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Public Comment
Region-wide MUN Evaluation
Deadline: 11/13/17 by 12 noon

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November 13, 2017

Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000
Commentletters@waterboards.ca.gov

Re: Comment Letter – Regionwide MUN Evaluation Process Basin Plan Amendment, Central Valley Regional Board

Ms. Townsend:

The following environmental organizations, commercial and sports fishermen associations, water conservation groups and environmental justice organizations submit this letter regarding the State Water Board's proposal to approve the Central Valley Regional Water Board's amendments to the Sacramento River and San Joaquin River Basin Plans and the Tulare Lake Basin Plan (Resolution R5-2017-0088) (collectively, "Basin Plan Amendments"). The Basin Plan Amendments establish a Regionwide municipal and domestic supply (MUN) beneficial use evaluation process that dedesignates the MUN beneficial use or changes the MUN use designation to a newly established subcategory of limited municipal and domestic supply (LMUN) in "agriculturally dominated" surface waters throughout the Central Valley region. ("Regionwide MUN Evaluation Process" or "Process"). In addition to adopting the Regionwide MUN Evaluation Process, the Basin Plan Amendments approve the removal of the MUN designation for 231 "agriculturally dominated" surface water bodies in the San Luis Canal Company District ("SLCC"), having served as "test cases" for the Regionwide MUN Evaluation Process being adopted.

We write today on behalf of the Environmental Law Foundation, Environmental Justice Coalition for Water, California Sportfishing Protection Alliance, Pesticide Action Network – North America, Pacific Coast Federation of Fishermen's Associations, Institute for Fisheries Resources, Environmental Working Group, Leadership Counsel for Justice and Accountability, Community Water Coalition, and Clean Water Fund. We appreciate the opportunity to submit comments in the public interest as there are serious deficiencies in the Basin Plan Amendments. In particular:

Comments addressed individually in response to comments document

- The Staff Report indicates that approximately 6,000 water bodies could be eligible for dedesignation as supporting MUN uses or redesignation to LMUN, effectively lowering water quality standards for a large portion of water bodies in the Central Valley despite the legal problems outlined in this letter;
- The Regionwide MUN Evaluation Process allows substantially more water bodies to be exempted from protecting water bodies as sources of drinking water than that allowed under the Resolution 88-63 State Water Board Sources for Drinking Water Policy ("Drinking Water Policy");
- The newly established LMUN beneficial use subcategory is not a valid water quality standard, as required by federal and state law;
- The Process does not require monitoring to assure protection of downstream waters, as required by law;
- The Regionwide MUN Evaluation Process does not address protection of groundwater quality;
- The result of the Process will leave a considerable number of water bodies without water quality standards, as the MUN beneficial use was their only designated beneficial use, leaving protections for fish and wildlife, groundwater recharge, irrigation supply and other existing beneficial uses unprotected;
- The Regionwide MUN Evaluation Process fails to provide for required peer review; and
- The Regionwide MUN Evaluation Process is inconsistent with other substantive laws, including the equivalency requirements under CEQA, the human right to water under Water Code § 106.3, and the reasonable use and public trust doctrines.

The Regionwide MUN Evaluation Process and the dedesignations of the SLCC water bodies are in violation of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 et seq. ("Clean Water Act"), the Porter-Cologne Water Quality Control Act, Water Code § 13000 et seq. ("Porter-Cologne"), the federal and state antidegradation policies, the human right to water codified under Water Code § 106.3, and other applicable federal, state and common law provisions. As a result, the Basin Plan Amendments will cause significant degradation to already-impaired surface and groundwaters in the Central Valley, substantially harm users near these waters, as well as downstream water users, and will exacerbate the impacts to downstream waters of the San Francisco Bay-Delta. The signatories to this letter strongly counsel the State Board to return the Basin Plan Amendments to the Regional Board with directions consistent with this letter, as discussed in more detail below.

