



July 24, 2017

[SENT VIA EMAIL: COMMENTLETTERS@WATERBOARDS.CA.GOV]

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor, Sacramento, CA 95814



RE: Proposed Approval Of An Amendment To The Water Quality Control Plan For The Tulare Lake Basin

Dear Ms. Townsend:

We write regarding the proposed basin plan amendment referenced above. These organizations submitted a CEQA scoping comment letter to the Regional Board on April 30, 2015 (Ex. A), submitted a comment letter on the proposed amendment on February 23, 2017 (Ex. B), and offered public comment at the hearing on the proposed amendment on April 6, 2017.

The Regional Board provided responses to these comments. (Ex. C.) However, the responses are inadequate and incorrect for the following reasons.

I. The Amendment Does Not Comply With State Or Federal Antidegradation.

With respect to Federal Antidegradation policy, the Regional Board responded that “[t]he federal Antidegradation Policy (40 C.F.R. § 131.12.) does not apply to waterbodies that fall outside the purview of the federal Clean Water Act (33 U.S.C. §1251 et seq.) ...” (Ex. C, pp. 2-3.) However, during oral discussions at the April 6, 2017 hearing, the Regional Board acknowledged that Federal Antidegradation does apply where there is a hydrological connection between groundwater and surface water. (See also Preamble, NPDES Permit Regulations for Storm Water Discharges, 55 FR 47990 [“...discharges to ground waters are not covered by this rulemaking (unless there is a hydrological connection between the ground water and a nearby surface water body.)”]; *McClellan Ecological Seepage Situation (MESS) v. Weinberger* (E.D.Cal. 1988) 707 F.Supp. 1182, 1196; *Exxon Corp. v. Train* (5th Cir. 1977) 554 F.2d 1310, 1312 n.1.)

Here, the Staff Report does not discuss whether there is a hydrological connection between the groundwater at issue and surface water. Further, the Tulare Lake Bed reappears during some high precipitation years (colloquially known as the “phantom” Tulare Lake, see, e.g., 1997),¹ and it is likely that discharges into the delineated groundwater will affect surface water quality during those years. There is thus a sufficient hydrological connection between the groundwater at issue and a surface water body, requiring analysis of the Federal Antidegradation policy.

Turning to State Antidegradation policy, the Regional Board acknowledged that Resolution 68-16 applies to basin planning activities, and implicitly recognized that de-designation implicates

¹ http://articles.latimes.com/1997-02-13/news/mn-28291_1_tulare-lake

discharges into high quality waters of the state. (Ex. C, p. 3.) However, the Regional Board contended that it adequately demonstrated that the amendment is consistent with the maximum benefit to the people of the State as “extensive efforts were made to ensure that the areas circumscribed for de-designation were limited to those areas where groundwater was not being used, nor was expected to be used, for MUN or AGR purposes” and “the economic analyses demonstrate that requiring dischargers to meet water quality objectives designed to protect the MUN and AGR beneficial uses in these areas would impose exorbitant and unreasonable costs upon those dischargers.” (*Id.*)

The analysis is incorrect. While the Regional Board considered existing uses of the relevant groundwater, and purports to consider future uses, it does not properly consider economic and other impacts to anyone other than dischargers. This is an insufficient analysis, and does not affirmatively demonstrate maximum benefit. As one example, the Staff Report does not consider whether the proposed amendment would degrade groundwater to such an extent that restoration of a portion of Tulare Lake overlying the relevant horizontal boundary would become economically or practically infeasible. (*See* Section III., *infra.*) The Regional Board is also incorrect that it has no present duty to require best practicable treatment and control.

II. Exception 1.a. To The Sources Of Drinking Water Policy Is Inapplicable.

The Sources of Drinking Water Policy (Resolution 88-63) sets forth affirmative requirements for designation of groundwater as supporting the MUN beneficial use, subject to certain exceptions. It does not, in contrast, set forth any criteria for de-designation of the MUN beneficial use after groundwater has been designated as supporting that use. (*See* Ex. B, pp. 3-5.) As such, the Regional Board cannot rely on the exceptions to the Sources of Drinking Water Policy in de-designating the relevant portion of the Tulare Lake Bed.

The Regional Board incorrectly responded that *In re Curtis D. Quinones and Vapor Cleaners, Inc.*, State Water Board Order WQ 2006-0010 supports the conclusion that exception 1.a. to the Sources of Drinking Water policy is a tool for determining what waters should be de-designated. (Ex. C, p. 5.) In fact, *In re Curtis* supports the opposite conclusion, stating that the Sources of Drinking Water Policy provides “a tool to use in determining *designations*.” (emphasis added.)

Further, the Regional Board’s citation to Old Alamo Creek as an example of use of the exceptions to the Sources of Drinking Water Policy to de-designate beneficial uses is inapposite. The State Board determined in 2006 that Old Alamo Creek *did not* meet any of the exceptions to the Sources of Drinking Water policy, but that “[n]evertheless, a site-specific exception to the Policy is appropriate because MUN is not an existing use for the creek nor can this use be feasibly attained in the future.” (*See* Resolution No. 2006 – 0008.) While there is thus precedent for creating a new site-specific exception to the Sources of Drinking Water Policy, there is no precedent for utilization of its general exceptions as a tool for de-designations.

