

MEMORANDUM

TO: Dennis Westcot, Chair
FROM: Roberta L. Larson and Adam D. Link
SUBJECT: Responses to Legal Questions Posed by Lower San Joaquin River Committee
DATE: November 9, 2010

I. ISSUE PRESENTED

The CV-SALTS Lower San Joaquin River Committee has requested responses to a number of substantive and procedural questions relating to de-designation and re-designation of a potential Municipal and Domestic Supply (MUN) beneficial use under the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins (Basin Plan). Such an analysis must consider existing precedent including the California State Water Resources Control Board (State Board) Sources of Drinking Water Policy (Policy), federal Clean Water Act (CWA) regulations, and the tributary rule as articulated in the Basin Plan and as interpreted by the United States Environmental Protection Agency (U.S. EPA). The essence of these questions is: How does an entity go about removing, refining, or re-designating a beneficial use in the Basin Plan, and what are the standards governing that effort?

II. BRIEF ANSWER

In order to remove a potential MUN use designation through a Basin Plan amendment, the Central Valley Regional Water Quality Control Board (Regional Board) must find that the proposed amendment: (1) satisfies federal requirements for removing designated uses, including a demonstration that the designated use is not attainable for specified reasons and/or completion of a use attainability analysis (UAA); (2) satisfies one of the exemptions for MUN use designation listed in the Sources of Drinking Water Policy; and (3) satisfies environmental compliance documentation requirements. The Basin Plan amendment conforming to these considerations does not become effective until approved by Regional and State Boards, approval of the regulatory provisions by the Office of Administrative Law, and if surface water is involved, the action is approved by U.S. EPA.

III. DISCUSSION

A. Is There a Legal or Policy Definition of the Term “Potential” in the Designation of a Beneficial Use in the Basin Plan?

No, but federal regulations may provide appropriate guidance in this area. Regional or State Board staff may have further insight on this issue, but after an initial examination of the Basin Plan, there appears to be no explicit legal or policy definition of the term “potential” contained therein. All references within the “Beneficial Uses” section of the Basin Plan use the phrase “existing and potential uses” without further explanation or definition. (Basin Plan at p. II-1.00.) The accompanying beneficial use designation tables list “existing potential use” as a designation, but do not define or describe the term any further. (Basin Plan, Table II-1 at p. II-5.00.) In addition, the term “potential” as used in the context of a beneficial use is not specifically defined within Porter-Cologne [not previously defined] or the CWA.

However, federal regulations provide guidance on the distinction between an existing use and other designated uses, and may constitute a sufficient legal or policy definition to address the questions below. Under relevant federal regulations, an existing use is defined as any use that has existed in the stream at any time since November 28, 1975. (40 C.F.R. § 131.3(e).) Existing uses must be fully protected and cannot be removed. (40 C.F.R. § 131.10(h)(1).) Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained. (40 C.F.R. § 131.3(f).) A “potential” beneficial use likely falls under this category of other “designated” beneficial uses. Unlike an existing use, a designated use may be removed or modified by the Regional Board under certain circumstances. Because no specific definition has been provided in the Basin Plan or other relevant statutory or regulatory text, in all likelihood the designation of a “potential” use should be treated similarly to other non-existing “designated” beneficial uses for federal regulatory purposes.

B. Under the Policy, Can a “Potential” MUN Use Be Removed, and If So, What Would Be Required to Make Such a Demonstration?

Yes, the designation of “potential” MUN use can likely be removed, in accordance with the relevant procedures.

1. The Policy and Basin Plan Define All Water Bodies as Suitable or Potentially Suitable for MUN Use.

Under the Policy, “[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 Board . . .” (State Board Resolution No. 88-63, as revised by State Board Resolution No. 2006-0008 (Resolution No. 88-63).) In compliance with Resolution No. 88-63, the Regional Board modified the Basin Plan for the Sacramento and

San Joaquin River Basin to incorporate the Policy by adding language that states water bodies in the region that do not already have beneficial uses designated in the tables identifying specific waters and their uses are assigned MUN designations in accordance with Resolution 88-63. (1990 Basin Plan at p. II-1.00.) The most recent Basin Plan states that, “[w]ater Bodies within the basins that do not have beneficial uses designated in Table II-1 are assigned MUN designations in accordance with the provisions of State Water Board Resolution No. 88-63 which is, by reference, a part of this Basin Plan” (Basin Plan at p. II-2.01.)¹ As such, the State Board interprets Basin Plan incorporation of the Sources of Drinking Water Policy to designate all unidentified water bodies as suitable or potentially suitable for the MUN use unless otherwise specified.² (State Board, *In the Matter of the Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 For Vacaville’s Easterly Wastewater Treatment Plant* (Oct. 3, 2002), Order WQO 2002-0015 at p. 27, “[t]he Central Valley Regional Board chose to implement Resolution No. 88-63 through a blanket MUN designation for all unidentified waterbodies in the region.”)