I. The Basin Plan Amendments' Approach to MUN Dedesignation Violates State and

Federal Law.

***A.* The Regional Board Is Unlawfully Dedesignating a Much Broader Category of Waters than Allowed by the Drinking Water Policy.**

Exception 2b of the Drinking Water Policy allows exemption of MUN use designation for a specific and limited type of surface water body.[1] Exception 2b applies only to surface waters that are "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."[2]

The Basin Plan Amendments extend this limited exception to apply to "ag dominated" waters, defined as "systems designed or modified for the primary purpose of conveying or holding waters used for or resulting from agricultural production, and/or water bodies with greater than 50 percent of the flow dependent on agricultural operations for greater than 50 percent of the irrigation season." (Resolution R5-2017-0088, Attach. 1 at 9.) [3]

The Process proposes to dedesignate two categories of waters. The first is Constructed Ag Drainage/Combo ("C1"), which are constructed channels that convey both agricultural drainage and irrigation supply waters. (Resolution R5-2017-0088 at pp. 5, 35.) The second is Modified Ag Drainage/Combo ("M1"), which are channels that convey agricultural drainage and irrigation supply for waters defined as "a water body in which the hydrology has been changed through construction and/or management and/or in which the channel has been extensively realigned and reconstructed." (*Id.*) In addition, Closed Controlled Recirculating Systems may have their MUN designation removed when they are closed year-round or for the season they are closed, when closed seasonally. (*Id.*)

These water bodies are much broader than the terms of Exception 2b for several reasons. First, they are used for both agricultural drainage and for irrigation supply. Because the MUN Evaluation Process does not distinguish between drainage and supply channels, it is unclear how many additional water bodies are being losing their MUN designation than would be allowed

Comment 1

[1] Although the Drinking Water Policy does not itself designate or exempt beneficial uses (State Water Board WQO 2002-0015 (Vacaville)), the Regional Board implemented the Drinking Water Policy through a blanket MUN designation for all water bodies that are not identified in Table II-1 of their respective Basin Plans. Having designated all of these waters as MUN, the Regional Board is required to comply with substantive requirements for dedesignation. (Basin Plans, II-2.00; see also Order No. R5-2010-0002-01, City of Turlock Water Quality Control Facility, NPDES No. CA0078948, Attachment F – Fact Sheet, at p. F-10-12.)

[2] Resolution 88-63, Sources of Drinking Water Policy ("Drinking Water Policy"), at p. 2.

[3] The Staff Report is ambiguous about which waters the "ag dominated" definition applies to. While the flowchart (Resolution R5-2017-0088, Attach. 1 at p. 9) implies, via a footnote, that the definition applies only to B1 and B2 water bodies, the discussion of the categorization, the title of the entire Process, and the language of the Basin Plan Amendments themselves apply seem to use the "ag dominated" definition for all waters proposed for dedesignation or redesignation. (E.g., Staff Report at pp. v, xv, lix, 31.) Even under the narrowest application of the definition, however, this Process is legally inadequate.

under Exception 2b in the Drinking Water Policy. For example, the Basin Plan Amendments will dedesignate the MUN use from 231 water bodies, which total almost 500 stream miles. It is unknown how many of these are supply/drainage combo, and thus ineligible for dedesignation under the language of Exception 2b, and how many are drainage only and thus clearly eligible for dedesignation under the language of the Policy.[4] (Resolution R5-2017-0088, Att. 1, at pp. 14-28.)[5]

The second significant divergence from Exception 2b category is the definition of "modified" waters,[6] which is overly expansive, vague, and leaves little to distinguish between modified waters and natural channels. The Staff Report's definition of "Modified/Reconstructed Water Body" states:

Examples include any or a combination of the following:

- The natural head waters have been diverted
- The water body contains dams, diversion or other types of hydrologic modifications that make it infeasible to restore the water body to its original condition;
- The channel has been physically altered such as deepened, straightened and/or graded;
- Portions of water body are concrete lined and/or rip-rapped;
- Portions of water body have been piped.[7]