Here, the Regional Board in 1993 designated the relevant portion of the Tulare Lake Bed as supporting the MUN beneficial use. It cannot now rely on the exceptions to the Sources of Drinking Water Policy to de-designate that beneficial use. To conclude otherwise would create perverse incentives, including the incentive to contaminate water which supported the MUN beneficial use in 1988 such that it can later be de-designated under an exception.

III. The “Reasonable And Beneficial Use” And “Public Trust” Doctrines Apply.

With respect to the reasonable and beneficial use doctrine, the Regional Board responded that the proposed amendment will not affect any existing or future right to use groundwater. (Ex. C, p. 5.) However, the Staff Report does not demonstrate that no existing or future users of groundwater or hydrologically connect surface water will be affected. (See Section I., *supra.*)

With respect to the public trust doctrine, the Regional Board contended that it is inapplicable because “the proposed Basin Plan Amendment will not have any effect on tidal and navigable bodies of water...” (Ex. C, p. 5.) However, a California court recently held that the public trust doctrine applies to groundwater given a hydrological connection with surface water. (*Envtl. Law Found. v. State Water Res. Control Bd. No. 34-2010-80000583* (Cal. Super. Ct July 15, 2014).) As such, the hydrological connection between the relevant groundwater and “phantom” Tulare Lake implicates the reasonable and beneficial use doctrine. (See Section I., *supra.*)

Moreover, California has begun to regulate groundwater as a public resource, finding “groundwater is a valuable natural resource in California, and should be managed to ensure both its safe production and its quality.” (Water Code § 10750(a).) This finding, in conjunction with the Sustainable Groundwater Management Act as a whole and the Human Right to Water (Water Code § 106.3), creates a duty to manage groundwater quality for the benefit of the public trust.

* * * * *

Based on the foregoing and previous comments, the State Water Resources Control Board should exercise its discretion under Water Code § 13245 not to approve the proposed amendment.

Respectfully submitted,



Michael K. Claiborne, Attorney
Leadership Counsel for Justice and Accountability



Jennifer Clary, Water Programs Manager
Clean Water Fund



Laurel Firestone, Co-Director & Attorney at Law
Community Water Center

EXHIBIT A



April 30, 2015

Pam Buford
California Regional Water Quality Control Board
Central Valley Region
1685 E Street
Fresno, CA 93706

Re: Notice of Public Workshop and CEQA Public Scoping Meeting for the Evaluation of the Municipal and Domestic Supply (MUN) and Agricultural Supply (AGR) Beneficial Uses in a Portion of the Historical Tulare Lakebed

Dear Ms. Buford,

We submit these comments in response to the “Notice of Public Workshop and California Environmental Quality Act Public Scoping Meeting” for the “Evaluation of the Municipal and Domestic Supply (MUN) and Agricultural Supply (AGR) Beneficial Uses in a Portion of the Historical Tulare Lakebed”. The Public Notice states that the Scoping Meetings will include discussions of potential amendments to the Tulare Lake Basin Plan to incorporate a framework for evaluating the applicability of the MUN and AGR beneficial uses and associated water quality objectives throughout the Tulare Lake Basin. Accordingly, these comments address those potential amendments as well.

Basin Planning is a “certified regulatory program,” and therefore requires development of a Substitute Environmental Document (SED) pursuant to the California Environmental Quality Act (CEQA). Through said document the Central Valley Regional Quality Control Board (CVWQCB or Board) must comply with CEQA’s mandate to disclose the environmental effects of a proposed change to a basin plan and must “identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures and / or through the selection of feasible alternatives.” Public Resources Code § 21159, *et seq.*; *see also, Sierra Club v. State Bd. of Forestry*, 7 Cal. 4th 1215, 1233 (1994).

Our comments focus on the responsibility of the Board to consider the impact of any proposed change on the quality and reliability of drinking water sources for low income communities and communities of color that rely for their drinking water supply on groundwater that is currently or may in the future become contaminated (vulnerable communities). The Board must consider, as part of this analysis, the impact that any proposed change will have for communities reliant for MUN uses on both public water systems and state small systems, as well as for individuals relying on private wells. The Board must consider the impact on both current and future MUN beneficial uses.

Under California law, “environmental justice” means the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies. Gov. Code, § 65040.12, subd. (e). Fairness in this context means that the *benefits* of a healthy environment should be available to everyone, and the *burdens* of pollution or inequitable investments should not be focused on sensitive populations or on communities that already are experiencing its adverse effects. Agencies subject to CEQA, including state and regional water boards, must promote these principles. Pub. Res. § 71110, *et. seq.* Accordingly, the CVWQCB must analyze and address the *distribution* of environmental impacts and any disparities affecting low-income people and people of color, to ensure that the benefits and burdens of the any de-designation or Basin Plan Amendment are fairly distributed.