In addition, there is a contradiction in language between statutes governing basin planning activities and the language within the Basin Plan itself. The California Water Code uses the term “probable” as the identifying factor to be considered when adopting specific water quality objectives in a basin plan. Specifically, it states that:

Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following: (a) Past, present, and *probable* future beneficial uses of water. (Wat. Code, § 13241, emphasis added.)

At least one Appellate Court appears to have used the terms “probable” and “potential” somewhat interchangeably. In a 2007 ruling, the Third Appellate District Court of Appeal stated that “. . . [a]ll groundwaters in the Sacramento and San Joaquin River Basins have been designated as MUN and the designation includes *probable* future uses.” (*County of Sacramento v. State Water Resources Control Bd.* (2007) 153 Cal.App.4th 1579, 1589, emphasis added.) The court used this language despite the fact that the only designations in the designation tables are existing use, potential use, and limited existing use. (Basin Plan, Table II-1 at p. II-5.00.) In contrast, an Orange County Superior Court made a clear distinction between the two, and went so far as to determine that, “. . . basing Standards on ‘potential’ uses is inconsistent with the clear and specific requirement in the law that Boards consider ‘probable future’ uses . . . ,” and that the State Board “acted contrary to the law by

¹ The most recent copy of the Water Quality Control Plan for the Sacramento River and San Joaquin River Basins is available at http://www.swrcb.ca.gov/centralvalley/water_issues/basin_plans/index.shtml.

² Whether the MUN use is lawfully designated via the Sources of Drinking Water Policy is an issue currently before the California Court of Appeal, First Appellate District. (*City of Vacaville, et al. v State Water Resources Control Board, et al.* (Case No. A127207, app. pending) (*Vacaville*).

applying the vague ‘potential’ use designations . . .” under the circumstances. (*Cities of Arcadia v. State Water Resources Control Board*, Case No. 06CC02974, (Cal. Super. filed Feb. 9, 2006).) Given that “potential” use is not explicitly defined in the Basin Plan or elsewhere, the consequences of this deviation from the California Water Code, if any, are unclear.

2. When Removing a Designated Use, Federal Regulations Requires an Examination of Feasible Uses Under Title 40 of Code of Federal Regulations Section 131.10 Subdivision (g), But Not Necessarily a Full UAA.

Under the Policy, Regional Boards must “assure that any changes in beneficial use designations for surface waters of the State are consistent with all applicable regulations adopted by the Environmental Protection Agency.” (Resolution No. 88-63.) Federal regulations distinguish between existing and other designated uses, and the potential MUN use designation likely falls into the other designated uses category as noted in Section A of this memorandum. However, it is not entirely clear in the context of removing only the MUN use designation whether a full UAA is required under the regulations, or whether some lesser examination of factors identified in the regulations would suffice.

According to the regulations, states may remove a designated use, which is not an existing use, if the state can demonstrate that attaining the use is not feasible for any one of the six factors listed within the regulations. (40 C.F.R. § 131.10(g).) Specifically:

States may remove a designated use which is not an existing use, as defined in § 131.3, or establish sub-categories of a use if the State can demonstrate that attaining the designated use is not feasible because:

- (1) Naturally occurring pollutant concentrations prevent the attainment of the use; or
- (2) Natural, ephemeral, intermittent or low flow conditions or water levels prevent the attainment of the use, unless these conditions may be compensated for by the discharge of sufficient volume of effluent discharges without violating State water conservation requirements to enable uses to be met; or
- (3) Human caused conditions or sources of pollution prevent the attainment of the use and cannot be remedied or would cause more environmental damage to correct than to leave in place; or
- (4) Dams, diversions or other types of hydrologic modifications preclude the attainment of the use, and it is not feasible to restore the water body to its

original condition or to operate such modification in a way that would result in the attainment of the use; or

(5) Physical conditions related to the natural features of the water body, such as the lack of a proper substrate, cover, flow, depth, pools, riffles, and the like, unrelated to water quality, preclude attainment of aquatic life protection uses; or

(6) Controls more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread economic and social impact. (40 C.F.R. § 131.10(g).)