To compare, "Natural Water Body (in National Hydrography Dataset)" is defined as a "Water body feature type attribute is described as 'natural' or made up of 'natural' water bodies in the Standards for National Hydrography Dataset. Most common example of a natural water body is a feature type of 'Stream/River'. Water bodies that are not considered 'natural' include those with a feature type of 'Canal/Ditch' and 'Artificial Path'." (*Id.*) Moreover, "Natural Flow" is defined as "The flow of a water body without anthropogenic inputs and outside management, such as operational spills, drainage, or other diversions or inflows." (*Id.*)

The Staff Report's definitions leave few water bodies that would not constitute "modified," relative to "natural," for purposes of its eligibility for dedesignation (or change of designation to supporting LMUN uses, if it exclusively conveys irrigation supply water). California's water systems are largely modified and humans have altered the vast majority of streams, to some degree, from their original condition. The Staff Report states that the Central Valley's three basins together cover 40% of the State of California, 75% of which is irrigated

Comment 1 (continued)

[4] Assuming other legal requirements are met.
[5] The Regional Board's Environmental Checklist calculated the SLCC District dedesignated water bodies to total 391 "channel miles." However, the total "length of water body segments (miles)" in Appendix 44 totals 470 miles. (Staff Report, Appendix L, p. 324.)
[6] Modified water bodies are divided into drainage and supply (M1) and supply only (M2). M1 are dedesignated as supporting MUN uses, whereas the smaller subset of M2 waters will have their use designation changed to LMUN.
[7] Staff Report at p. lix.

agriculture and provide 51% of managed water supply.[8] It continues to explain that irrigated agriculture is the major land use in the valley floor portions of these basins and an extensive water supply and drainage network has been developed to serve the agricultural industry. (*Id.*) Thus, the Staff Report's expansive inclusion of waters deemed "modified" and its very narrow inclusion of waters deemed "natural" is incongruent with determining the level of water quality protection necessary for the particular water body.

Moreover, these definitions stray far from Exception 2b's "systems designed or modified *for the primary purpose* of conveying or holding agriculture drainage waters."[9] The Basin Plan Amendments, even when the defined categories are further qualified by the definition for "agriculturally dominated" waters, provide for a vastly broader category of water bodies eligible for MUN dedesignation than the narrow category in the Drinking Water Policy's categorical exemption for water bodies that were constructed or modified for the "primary purpose" of conveying agricultural drainage.

Comment 1 (continued)

Third, the Basin Plan Amendments clearly intend the MUN dedesignation to benefit POTWs and storm water dischargers, as well as irrigated agriculture, and anticipate discharge permits of all these classes of dischargers will be modified accordingly.[10] This underscores the deviation from the narrow category established under Exception 2b, based on the criteria that the system be constructed or modified for the "primary purpose" of conveying ag drainage. (Drinking Water Policy at p. 2.) The Drinking Water Policy has a separate categorical exemption for wastewater from POTWs and storm water runoff in Exception 2a. A separate process should be developed that will properly assess such discharges and their receiving water bodies. The processes should not be conflated.

Comment 2

Statement that this issue was raised before the Regional Board: This inconsistency with the categorical exemption in the Drinking Water Policy was raised by multiple parties, including the comments submitted by the San Francisco Baykeeper coalition[11] and the Sacramento River Source Water Protection Program.[12]

***Statement that the Regional Board's Response was inadequate*:** The Regional Board addressed these comments in the Regional Board's Response to Written Comments on A Basin Plan Amendment to Establish a Region-Wide Municipal and Domestic Supply (MUN) Beneficial Use Evaluation Process in Agriculturally Dominated Surface Water Bodies ("Response to Comments") in Broad Issues 1: Monitoring Impacts and 3: Consistency with the *Sources of Drinking Water Policy*. The Response to Comments made no changes to the Basin Plan Amendments in response to comments and nor did the responses elaborate on information that was provided in the Draft Staff Report. (See, e.g., Response to Broad Comment 1, pp. 3-5, Broad