CEQA requires consideration of “economic, environmental, and social factors,” particularly, “the goal of providing a decent home and satisfying living environment for every Californian.” CEQA Guidelines, §15021. CEQA Guidelines, and the guidelines governing water boards, specifically require responsible agencies to determine if a proposed project will expose “sensitive receptors” to pollution. *See e.g.*, 14 C.C.R., Appendix G; 23 C.C.R., Appendix A. Moreover, “CEQA requires a lead agency to consider whether a project’s effects, while they might appear limited on their own, are ‘cumulatively considerable’ and therefore significant.” Pub. Res. Code, § 21083, subd. (b)(3). Consideration of cumulative effects is especially crucial for vulnerable communities, who may already be burdened by pollution from existing sources. *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 723-24 (Cal. Ct. App. 1990) (EIR inadequate since it failed to study effects of all proposed power projects in San Joaquin Air basin); *Los Angeles Unified School District v. Los Angeles*, 58 Cal. App. 4th 1019, 1025-26 (Cal. Ct. App. 1997) (EIR inadequate since it failed to study increased noise pollution in relation to existing levels of noise pollution). Under CEQA, an agency is required to find that a “project may have a ‘significant effect on the environment’” if, among other things, “[t]he environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly[.]” Pub. Res. Code, § 21083, subd. (b)(3); *see also*, CEQA Guidelines, § 15126.2.

The SED must explicitly and robustly identify and assess mitigations for impacts that potentially impact vulnerable communities. This includes the impacts, disaggregated by race and income, related to: access to water that meets water quality objectives in the short and long term, costs

related to accessing potable water, and other public health factors (including those related to chronic diseases).

The Board must assess each proposed change and each alternative as a whole and its constituent parts for its impact on vulnerable communities. The SED must assess each proposed change and each alternative's impact on vulnerable and environmental justice communities in the short and long term, on current drinking water sources and on potential drinking water sources, on vulnerable communities in the aggregate, vulnerable communities in identifiable hydrologically relevant regions, and in each potentially impacted community. In each analysis, the SED must assess the maximum impact that each alternative may have on communities and individuals that will potentially be impacted by de-designation, by the proposed basin plan amendments, and programs and policies that derive their authority from the modified basin plan, including programs and policies developed in basins beyond the Tulare Lake Basin.

Not only must each proposed change and each alternative be assessed holistically for its impact on vulnerable communities but each critical component and each mitigation measure, as discussed below, must be assessed for such impact. The assessment should evaluate the impact on vulnerable communities as a whole and include specific information with respect to numbers of communities and residents impacted by each alternative and the impact of each alternative on specific geographies, communities and individuals as discussed above. Specifically,

- The SED must assess each proposed change to the Beneficial Use Classification system, including but not limited to the creation of new beneficial uses, the creation of beneficial use subcategories such as “limited” or “restricted” MUN beneficial uses, the use of interim designations in water bodies that are not specifically named in the Basin Plan, and de-designation of existing beneficial uses in specific water bodies or categories of water bodies.
- The SED must include an analysis of how any proposed change will impact drinking water quality for any person, including those individuals and communities relying on private wells and wells serving fewer than fifteen people. The SED must conduct this analysis over the short and long term.
- Similarly, the SED must assess the impact of each modified Water Quality Objective (WQO) for the above-mentioned modified MUN uses.
- The SED must assess the health and fiscal impacts of any proposed change to WQOs including the elimination or modification of any relevant secondary MCL.
- The analysis must include the health and fiscal impact of any proposed change on current and potential beneficial uses of the subject groundwater and the health and fiscal impact

of any proposed mitigations measures on current and potential beneficial uses of subject groundwater.

- The SED must analyze any potential modification or modifications to the basin plan for its maximum potential short and long term impact on all drinking water sources, including both current and potential drinking water sources.
- To the extent that any proposed amendment or mitigation measure relies on treatment or monetary compensation, rather than groundwater protection, the SED must assess its potential impact on groundwater quality and compliance with relevant state law, including the state's Anti-degradation policy.
- The SED must assess the maximum potential impact of the proposed de-designation of the Historical Tulare Lakebed as well as the maximum potential impact of any basin plan amendment that includes a framework for de-designating MUN uses throughout the planning area. The SED must include in its evaluation of the latter an analysis of how findings in the Tulare Lakebed de-designation study are sufficiently replicable to serve as the foundation for a basin-wide framework.
- Similarly, the SED must assess the potential use of any modified framework for evaluating de-designation or modified MUN designations beyond the Tulare Lake Basin, and the impacts thereof.
- The SED must assess any change to the manner in which WQOs are applied or assessed including any expanded discretion granted to the Board to alter compliance standards. The SED must assess both the health and economic impacts of any such change.

We welcome any questions regarding these comments and look forward to reviewing the substitute environmental documentation for the proposed changes to ensure that it effectively and fairly promotes the Board's responsibility to protect the water for all residents within its jurisdiction. Should you have any questions, please do not hesitate to contact Phoebe Seaton at pseaton@leadershipcoun.org.

Sincerely,



Phoebe Sarah Seaton
Co-Director and Attorney
Leadership Counsel for Justice
and Accountability



Jennifer Clary
Water Policy Analyst
Clean Water Action



Laurel Firestone
Co-Executive Director and
Attorney at Law
Community Water Center

EXHIBIT B



February 23, 2017

[SENT VIA EMAIL: GLENN.MEEKS@WATERBOARDS.CA.GOV;
BETHANYSOTO@WATERBOARDS.CA.GOV]

Glenn Meeks
Bethany Soto
Central Valley Regional Water Quality Control Board
1685 E Street
Fresno, CA 93706

RE: Proposed Amendment To The Water Quality Control Plan For The Tulare Lake Basin To Remove The Municipal and Domestic Supply (MUN) And Agricultural Supply (AGR) Beneficial Uses Within A Designated Horizontal And Vertical Portion Of The Tulare Lake Bed

Dear Mr. Meeks and Ms. Soto:

We submit these comments in response to the “Notice Of Opportunity To Comment, Public Hearing, And Filing” concerning “[a]n Amendment to the Water Quality Control Plan for the Tulare Lake Basin to Remove the MUN and AGR Beneficial Uses Within a Designated Horizontal and Vertical Portion of the Tulare Lake Bed” (the “Amendment”).

