

**VALLEY WATER MANAGEMENT COMPANY**7500 MEANY AVE.  
BAKERSFIELD, CALIFORNIA 93308

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BY EMAIL – [anne.littlejohn@waterboards.ca.gov](mailto:anne.littlejohn@waterboards.ca.gov)

Ms. Anne Littlejohn  
and Regional Water Board Members  
Central Valley Regional Water Quality Control Board  
11020 Sun Center Drive, Suite 200  
Rancho Cordova, CA 95670-6114

RE: Comments on Proposed Amendment to the Water Quality Control Plans for the Sacramento River and San Joaquin River Basins and the Tulare Lake Basin to Incorporate a Process into the Basin Plans for Determining Appropriate Designation and Level of Protection of Municipal and Domestic Supply (MUN) in Agriculturally Dominated Water Bodies

Dear Ms. Littlejohn:

Valley Water Management Company (“Valley Water”) supports the proposed amendments establishing a region-wide process for evaluating the Municipal and Domestic Supply (MUN) beneficial use in agriculturally dominated surface water bodies and also supports de-designation of all waters that meet *any* of the criteria identified in the Sources of Drinking Water Policy. However, Valley Water provides some specific comments and requested changes below that should be incorporated into the final Basin Plans’ amendments.

A. The Amendments Should Cite the Regional Board Resolutions, Not SWRCB Res. No. 88-63.

As we explained at the workshop on this matter, the history of the Sources of Drinking Water Policy must be taken into account in order to give this proposed action the appropriate context. The initial designation of the agricultural water dominated surface water bodies was a result of the passage of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986. (Health & Saf. Code, §25249.5 *et seq.*; Cal. Code Regs., tit. 27, §27001 *et seq.*) Among other things, Proposition 65 prohibits business activities from releasing certain chemicals that pass into a source of drinking water. (Health & Saf. Code, §25249.5.) Proposition 65 defined “source of drinking water” as “either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal uses.” (Health & Saf. Code, §25249.11(d).)

Because many water quality control plans/Basin Plans throughout the state did not clearly identify waters with an MUN use, the State Water Resources Control Board (“SWRCB”) passed Resolution No. 88-63 in an effort to clarify Proposition 65’s reference to “sources of drinking

water” for purposes of enforcement of that statute. Resolution 88-63 provided that, with the exception of certain specified waters, all surface and ground waters of the state should be considered to be suitable, or potentially suitable, for municipal or domestic water supply.

Resolution 88-63, however, ran afoul of the California Administrative Procedure Act (“APA”). (Gov. Code, §§11346-11346.8.) In its Determination No. 8, the Office of Administrative Law (“OAL”) held that Resolution 88-63 was a “regulation” subject to the APA, and that its adoption violated Government Code §11347.5 (now §11340.5) because the SWRCB failed to comply with the APA. Thus, Resolution 88-63 was invalidated and should not have been used for regulatory purposes by any agency. (Gov. Code, §11340.5(a).)

***Requested Change to Amendments: Instead of referring to SWRCB Resolution No. 88-63, the following Regional Board resolutions (Nos. 89-056 and 89-098) should be cited in the Amendments and related documents as the authority for the action proposed. This is more accurate and legally correct given the issues with the SWRCB Resolution discussed previously.***

B. Where MUN Was Not an Existing Use in 1989, Designation Should be Recognized as “Potential” Only.

In 1989, the Regional Water Quality Control Board for the Central Valley Region (“Regional Board”) incorporated Resolution 88-63 into the Sacramento/San Joaquin River Basin Plan through Resolution No. 89-056 and into the Tulare Lake Basin Plan through Resolution No. 89-098. Although the wording differs slightly, these resolutions stated the following:

“[B]e it RESOLVED, that all surface and ground waters within the Tulare Lake Basin which currently have no beneficial use designation are hereby designated municipal and domestic supply (MUN), *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 be expected by the Regional Boards to supply a public water system; or

b. There is contamination, either by natural processes or by human activity (unrelated to a 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 Board, 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 Board.

3. Ground waters:

a. Where the aquifer is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulation (CFR), 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;

and be it further RESOLVED, that the above criteria notwithstanding, waters presently used for municipal and domestic supply are hereby designated for protection as MUN....” (Resolution 89-098, italic and bold and color added, underlining in original.)