Under the express language of the regulations, states must look to these factors, hereafter referred to as “attainability factors,” when removing a designated use. However, merely demonstrating that attaining the use is not feasible is not necessarily the same as completing a full UAA, and there is a great deal of support for the position that a full UAA is only required under specified circumstances, not every time a state removes a designated use.

In a separate section of the regulations, the attainability factors are listed as mandatory considerations within a UAA. A UAA is defined as a structured scientific assessment of the factors affecting the attainment of the use, which may include physical, chemical, biological, and economic factors as described in 40 Code of Federal Regulations section 131.10, subdivision (g). According to U.S. EPA, a UAA is a structured scientific assessment of the factors affecting the attainment of uses specified in section 101, subdivision (a)(2) of the CWA, so called “fishable/swimmable” uses. (UAA’s and Other Tools for Managing Designated Uses, U.S. EPA, March 2006 at p. v.)³ The regulations specify that a state *must* conduct a UAA in two situations: When the State designates uses that do not include fishable/swimmable uses, or when the state wishes to remove or adopt subcategories of a fishable/swimmable use, which require less stringent criteria. (40 C.F.R. § 131.10(j), emphasis added.) MUN use is not a fishable/swimmable use.

Such guidance suggests a UAA is not absolutely required when changing a potential MUN use designation, so long as the change does not affect the fishable/swimmable uses of the water body. State Board orders support this position as well. In an order discussing removal of a recreational use designation in the Los Angeles Region, the State Board noted that:

. . . the Clean Water Act and implementing U.S. EPA regulations provide special protection for “fishable/swimmable” uses, including recreation. The statute and regulations create a rebuttable presumption that all waters support these uses. To overcome *this presumption*, the states must conduct a UAA and demonstrate that attaining the uses is not feasible based on at least one of six

³ Available at www.epa.gov/waterscience/standards/uaa/pdf/cs-all.pdf.

use removal factors. (*In the Matter of Own Motion Review of Failure to Modify Recreational Use Standards for Ballona Creek* (Jan. 20, 2005), Los Angeles Regional Board Order No. WQO 2005-0004, emphasis added.)

Furthermore, in past de-designation resolutions and orders that involved fishable or swimmable uses of surface waters, there are indications that a UAA was completed in support of the de-designation.⁴ However, in a separate Basin Plan amendment that involved de-designation of the MUN use exclusively, there is no indication that a UAA was completed in support of the amendment.⁵

Nonetheless, the language of the regulations seems to indicate that the attainability factors must be considered in some way, albeit not as part of a full UAA, whenever a state seeks to remove any designated use. (40 C.F.R. § 131.10(g).) Therefore, even though removal of a potential MUN use designation may not fall under the mandatory UAA provisions of the CWA regulations, the regulations can be interpreted to require at least some examination of the same factors that would otherwise be in a UAA.

3. In Order to Remove a Potential MUN Use, the Regional Board Must Also Address the Policy.

In addition to the federal regulatory requirements for the removal of a potential use designation, there are also specific requirements related to removal of MUN use designations found in the Policy. A potential MUN use designation may be removed for a water body that falls within one of the listed exceptions in the Policy⁶, or where site-specific conditions otherwise warrant an exemption for the particular water body.⁷

⁴ See State Board Meeting Session Discussion, Item 3, (Feb. 1, 2006), discussing a UAA completed in support of the Old Alamo Creek de-designation changing a “fishable” use; see also State Board Resolution No. 2005-0015, discussing a UAA completed in support of a change to the recreational “swimmable” use in Ballona Creek.

⁵ See State Board Meeting Session Discussion, Item 5, (Sept. 20, 2001), discussing approval of State Board Order No. 2001-100, a Basin Plan amendment removing the potential MUN use designation from specified water bodies.

⁶ See State Board Order No. 2001-100, *Approving an Amendment to the Water Quality Control Plan for the Lahontan Region to Remove Potential Beneficial Use Designations from Nine Water Bodies*, which found a proposed Basin Plan amendment to be in conformance with the Policy specifically because the Policy “allows exemptions of certain waters from the MUN designation where appropriate conditions are met.”

