

**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

Ayers, R.S. and D.W. Westcot. 1985. Water Quality for Agriculture. Food and Agriculture Organization of the United Nations, Irrigation and Drainage Paper 29, Rev. 1, Rome.

Canada. 2012. Canadian Environmental Quality Guidelines: Water Quality Guidelines for the Protection of Agriculture.

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Last accessed February 3, 2016.

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.)