In order to timely comply with Resolution No. 88-63 at the least cost and effort, the Regional Water Board blanket designated MUN for all water bodies without any on-the-ground evaluation or assessment. In 2000, the SWRCB approved the Regional Board’s resolution as a Basin Plan amendment notwithstanding OAL’s disapproval of the basis for that resolution (i.e., SWRCB Res. 88-63), and the Tulare Lake Basin Plan thereafter has stated:

Due to the “Sources of Drinking Water Policy,” all ground waters are designated MUN (the **use may be existing or potential**) unless specifically exempted by the Regional Water Board and approved for exemption by the State Water Board. (Tulare Lake Basin Plan, at pg. II-2 (emphasis added).)

Unlike other Basin Plans in California that identify whether uses are designated as existing or potential with an “E” or a “P,” the Tulare Lake Basin Plan simply placed a dot in the MUN column, making the designation unclear. (*Id.* at Table II-2; see excerpt for Kern County Basin inserted below.) In other words, it is impossible to tell whether the use was designated as existing or merely potential.

| TABLE II-2<br>TULARE LAKE BASIN<br>GROUND WATER BENEFICIAL USES* (continued) |                  |     |     |     |     |       |       |      |
|--|------------------|-----|-----|-----|-----|-------|-------|------|
| HYDROLOGIC UNIT  | DAU              | MUN | AGR | IND | PRO | REC-1 | REC-2 | WILD |
| Kern County Basin  |                  |     |     |     |     |       |       |      |
|  | 245              | .   | .   | .   |     |       |       |      |
|  | 254 <sup>a</sup> | .   | .   | .   | .   | .     | .     | .    |
|  | 255              | .   | .   | .   |     |       |       | .    |
|  | 256              | .   | .   | .   | .   |       |       |      |
|  | 257              | .   | .   | .   |     | .     |       |      |
|  | 258              | .   | .   | .   | .   |       |       |      |
|  | 259 <sup>b</sup> | .   | .   | .   |     |       |       |      |
|  | 260              | .   |     | .   |     |       |       |      |
|  | 261              | .   | .   | .   |     |       |       |      |

Although these waters may have been designated in 1989, the presumption should be that the water was designated only as “potential” unless there was evidence in the record to demonstrate that the designated MUN use is an actual, existing use.<sup>1</sup> A Regional Board decision must adequately consider all relevant factors and evidence, and demonstrate a rational connection between those factors/evidence, the choices made, and the purposes of the enabling statutes. (See *California Hotel & Motel Ass’n v. Industrial Welfare Comm.*, 25 Cal.3d 200, 212 (1979).) Without evidence of an existing use, such a designation would have been legally infirm.

Where no evidence supported an existing MUN use in 1989, which was the case for most agricultural drainage waterways at the time of designation, these waters should not have been deemed designated due to the exception language contained in Resolution Nos. 89-056 and 89-098, section 2.b. However, if any of the exceptions were met as of May of 1989 when this resolution was adopted, then there should have been *no designation of MUN* due to the language granting the exceptions to the general rule of designation. (See *Blumenfeld v. San Francisco Bay Conservation etc. Com.* (1974) 43 Cal.App.3d 50, 59 (The interpretation of an administrative regulation is subject to the same principles as the interpretation of a statute); *Environmental Charter High School v. Centinela Valley Union High School Dist.* (2004) 122 Cal.App.4th 139, 148–149, 18 Cal.Rptr.3d 417 (The plain meaning of the regulatory text must be employed).) Instead, the Regional Board is going through what may be an unnecessary exercise of de-designating waters that arguably were not designated in the first place.

<sup>1</sup> The California Supreme Court has held that “source of drinking water” includes any water *currently* destined to be used as drinking water. Treating all water as an existing use, when it is only a potentially suitable source of drinking water “would greatly extend the reach of the statute, and would lead to absurd circumstances (like, for example, protecting brackish lagoons which never could be used for drinking water, but would still be designated ‘potentially suitable.’)” See *People of the State of California and the City of San Diego v. Kinder Morgan Energy Partners, L.P. et al.*, U.S. Dt. Ct. for Southern District, Case No. 07-CV-1883 W (AJB), ORDER on Motion to Dismiss (2008) citing *People ex rel. Lungren v. Superior Court*, 926 P.2d 1042, 1049 (Cal. 1996). Thus, at most, if a designation did occur, then only a *potential* MUN use was designated since the Policy’s exceptions applied.

***Requested Change to Amendments: Expressly acknowledge that the MUN use being de-designated was not an existing use and was, at most, a potential use. This distinction is important particularly for surface waters for which USEPA must review and approve use designations as part of the federal water quality standards.***

C. Language Used Should Be Consistent with Underlying Resolutions.

The language of the Basin Plan Amendments should track the language of the applicable resolutions, not the SWRCB's Sources of Drinking Water Policy. The proposed Basin Plan language discusses "constructed or modified" for a C or M designation, when Resolution 89-098 (and even SWRCB Resolution No. 88-63) uses the phrase "designed or modified."