⁷ See State Board Resolution No. 2006-0008, *Revision to Sources of Drinking Water Policy to Establish a Site Specific Exception for Old Alamo Creek*, which states that even though “none of the Policy’s exceptions specifically applied to Old Alamo Creek Nevertheless, 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. Although the Policy’s exceptions do not specifically apply, the circumstances for Old Alamo Creek are similar to the bases for several exceptions in the Policy”; See also *In the Matter of the Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 For Vacaville’s Easterly Wastewater Treatment Plant*, *supra*, Order WQO 2002-0015 at p. 28.

The Basin Plan states that in making any exemptions to the MUN beneficial use designation, the Regional Board will apply the exceptions listed in Resolution No. 88-63. (Basin Plan at p. II-2.01.) The Regional Board has de-designated the MUN use from a water body based on one of the listed exemptions.⁸ These listed exceptions to the general designation include:

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; or
 - b. There is contamination, either by natural processes or by human activity (unrelated to the specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices; or
 - c. The water source does not provide sufficient water to supply a single well capable of producing an average, sustained yield of 200 gallons per day.

2. Surface Waters Where:
 - a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards; or,
 - b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards.

⁸ See State Board Meeting Session, Discussion of Item 3 (Mar. 18, 2008), discussing Regional Board Resolution No. R5-2007-0021 removing the MUN use for Sulfur Creek, which stated, “. . . the high levels of total dissolved solids and electrical conductivity meet the criteria set forth in State Water Resources Control Board’s (State Water Board’s) Sources of Drinking Water Policy (Resolution No. 88-63) for excepting the municipal and domestic supply beneficial use designation for surface and ground waters.”

3. Ground water where:
 - a. The aquifer is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulations, section 146.4 for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 CFR, section 261.3. (Basin Plan, p. II-2.01; Resolution No. 88-63.)

In summary, in order to remove a potential MUN use designation, the proponent must demonstrate that one of the above exceptions applies to the particular water body, or that site-specific conditions warrant an exemption.

4. The Basin Plan Amendment Process Is a Certified Regulatory Program and Therefore the Regional Board Must Prepare a “Functional Equivalent” Document for Public Review.

The Regional Board Basin Plan amendment process has been certified pursuant to Public Resources Code section 21080.5 under the California Environmental Quality Act (CEQA), as a functionally equivalent process to the preparation of an Environmental Impact Report or Negative Declaration. (Central Valley Regional Board Resolution No. R5-2002-0127.) Though a full CEQA analysis would not be required for the Basin Plan amendment, the Regional Board staff would need to prepare and circulate a draft functional equivalent environmental document for public review as part of the Basin Plan amendment process.

5. A Basin Plan Amendment Is the Proper Vehicle for Removing a Potential MUN Use Designation and Requires Public Participation, Regional Board Approval, State Board Approval, and Possibly U.S. EPA Approval.

The proper vehicle for removal of a potential MUN use designation is a Basin Plan amendment. California Water Code section 13240 gives each Regional Water Quality Control Board the authority to periodically review and revise its Basin Plan, and states may revise standards based on a request from industry, environmental groups, or the public. Basin Plans are adopted and amended through a process involving public participation, including notice and a hearing. (Wat. Code, § 13244.) The State Board has found under circumstances involving the proposed removal of the MUN use designation, that a Basin Plan amendment was the appropriate vehicle to de-designate a particular water body. (*In the Matter of the Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 For Vacaville’s Easterly Wastewater Treatment Plant, supra*, Order WQO 2002-0015.) Basin Plan amendments or revisions do not become effective unless and until they are approved by the State Board. (Wat. Code, § 13245.) U.S. EPA must also approve all new or revised

surface water quality standards before they go into effect for CWA purposes. (33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.21(c); *Alaska Clean Water Alliance v. Clarke*, 1997 U.S. Dist. LEXIS 11144, 6-7 (W.D. Wash. 1997).)

In sum, a potential MUN use designation within the Basin Plan can be removed, but proponents of such a change must go through the Basin Plan amendment process, including potentially performing a UAA and satisfying the exemption criteria in the Policy. Such a change will have to go through a public process and be approved by the Regional Board, the State Board, and potentially U.S. EPA before it takes effect.

C. Under the Policy, Is It Possible to Change a Potential MUN Use Designation to a “Limited” MUN Use Designation, and If So, What Would Be Required?