After reviewing the Draft Staff Report associated with the proposed basin plan amendment, the undersigned representatives of Leadership Counsel for Justice and Accountability, Clean Water Fund, and Community Water Center recommend that the Central Valley Regional Water Quality Control Board (the “Regional Board”) decline to adopt the Amendment.

The signing organizations make this recommendation for three (3) reasons: (1) the proposed amendment does not comply with the State or Federal Antidegradation policy; (2) the proposed amendment does not fall within the scope of Exception 1.a. to the Sources of Drinking Water Policy; and (3) the proposed amendment violates the “public trust” and “reasonable and beneficial use” doctrines.

Many of these concerns expressed here may potentially be alleviated with an express statement in the resolution adopting the proposed amendment, and in any resulting amended water quality control plan, that the adoption of the proposed amendment will not serve as precedent for designation of beneficial uses in the future.

Mr. Meeks
Ms. Soto
February 23, 2017

A. The Proposed Amendment Does Not Comply With The State Or Federal Antidegradation Policy.

The State Antidegradation Policy derives from Resolution 68-16 issued by the State Water Resources Control Board (“SWRCB”), which states in part that high quality waters shall “be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water and will not result in water quality less than that prescribed in the policies.” Resolution 68-16 further states that “[a]ny activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters will be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with the maximum benefit to the people of the State will be maintained.”

In order to comply with the State Antidegradation Policy, the Regional Board must affirmatively “demonstrate” compliance with the Policy. (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1278.) Thus, “[w]hen undertaking an antidegradation analysis, the Regional Board must compare the baseline water quality (the best quality that has existed since 1968) to the water quality objectives.” (*Id.* at 1270.) “If the baseline water quality is equal to or less than the objectives, the objectives set forth the water quality that must be maintained or achieved” and “the antidegradation policy is not triggered.” (*Id.*) On the other hand, “if the baseline water quality is better than the water quality objectives, the baseline water quality must be maintained in the absence of findings required by the antidegradation policy.” (*Id.*)

Once it is determined that the Antidegradation Policy is triggered, the Regional Board must conduct a “two-step process” for “determining whether a discharge into high quality waters is permitted.” (*Id.* at 1278, 1282.) The first step of the process is for the Regional Water Board to make three (3) “specified findings,” that the “change in water quality (1) will be consistent with maximum benefit to the people of the State, (2) will not unreasonably affect present and anticipated beneficial use of such water, and (3) will not result in water quality less than that prescribed in state policies...” (*Id.* at 1278.) The second step of the AGUA process is a finding “that any activities that result in discharges to such high quality waters are required to use the best practicable treatment or control of the discharge necessary to avoid a pollution or nuisance and to maintain the highest water quality consistent with the maximum benefit to the people of the State.” (*Id.*)

Here, the Staff Report does not include a baseline analysis comparing the “best quality that has existed since 1968...to the water quality objectives,” nor is there any conclusion that the delineated portion of the Tulare Lake Bed has not since 1968 contained any groundwater of a quality better than the water quality objectives. As such, the Regional Board must conclude that the Antidegradation Policy is triggered and that the baseline water quality must be maintained unless it makes the findings required in the “two-step process” described in *AGUA*.

The Staff Report appears to recognize that this is the proper conclusion, as there is no finding that the Antidegradation Policy is inapplicable. However, the Report concludes that the de-designation

“is not expected to result in any significant increase in the discharge of pollutants to the groundwater in the project area.” (p. 55.) There are at least two (2) problems with this conclusion. First, even if present rates of discharge will not *increase* if the MUN and AGR beneficial uses are removed in the delineated area, that does not demonstrate compliance with the Antidegradation Policy if the actions of the Regional Board allow non-compliant discharges to continue.

Second, the conclusion that there will be no “significant” increase in discharge in the project area is inconsistent with other findings in the Draft Staff Report. In fact, the Report states in the sentence immediately following this finding that “[t]he preferred MUN (see Section 4.1.3) and AGR (see Section 4.4.5) project alternatives would allow for continued agricultural discharges to groundwater within the de-designation boundary without a requirement for agriculture to implement costly treatment and control of its drainage in order to meet relevant MUN and AGR related WQOs.” (p. 55.) If the presently applicable beneficial uses would require the implementation of “costly treatment and control” methods, then those beneficial uses designations would certainly cause a significant decrease in the present rates of contaminant discharge.

The conclusion that the de-designation would cause degradation finds additional support in several other statements in the Draft Staff Report. (See, e.g., pp. 55 [“A new evaporation pond, the Mid Evaporation Basin, is scheduled to begin operation in late 2016...”]; 64 [“Central Valley Water Board staff anticipate that the regulated entities whose permits may be revised by the Board subsequent to the adoption of the proposed Basin Plan Amendment may include agricultural and gas and oil field operations.”].)

As the proposed amendment does not comply with State or Federal Antidegradation Policy, the Regional Board should not adopt the amendment.

