy would seem to allow a water body to be listed due to toxicity, adverse biological response, degradation of biological populations without a clear link to a specific pollutant. This is inappropriate for the 303(d) list... (USEPA Comments 40.88 and 40.22)."

Given the implications of a Category 5 listing to SMCWPPP member agencies and the broader regulated community, it is critical that limited public resources are expended on impairments which have a level of certainty that a pollutant is significantly causing or contributing to the impairment. The placement of waterbodies in Category 5, requiring a TMDL even if the cause of the impairment is unknown, places an inordinate burden on both the regulators and the regulated agencies. Based on comments provided in 2004 during the adoption of the Listing Policy, it appears that USEPA agreed with this perspective.

SMCWPPP suggests that it is better public policy to place these receiving waterbodies in Category 3 until the State Water Board can develop and utilize a methodology for associating the degraded benthic community and the magnitude of the degradation with pollutants and/or other non-pollutant pollution

⁴ State Water Resources Control Board (2004) Functional Equivalent Document for the *Water Quality Control Policy for Developing California's Clean Water Act Section 303(d) List*, Appendix B, Responses To Comments.

factors. Once this methodology is developed, it can be applied to the receiving waterbodies in Category 3 and modified as needed, which is, in fact, what the State Water Board proposed in the 2024 Integrated Report. This approach will assist the State and Regional Water Boards and the regulated community in focusing on those waterbodies that have a level of certainty that a pollutant is significantly causing or contributing to the impairment.

3. The proposed Category 5 listings for benthic community effects are based on water quality thresholds that have not been adopted by Regional/State Water Boards or USEPA through a public process and therefore should not be used as Lines of Evidence (LOE) in the 2024 Integrated Report.

Neither the San Francisco Bay Regional Water Board (SF Bay Regional Water Board) nor the State Water Board has established and adopted numeric water quality objectives (WQOs) for benthic communities in creeks/streams in California. Additionally, neither the SF Bay Regional Water Board nor the State Water Board have adopted a process for assessing benthic communities in California and determining whether observed ecological conditions are affected by controllable water quality factors. Although SMCWPPP would prefer that the State Water Board forego including waterbodies in the 2024 Integrated Report as Category 3 based on the CSCI scores, we understand that by including these waterbodies in Category 3 the State is acknowledging that there are insufficient available data and/or information to support a 303(d) listing (i.e., Category 5) determination based on bioassessment data, and that additional time and resources are needed to fully evaluate the application of the CSCI tool in all types of California creeks/streams before using this tool for 303(d) listing determinations. That said, by unilaterally moving 44 receiving water segments to the 303(d) list the USEPA has undermined the scientifically sound and responsible process implemented by the State Water Board. Using the complex and unvetted CSCI tool to make impairment decisions will lead to unfounded 303(d) listings with no clear or demonstrated successful path towards delisting receiving waters that may not be impacted by controllable water quality factors.

For over a decade, the State Water Board has been working with technical consultants and a dedicated Science Panel, Regulatory Group, and Stakeholder Advisory Group to develop a Biostimulatory and Biointegrity Program.⁵ Throughout this process several concerns have been raised regarding the use of the CSCI or similar tools within a policy framework. These concerns include (but are not limited to):

- The CSCI threshold score of 0.79 used in the 2024 Integrated Report is rarely achieved in engineered channels and may not be appropriate for highly modified urban streams that are managed for flood protection.
- Low CSCI scores (i.e., below 0.79) may be caused by natural disturbances such as prolonged drought or impacts associated with fire, and not by anthropogenic sources of impairment.
- The CSCI tool is only applicable during ecoregion-specific index periods which occur during the dry season when wet weather flows are not present.

These and other issues have yet to be addressed by the State Water Board, hence the reason for the State Water Board only including receiving waterbodies on Category 3 in the 2024 Integrated Report based on CSCI scores. The CSCI (or other indicators of biological community condition) should not be used by the State Water Board or USEPA without being fully vetted through a public process administered by the State Water Board and incorporated into the State of California Water Quality Policy.

⁵ This program began as two separate projects for wadeable streams (Biostimulatory substances and Biointegrity) which combined in 2016 in recognition of commonalities and linkages between the two projects. The current effort is titled "Biostimulation, Cyanotoxins, and Biological Condition Provisions".

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Thank you for the opportunity to comment on the USEPA's partial approval of the 2024 California Integrated Report and its addition of San Francisco Bay Region receiving waters to the Clean Water Act Section 303(d) List. Please contact me at rbogert@smcgov.org if you have questions regarding the comments or requests included in this letter. We look forward to continuing to work with USEPA, and the Regional and State Water Boards on protecting and restoring receiving waters in San Mateo County.

Sincerely,



Reid Bogert
SMCWPPP Program Director

CC: SMCWPPP Stormwater Committee Members
Kevin Lunde - SF Bay Water Board
Karen Cowan – CASQA Executive Director