Likely yes, but changing the use designation from “potential” to “limited” may involve the same process as removing the designated use entirely. There is no guidance in the Policy or the Basin Plan as to whether there is a different procedure for changing a potential use to a limited use, as opposed to or in contrast with removing the use designation entirely. Furthermore, the term “limited” MUN use is not defined in the Policy or elsewhere in the Basin Plan, though it is listed as a designation in the Basin Plan without further discussion. (Basin Plan, Table II-1 at p. II-5.00.) It can be argued that the transition from one use to another involves both the removal of the existing designation and the addition of a new designation. In application, it is debatable whether re-designating a MUN use from “potential” to “limited” involves both removal of a designated use and designation of a new use. As noted above, states may only remove a designated use if the state can demonstrate that attaining the use is not feasible for any one of six listed exceptions. (40 C.F.R. § 131.10(g).) Even if the change from a “potential” to a “limited” use designation were considered a transition rather than removal of the original designation, there is some support for the position that a UAA-like analysis would be nonetheless required.⁹

Furthermore, there is some indication that undertaking a UAA-like process may be preferable under these circumstances. According to U.S. EPA, it is a common misconception that UAAs are only a means to remove a designated use. U.S. EPA suggests that UAAs have supported both removing uses and adding uses, and that in the future there will be a growing practice of “sub-categorizing” or “refining” designated uses; that is, making them more specific and precise as opposed to removing them entirely.¹⁰ To the extent that the transition from a “potential” MUN use designation to a “limited” MUN use designation is a refinement

⁹ For example, the State of Washington developed draft guidance that states a UAA is necessary to develop a seasonal designated use. (Draft Use Attainability Analysis Guidance for Washington State, Draft Version 1.2 (July 2005) at p. 4 available at <http://www.ecy.wa.gov/programs/wq/swqs/uaa.html>.) This guidance is in the context of a transition from a year-round designated use to a seasonal designated use, but by analogy could be applied to the transition between a “potential” use and a “limited” use.

¹⁰ Basic Information: Introduction to UAAs, U.S. EPA Website, available at <http://water.epa.gov/scitech/swguidance/waterquality/standards/uses/uaa/info.cfm>.

or sub-categorization of that use, U.S. EPA guidance in this respect may be on point. In sum, whether undertaking a UAA is absolutely required under these circumstances is not entirely clear, but it would be prudent to perform a UAA for this contemplated re-designation just as it may be required under the removal procedures outlined above.

Because it is not explicitly clear how a “limited” MUN use designation is defined in the Basin Plan, or what a limited beneficial use entails, it would be difficult to speculate as to whether an exception within the Policy would need to be applied to a re-designation as opposed to removal of the designated use. There is some support for the position that if the potential MUN use designation is not removed but merely re-designated, and the new use is still a “suitable or potentially suitable” use as described under the Policy, then the action need not fit within the exceptions for removal. Technically, if there is no “removal” of the designation, then there is no need to demonstrate the change falls under an exception to the Policy. However, there is also a legally defensible argument that, as described above, re-designation of the use is actually the removal of a designated use and a subsequent addition of a new use designation, in which case an exemption under the Policy would likely need to be demonstrated to effect the removal.

D. If a Beneficial Use Is Designated as a “Potential Use,” Does That Designation Apply to Upstream Tributaries?

Likely, yes. As noted above, though not fully defined, a potential use is merely a form of designated beneficial use that is not an existing use. Pursuant to the tributary rule, unlisted streams are deemed to have the same beneficial use designations as the downstream water bodies to which they are tributary. The rule makes no distinction between “potential” use or any other sub-category of beneficial use, and appears to apply to all beneficial use designations.

The “tributary statement” or “tributary rule” involves the application of downstream uses to upstream tributary waters. States are required to adopt water quality standards for all waters of the United States including tributaries (40 C.F.R. § 122.2), and the State Board views the tributary statement as a valid means by which states may comply with that requirement. (Analysis of Legal Issues Raised by the San Joaquin River Basin Technical Committee, Office of Chief Counsel, State Water Resources Control Board (February 1987, Amended April 1986).) The tributary rule has its origins in part of the original Basin Plan from 1975. A footnote in that original plan stated, “[t]hose streams not listed have the same beneficial uses as the streams, lakes, or reservoirs to which they are tributary.” (1975 Basin Plan at Table II-1.00.) In 1994, the Regional Board replaced the footnote with language that was intended to allow beneficial uses to be evaluated on a case-by-case basis, the footnote was later disapproved by U.S. EPA. In reviewing a petition arising from application of the tributary rule without benefit of the case-by-case exception footnote, the State Board concluded that “the Central Valley Regional Board reasonably interpreted the tributary language in the Current Basin Plan to assign MUN, COLD, AGR, and REC-1 uses to Old