B. The Proposed Amendment Does Not Fall Within Exception 1.a. To The Sources Of Drinking Water Policy.

The State Board adopted Resolution 88-63, entitled the “Sources of Drinking Water” Policy, on May 19, 1988. The Policy sets forth affirmative requirements for *designation* of surface and ground waters as supporting the MUN beneficial use. It does not, however, set forth required conditions or elements for *de-designation* of the MUN beneficial use from groundwater once the designation has been applied.

Specifically, the Sources of Drinking Water Policy resolves, in part, that:

All surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards with the exception of:

1. Surface and ground waters where:
 - a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Boards to supply a public water system.

...

4. Regional Board Authority to Amend Use Designations:
Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion. Where a body of water is not currently designated as MUN but, in the opinion of the Regional Board, is presently or potentially suitable for MUN, the Regional Board shall include MUN in the beneficial use designation.

...

The Regional Boards shall review and revise the Water Quality Control Plans to incorporate this policy.

Thereafter, in 1993, the Regional Board incorporated the Sources of Drinking Water Policy into the relevant Water Quality Control Plan, making a "blanket designation that all groundwaters support the MUN beneficial use by default." (Staff Report p. 2.)

Now, the Regional Board considers an amendment de-designating the MUN beneficial use for a designated horizontal and vertical portion of the Tulare Lake Bed. The Draft Staff Report in support of the proposed amendment concludes that "[g]roundwater only needs to meet one of the exceptions in the *Sources of Drinking Water Policy* to be eligible to have the MUN use removed." (p. 37.) No authority is offered for this proposition beyond the Sources of Drinking Water Policy itself. The Report also concludes that "Section 4.1.3.1 demonstrates that the area proposed for MUN de-designation meets exception 1a of the Sources of Drinking Water Policy." (p. 38.) As a result, the Draft Report "recommends MUN Alternative 3, which is to de-designate the MUN beneficial use from the portion of the historical Tulare Lake Bed represented in Figure 8 by applying the Sources of Drink (sic) Water Policy Exception 1a." (*Id.*)

The flaw in this reasoning is that Exception 1a, by its own terms, does not apply once MUN beneficial use has been designated by the Regional Board in compliance with the 1988 mandate in the Sources of Drinking Water Policy.¹ Instead, it applies to the initial designation: "[a]ll surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply **and should be so designated** by the Regional Boards with the exception of..." (emphasis added.)

If, in 1993, the Regional Board had demonstrated that the groundwater in the delineated portion of the Tulare Lake Bed met the requirements of Exception 1a, the Sources of Drinking Water Policy would have permitted a decision not to designate that groundwater as supporting the MUN beneficial use. Instead, the Regional Board made the decision at the time to make a blanket designation of all groundwater in the region. It cannot now rely on an exception to the Sources of

¹ The same flaw exists with any attempt to utilize Exception 1b to the policy. (*See* Staff Report p. 137.)

Drinking Water Policy to, based upon current conditions, reverse its prior decision and de-designate the Tulare Lake Bed.

The interpretation of the Sources of Drinking Water Policy set forth in the Draft Staff Report would create perverse incentives. Specifically, if groundwater quality supported the MUN beneficial use in 1988 and 1993, a discharger could contaminate otherwise high quality waters and then request de-designation.

Moreover, the Policy must be interpreted “as a whole” in a way that accords “meaning to every word and phrase in the regulation.” (*See Butts v. Board of Trustees of California State University* (2014) 225 Cal.App.4th 825, 835.) With this principle in mind, the interpretation set forth in this letter is consistent with Provision 4 of the Sources of Drinking Water Policy, quoted above. Provision 4 states that if in 1988 any water had a “*current* specific designation previously assigned” to it, the Regional Board retained discretion to retain that specific designation or instead to de-designate. (emphasis added.) This provision supports the conclusion that the State Board, in adopting the Sources of Drinking Water Policy, viewed affirmative designation differently from de-designation. It also further supports the conclusion that the Policy was intended to be applied based on “current” conditions present when the 1988 Policy was adopted.

Because the Sources of Drinking Water Policy sets forth exceptions that were applicable only when the Regional Board initially determined which waters to designate as supporting the MUN beneficial use, Exception 1a does not provide authority for the proposed de-designation. In order to de-designate the specified area, the Regional Board will instead have to ask that the “State Water Board grant an exception that is not already included in the Policy.” (*See CVRWQCB Staff Report, Municipal and Domestic Water Supply (MUN) Beneficial Uses in Agricultural Drains* (May 2011).)

C. The “Reasonable And Beneficial Use” And “Public Trust” Doctrines Apply.

The “reasonable and beneficial use” doctrine is codified in the California Constitution, requiring that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” (Cal Const, Art. X § 2; *see also United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 105 [“...superimposed on those basic principles defining water rights is the overriding constitutional limitation that the water be used as reasonably required for the beneficial use to be served.”].)

Along the same lines, the “public trust” doctrine applies to the waters of the State, and states that “the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders” and that thus “no one has a vested right to use water in a manner harmful to the state's waters.” (*United States v. State Water Resources Control Bd.*, 182 Cal.App.3d at 106; *Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419, 426 [“before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”].)