***Requested Change to Amendments: Correct the language of the designations as Designed, not Constructed.***

D. The Amendments Must Clarify the Applicable Objectives to De-Designated and Re-Designated L-MUN Channels.

Establishing the appropriate uses are important to understand what water quality objectives apply to the waters. Under the relevant resolutions, an MUN use designation does not apply to agricultural waters provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Board.

***Requested Change to Amendments: The Amendments must make it clear that MUN-based water quality objectives (such as maximum contaminant levels (MCLs) or California Toxics Rule (CTR) criteria) do not apply in the de-designated channels or limited MUN (L-MUN) channels, but will be monitored in downstream MUN-designated waters to ensure that the appropriate drinking water objectives are maintained.***

E. Prospective Incorporation by Reference of MCLs Must Be Removed.

The proposed Basin Plan Amendments propose to maintain the prospective incorporation by reference of MCLs as water quality objectives. The language in the Chemical Constituents objective is as follows: "This incorporation-by-reference is prospective, including future changes to the incorporated provisions as the changes take effect." Similar language is included in the Pesticides objective.

Valley Water has previously testified at the Regional Board about the problems with this language and objects to this language being maintained in or readopted into the Basin Plan since there is no evidence that an adequate Water Code section 13241 analysis is done on MCLs for their application as water quality objectives in surface waters prior to this incorporation by reference. As the rest of the language proposed states, the "Regional Water Board acknowledges that specific treatment requirements are imposed by state and federal drinking water regulations on the consumption of surface waters under specific circumstances." In other words, these drinking water standards were never

meant to apply in ambient source waters, but only to finished tap water after treatment under USEPA's surface water treatment rule. Having these new MCLs automatically apply when they have not met the legal requirements for adoption of water quality objectives, and when these MCLs can then automatically apply as binding permit limits violates the requirements for adoption of water quality objectives and the requirements that permits go through a public notice and comment period before being amended. For all of these reasons, these problematic provisions should be deleted.

***Requested Change to Amendments: Remove the following sentences from the Chemical Constituents and Radioactivity objectives: "This incorporation-by-reference is prospective, including future changes to the incorporated provisions as the changes take effect" and "This incorporation-by-reference is prospective, including future changes to the incorporated provisions as the changes take effect," respectively.***

F. The Other Exemption Criteria Need a Similar Streamlined Process.

The proposed process only addresses one of the criteria set forth under the Sources of Drinking Water Policy and the Regional Board resolutions implementing that policy – namely criteria 2.b. However, there are other exemption criteria in sections 1.a.-c. and 3 that do not have a similar streamlined process for demonstrating that an MUN designation is inappropriately being applied. Valley Water suggests that these Amendments provide a template to create similar streamlined approaches for the other exemption criteria. Time is of the essence for these actions as citizens groups have begun bringing Proposition 65 lawsuits against industries, such as the oil and gas industry, for discharges into sources of drinking water. Where the waters were inappropriately designated as MUN, these industries are being unnecessarily exposed to liability that would not otherwise exist. These industries need the Regional Board to correct this problem to avoid more unnecessary litigation where MUN is a non-existent use in surface water and groundwater. This is particularly acute in the West side of Kern County where natural groundwater salinity levels exceed the exemption criteria yet the Basin Plan nevertheless deems these waters to have been designated as MUN.

***Requested Change to Amendments: Either broaden the applicability of the proposed Amendments to all exemption criteria, or begin a new Basin Planning process to address these other criteria in a similar streamlined manner once these Amendments have been approved.***

Valley greatly appreciates being able to communicate its concerns with these Amendments and hopes that the requested changes will be made. Should you have any questions regarding this submittal, please contact me or Chris Reedy, at (661) 410-7500.

Sincerely,



Russell Emerson, Manager  
Valley Water Management Company

cc: Patrick Pulupa, Regional Board Counsel - [Patrick.Pulupa@waterboards.ca.gov](mailto:Patrick.Pulupa@waterboards.ca.gov)  
Gary Carlton, Kennedy/Jenks - [GaryCarlton@KennedyJenks.com](mailto:GaryCarlton@KennedyJenks.com)  
Melissa Thorme, Downey Brand LLP - [mthorme@downeybrand.com](mailto:mthorme@downeybrand.com)

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