Alamo Creek. . . . The Central Valley Regional Board reasonably determined that a basin plan amendment was the proper way to change the creek’s uses.” (*In the Matter of the Review on Own Motion of Waste Discharge Requirements Order No. 5-01-044 For Vacaville’s Easterly Wastewater Treatment Plant, supra*, Order WQO 2002-0015 at p. 29.)¹¹

E. Is a UAA Required if the Use Has Not Been Specifically Designated in the Basin Plan for the Water Body in Question?

Is a UAA Required if the Use Under Consideration for Change Has Been Designated Through the Sources of Drinking Water Policy Resolution?

Both of these questions are interpreted as inquiring into whether a full UAA (or an analysis of the Code of Federal Regulations section 131.10 subdivision (g) factors) is required for change or removal of a potential MUN use designation that has not been explicitly designated in the Basin Plan. There are two reasons why a designated use would not be specifically designated for a particular water body: (1) the water body is a tributary water that is covered by the tributary rule, or (2) the water body is covered by the blanket designation in the Policy that purportedly designates all waters lacking specific designations as potentially suitable for the MUN use. In either case, a UAA or at least an analysis of the attainability factors would be required to remove that use, even though the use was not specifically designated in the Basin Plan.

Pursuant to the tributary rule, unlisted streams are deemed to have the same beneficial use designations as the downstream water bodies to which they are tributary. Removal of a use designation requires a UAA or at least an analysis of the attainability factors. Therefore, even though a use may not be specifically designated for a particular water body under the Basin Plan, the narrative of the plan designates the undesignated water body by association with any existing designated water through the tributary rule, and any removal requirements would fall under the same regulations as a specifically designated use.

Under the Policy and related Basin Plan language, all waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply. The State Board and U.S. EPA have accepted this as a valid use designation of all water bodies, even though a particular water body may not be specifically designated in the Basin Plan. Therefore, even though a use may not be specifically designated for a particular water body under the Basin Plan, the narrative of the Basin Plan incorporates the Policy and, in the State and Regional Boards’ view, establishes a blanket MUN designation. Thus, and any removal requirements would fall under the same regulations as a specifically designated use.

¹¹ As with the Policy, the lawfulness of use designations deriving from the tributary rule is currently before the California Court of Appeal in the *Vacaville* case.

F. Can There Be a Seasonal Requirement Related to Protecting the “Potential” Beneficial Use of Cold Water Spawning?

Likely, yes. In the present context, it is assumed this question would involve re-designation of a current year-round “potential” designated use to a seasonal designated use that more accurately reflects the spawning potential of the water. In some instances, rather than remove a designated use entirely, U.S. EPA encourages states to adopt seasonal uses and related criteria for uses that are attainable only during certain times of the year. (40 C.F.R. § 131.10(f).) However, the criteria cannot prevent the attainment of any more restrictive use attainable in other seasons. (*Ibid.*) Under U.S. EPA’s water quality standards regulations, the Regional Board can adopt a subcategory of a use, such as a seasonal use. (40 C.F.R. § 131.10(c).) Spawning is a beneficial use designation that includes uses of water that support high quality aquatic habitats suitable for reproduction and early development of fish. (Basin Plan at p. II-2.00.) Cold water spawning is a subcategory of that use. (Basin Plan, Table II-1 at p. II-5.00.) As with changes in the “potential” MUN use designation, proponents of changes in a “potential” spawning use designation would have to look to many of the same regulatory considerations, although the Policy would be inapplicable. The change may require development of a UAA,¹² but could also be construed, given the regulatory framework, as a mere transition that does not require an examination of the attainability factors. Whether a full UAA is required or not, it is clear that the State must support the new requirement with technical analysis and justification, as well as follow public participation requirements.

IV. CONCLUSIONS

Removal of a potential beneficial use designation is a difficult process requiring several levels of approval and a sufficient scientific basis for the change. In the case of changing a MUN use designation, an additional showing must be made that the water body falls under one of the exceptions in the Policy. While a UAA is likely not required under federal regulations in circumstances that do not affect the fishable/swimmable uses of the water body, a similar analysis is needed to remove or re-designate a beneficial use. Broader State and Regional Board policies such as the Policy and the tributary rule provide use designations for all water bodies, even those not specifically identified in the Basin Plan.

ADL:jm

¹² See footnote 3.