Mr. Meeks
Ms. Soto
February 23, 2017

The Staff Report does not mention, let alone apply, either the “reasonable and beneficial use” or “public trust” doctrines. Further, if it had, the degradation of “high quality waters of the State” as defined by the State Antidegradation policy would be inconsistent with those doctrines. As such, the Regional Board should not adopt the proposed amendment.

* * * * *

Based on the foregoing, the Regional Board should not adopt the proposed amendment.

Respectfully submitted,



Michael K. Claiborne, Attorney
Leadership Counsel for Justice and Accountability



Deborah Ores, Attorney & Legislative Advocate
Community Water Center



Jennifer Clary, Water Programs Manager
Clean Water Fund

EXHIBIT C

**Regional Water Quality Control Board
Central Valley Region
Board Meeting –6/7 April 2017**

**RESPONSE TO WRITTEN COMMENTS ON
A BASIN PLAN AMENDMENT TO REMOVE THE MUNICIPAL AND DOMESTIC
SUPPLY (MUN) AND AGRICULTURAL SUPPLY (AGR) BENEFICIAL USES WITHIN A
DESIGNATED HORIZONTAL AND VERTICAL PORTION OF THE TULARE LAKE BED**

At a public hearing scheduled for 6 and 7 April 2017, the Central Valley Regional Water Quality Control Board (Central Valley Water Board) will consider adoption of an amendment to the Water Quality Control Plan for the Tulare Lake Basin (“Basin Plan”) that would de-designate the MUN and AGR beneficial uses in a vertically and horizontally discrete portion of the Tulare Lake Bed groundwater basin. The rationale for de-designating MUN is based on Exception 1a contained in State Water Board Resolution No. 88-63, the *Sources of Drinking Water Policy*. The rationale for de-designating AGR is based on a review of maximum acceptable salinity concentrations for agricultural use (Ayers and Westcot, 1985) and (CV-SALTS, 2012a).

The Central Valley Water Board provided interested persons the opportunity to submit written comments on the proposed Basin Plan Amendment and draft Staff Report from 9 January 2017 to 23 February 2017. This document contains responses to written comments submitted to Central Valley Water Board staff during this period.

Three comment letters were received by:

1. Debbie Webster, Executive Officer, Central Valley Clean Water Association (CVCWA)
2. James Blair, Keller/Wegley Engineering (representing Stratford Public Utility District)
3. Jointly from three Environmental Justice/Disadvantaged Community Representatives
 - a. Michael K. Claiborne, Attorney, Leadership Counsel for Justice and Accountability
 - b. Deborah Ores, Attorney & Legislative Advocate, Community Water Center
 - c. Jennifer Clary, Water Programs Manager, Clean Water Fund

SECTION 1 – RESPONSES TO WRITTEN COMMENT LETTERS

This section contains Board staff responses to individual comment letters received during the comment period.

CENTRAL VALLEY CLEAN WATER ASSOCIATION (CVCWA)--Submitted February 24, 2017

CVCWA Comment: CVCWA supports the de-designation of MUN and AGR beneficial uses in groundwater in a portion of the historical Tulare Lake Bed where technical analyses showed that existing water quality does not support these uses and communication with municipal, domestic, and agricultural water users within and proximate to the proposed beneficial use de-designation area revealed that groundwater is not currently used, nor anticipated to be used in the future for MUN or AGR beneficial uses.

RESPONSE: Support Noted.

KELLER/WEGLEY ENGINEERING—Submitted January 18, 2017

Keller/Wegley Engineering Comment No. 1: It is our understanding that Stratford's Wastewater Treatment Facility (Facility) was not included in the Tulare Lakebed Beneficial Use Exception Area because the Facility is located upstream from three (3) to four (4) domestic wells that are 25 to 75 feet deep and are pumping groundwater which has an electrical conductivity (EC) concentration of less than 5,000 uS/cm. It is also our understanding that these wells provide sufficient water supply producing an average sustainable yield of 200 gallons per day.

RESPONSE: The commenter is correct that due to EC concentrations of less than 5,000 uS/cm and sufficient sustainable yield to produce 200 gallons per day in wells between the proposed dedesignation area and the Facility, the groundwater does not meet Exception 1a or 1c in the Sources of Drinking Water Policy so has not been included as part of the area for dedesignation of MUN.

Keller/Wegley Engineering Comment No. 2: The commenter requested additional information on the wells located between the facility and the proposed dedesignation area.

RESPONSE: Our office is currently required to keep domestic well information the Groundwater Ambient Monitoring and Assessment program confidential. Therefore our office is not able to share the requested domestic well logs. However, a governmental agency can sign a confidentiality agreement with the State Water Resources Control Board and request the domestic well logs directly. If Stratford Public Utilities District would like to try and obtain the requested well logs through this procedure, please contact Mr. John Borkovich, Supervising Engineering Geologist, at the Division of Water Quality by phone at (916) 341-5779 or by e-mail at john.borkovich@waterboards.ca.gov.

Keller/Wegley Engineering Comment No. 2: The commenter requested that the Board consider re-categorizing the Facility from Category 2 (defined as, "those discharges of waste that could impair the designated beneficial uses of the receiving waters, cause short-term violations of water quality objectives, cause secondary drinking standards to be violated, or cause a nuisance") to Category 3 as a low threat to water quality. The commenter also provided additional monitoring well information from the Stratford Public Utility District Wastewater Facility Improvement Project.

RESPONSE: The Commenter's letter was forwarded to the Fresno office permitting staff. Permitting staff will review and take under consideration the Facility Category change request.

JOINTLY FROM THREE ENVIRONMENTAL JUSTICE/DISADVANTAGED COMMUNITY REPRESENTATIVES—Submitted February 23, 2017

The Environmental Justice and Disadvantaged Community (EJ/DAC) representatives recommend that the Board decline to adopt the proposed amendment based on three reasons noted in comments one through three below.

EJ/DAC Representatives Comment No. 1: The proposed amendment does not comply with the State or Federal Antidegradation Policy.

RESPONSE: The proposed Basin Plan Amendment would de-designate the MUN and AGR beneficial uses in a discrete portion of a *groundwater* basin. The federal Antidegradation Policy (40 C.F.R. § 131.12.) does not apply to waterbodies that fall outside the purview of the federal Clean Water Act (33 U.S.C. §1251 et seq.), such as

the portion of the groundwater basin that would be de-designated pursuant to the proposed Basin Plan Amendment.

The commenters are correct that State Water Board Resolution 68-16, the Statement of Policy with Respect to Maintaining High Quality of Waters in California (*State Antidegradation Policy*) applies to this Basin Planning action, since the scope of the *State Antidegradation Policy* includes both surface waters, including those subject to federal jurisdiction, and groundwaters subject to state jurisdiction. Furthermore, the commenters are correct in stating that the *State Antidegradation Policy* requires that high-quality waters “be maintained until it has been demonstrated to the State that any change will be consistent with maximum benefit to the people of the State, will not unreasonably affect present and anticipated beneficial use of such water, and will not result in water quality less than that prescribed in the policies.”

The Staff Report and its supporting documentation provide such a demonstration. First, the Staff Report documents that extensive efforts were made to ensure that the areas circumscribed for de-designation were limited to those areas where groundwater was not being used, nor was expected to be used, for MUN or AGR purposes. Second, the economic analyses demonstrate that requiring dischargers to meet water quality objectives designed to protect the MUN and AGR beneficial uses in these areas would impose exorbitant and unreasonable costs upon those dischargers. Because the Staff Report and its supporting documentation demonstrate that no water user would be harmed as a result of the proposed de-designation and that the adoption of the proposed Basin Plan Amendment would avoid the imposition of unreasonable costs, the Board can reasonably conclude that adoption of the proposed Basin Plan Amendment is consistent with the maximum benefit to the people of the state. Further, Chapter 6 in the Staff Report demonstrates that the proposed Basin Plan Amendment “will not result in water quality less than that prescribed in the policies.”

The commenters, however, are incorrect in asserting that the proposed Basin Plan Amendment would itself authorize an “... activity which produces or may produce a waste or increased volume or concentration of waste and which discharges or proposes to discharge to existing high quality waters...,” thus requiring that the Board demonstrate that all dischargers potentially affected by the proposed Basin Plan Amendment will employ best practicable treatment or control of their discharges necessary to ensure that pollution or nuisance will not occur and that the highest water quality consistent with maximum benefit to the people of the State will be maintained.¹ The commenters are incorrect in this assertion because the Basin Plan is not self-implementing, and therefore, the proposed Basin Plan Amendment does not itself authorize “any activity” that may degrade high-quality waters.

Instead, the mechanism by which the Board may authorize such activities is via the issuance of waste discharge requirements issued pursuant to Water Code section 13260 et seq. This is recognized in the *State Antidegradation Policy*, which states that activities that threaten to degrade high-quality waters must “... be required to meet waste discharge requirements which will result in the best practicable treatment or control of the discharge necessary to assure that (a) a pollution or nuisance will not occur and (b) the highest water quality consistent with maximum benefit to the people of the State will be maintained.” Consistent with the *State Antidegradation Policy*, the Board’s evaluation of whether the pollution control technologies employed by a discharger will result in “best

¹ Requirements in the *State Antidegradation Policy* that are separate and distinct from the phrases discussed previously.

practicable treatment of control of the discharge” is conducted at the time that the Board sets permit limitations in waste discharge requirements. It is only at that point can the Board reasonably ascertain whether the pollution control technologies proposed to be employed by the discharger(s) will result in best practicable treatment of control of the discharge, since “best practicable treatment of control” is intended to be a dynamic standard.

Indeed, the general permit at issue in case cited by the commenters was one in which the Board imposed a regulatory standard from an applicable regulation that was later found *not* to be “best practicable treatment or control” because knowledge about wastewater pond design had evolved since the time the pond design standards were incorporated into Title 27 of the California Code of Regulations. (*Asociación de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1283.) The costs of pollution control technologies change, making technologies that once were impracticable practicable. New pollution control technologies will come on the market that will unseat what is currently considered the “best” pollutant control technology. Therefore, it is inappropriate for the Board to make conclusions as to the future cost-effectiveness and relative efficacy of treatment or control technologies at the time the Basin Plan Amendment is adopted, rather than at the time waste discharge requirements are issued.

Instead of defining what should be considered “best practicable treatment or control” at the time the Board revises the Basin Plan, it is reasonable for the Board to simply ensure that any proposed Basin Plan Amendment will be both consistent with the *State Antidegradation Policy* and will not interfere with the Board’s ability to make determinations as to whether or not a discharger’s treatment or control should be considered “best practicable treatment or control” when the Board issues waste discharge requirements in the future. Contrary to the assertion of the commenters, the proposed Basin Plan Amendment is wholly consistent with the *State Antidegradation Policy*.

EJ/DAC Representatives Comment No. 2: The proposed amendment does not fall within exception 1.a. to the Sources of Drinking Water Policy. The commenters assert that the exceptions cannot be utilized as part of a dedesignation process and should have been considered prior to the water body designation.

RESPONSE: The *Sources of Drinking Water Policy* (Resolution No. 88-63) specified that the Regional Boards “can conform [their] Water Quality Control Plans to this policy by amending the plans to incorporate the policy; and ... the State Board must approve any conforming amendments pursuant to Water Code section 13245.” The Central Valley Water Board incorporated the *Sources of Drinking Water Policy* into the Water Quality Control Plan for the Tulare Lake Basin Plan, Second Edition (Central Valley Water Board, Revised 2015) by adding language that states that, “. . . *In considering any exceptions to the beneficial use designation of MUN, the Regional Water Board employs the following criteria:*

1. *The TDS must exceed 3,000 mg/l (5,000 umhos/cm EC) and the aquifer cannot be reasonably expected to supply a public water system” (pages II-2 and II-3)”*

The Tulare Lake Basin Plan further states that, “[w]here the Regional Water Board finds that one of the exceptions applies, it may remove the MUN designation for the particular water body through a formal Basin Plan amendment which includes a public

hearing.”(page V-2.) The proposed Basin Plan Amendment is entirely consistent with the *Sources of Drinking Water Policy* as implemented in the Tulare Lake Basin Plan.

Furthermore, as the State Water Board has stated, “a Basin Plan amendment is the appropriate vehicle to designate and de-designate uses and ... Resolution 88-63 is a tool to use in determining designations.” (*In Re Curtis D. Quinones and Vapor Cleaners, Inc.*, State Water Board Order WQ 2006-0010, see also *In the Matter of Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 for Vacaville's Easterly Wastewater Treatment Plant*, State Water Board Order No. WQO 2002-0015.)

EJ/DAC Representatives Comment No. 3: The “Reasonable and Beneficial Use” and “Public Trust” Doctrines apply and have not been adequately addressed.

RESPONSE: The doctrine of reasonable and beneficial use applies to usufructuary water rights (a right to use the water, not a traditional ownership right). The public trust doctrine applies to the State’s trustee duties with respect to navigable surface waters. Since the proposed Basin Plan Amendment neither alters any existing groundwater right nor will it have any effect upon surface waters, neither doctrine is applicable to the proposed Basin Plan Amendment.

Groundwater rights are subject to the doctrine of correlative rights (*Katz v. Walkinshaw* (1903) 141 Cal. 116, 124.) and to the doctrine of reasonable and beneficial use (*Cal. Const., art. X, § 2*). However, nothing in the proposed Basin Plan Amendment would infringe upon any existing or future right to use groundwater, nor will the proposed Basin Plan Amendment in any way affect the applicability of the doctrine of reasonable and beneficial use to groundwater extractions.

The public trust doctrine is a common law doctrine originating in Roman law. (“By the law of nature these things are common to mankind – the air, running water, the sea and consequently the shores of the sea.” (Institutes of Justinian 2.1.1.)) The public trust applies to those resources for which states have taken ownership of by virtue of their admission to the Union. (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521.) The courts have defined the state’s ownership interest as “not of a proprietary nature ... the state holds such lands in trust for public purposes, which have traditionally been delineated in terms of navigation, commerce, and fisheries.” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 482.) The California Supreme Court has extended the scope of the public trust doctrine to tidal and navigable bodies of water. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 435.) However, the proposed Basin Plan Amendment will not have any effect on tidal and navigable bodies of water, and as such, the public trust doctrine does not apply.

Since neither the doctrine of reasonable and beneficial use nor the public trust doctrine has any bearing on the proposed Basin Plan Amendment, neither would provide a reason for the Board to not adopt the proposed Basin Plan Amendment.

EJ/DAC Representatives Comment No. 4: “Many of these concerns expressed here may potentially be alleviated with an express statement in the resolution adopting the proposed amendment, and in any resulting amended water quality control plan, that the adoption of the proposed amendment will not serve as precedent for de-designation of beneficial uses in the future.”

RESPONSE: No action of a Regional Water Quality Control Board sets binding precedent.² An express statement to that effect would be superfluous.

References

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Central Valley Salinity Alternatives for Long-Term Sustainability (CV-SALTS). 2012a. Salinity Effects on Agricultural Irrigation-Related Uses. Prepared by CDM Smith. Prepared for CV-SALTS. August 10.

Central Valley Water Board . 2015. Water Quality Control Plan for the Tulare Lake Basin, Second Edition, Revised January 2015

² "Pursuant to Government Code section 11425.60, the State Water Board's decisions in response to water quality petitions may be deemed to be precedential. The State Water Board has designated all decisions or orders it adopts at public meetings to be precedent decisions, except to the extent that a decision or order indicates otherwise, or is superseded by later enacted statutes, judicial opinions, or actions of the State Water Board. (State Board Order WR 96-1 (Lagunitas Creek), at footnote 11.) The State Water Board has not designated **any** decisions by Regional Water Boards to be precedential." (*emphasis added*, December 26, 2000 Chief Counsel Memorandum Re: State Water Board Order WQ 2000-11.)