[8] Staff Report at p. 5.
[9] Drinking Water Policy at p. 2 (emphasis added).
[10] Staff Report at pp. 71-72; Appendix L (Environmental Checklist) at pp. 341-42.
[11] Erica Maharg, Managing Attorney, San Francisco Baykeeper et al., Letter to Anne Littlejohn, Regional Board (March 24, 2017) ("Baykeeper Letter"), at pp. 2-3.
[12] Sacramento River Source Water Protection Program, Comments on Region-wide MUN De-Designation BPA ("SRSWPP Letter") at e.g. p. 5.

Comment 3, p. 7; Response to Sacramento River Source Water Protection Program, pp. 9-10; Responses, pp. 12-13; Responses, pp. 21-22, p. 25, pp. 39-41.)

B. The Regional Board Failed to Sufficiently Assess the Impacts of Removal of MUN Designation for Receiving Waters, Downstream Waters and Groundwater as Required Under Federal or State Law.

When establishing, revising or removing a designated use, the Regional Board must demonstrate that it designated the highest use attainable for the receiving water body that will also protect downstream waters, consistent with the Clean Water Act's objective to restore and maintain the Nation's waters and at a minimum attain sufficient quality to protect fish and wildlife and recreational uses ("fishable/swimmable"). (33 U.S.C. §§ 1251(a), 1313(c); 40 CFR § 131.10; see also Water Code §§ 13000, 13240.)

The Regional Board must submit documentation to justify how its consideration of the use and value of the receiving waters for the public water supply, fish and wildlife habitat, irrigation supply, recreation, among others, appropriately supports the Regional Board's removal of the MUN designation. In developing a use and value demonstration, the Regional Board must consider downstream protection and existing use of the receiving water (e.g. that there is no evidence that the water body was used for drinking water and the water quality has not supported this use since 1975. (40 CFR § 131.10(a), (b); § 131.3.)

In a letter dated March 23, 2017, EPA commented on the Regional Board's proposed Basin Plan Amendments and found that its use and value demonstration was insufficient. EPA commented that the Staff Report stated that the removal of MUN use from agricultural dominated waters that convey or hold agricultural drainage may be consistent with 40 CFR § 131.10(g)(1), (g)(3), and (g)(4).[13] However, in its removal of the MUN use for waters in the San Luis Canal Company District, the EPA commented that Staff Report does not include further analysis to explain why the use removal meets the relevant §131.10(g) factors. (See 80 FR 51026 (August 21, 2015).) EPA noted that the Regional Board may choose between developing a use attainability analysis or a use and value demonstration, but that the Regional Board's documentation was insufficient: it provided some of the elements of both but insufficient information to satisfy either.[14]

None of these factors proffered by the Regional Board supports removal of the MUN designation for the SLCC waters or as justification for the Regionwide MUN Evaluation Process. In the Final Staff Report, the Regional Board states that the Drinking Water Policy exemption of the MUN designation from "Ag dominated water bodies that are designed or modified for the primary purpose of conveying or holding Ag drainage" is equivalent to the circumstances in 40 CFR 131.10(g) for establishing when an existing use is not feasibly attainable.[15] The Regional Board states that these water bodies have a higher risk of having naturally and human caused conditions that are sources of pollution, thus preventing attainment of the MUN use, citing 40

Comment 3

[13] Matthew Mitchell, Water Quality Assessment Section, EPA, letter to Anne Littlejohn, Regional Board (March 23, 2017) ("EPA Letter"), at p. 1.
[14] *Id.*
[15] Staff Report at p. 22.

CFR § 131.10(g)(1) and (3). However, the regulation only allows dedesignation due to infeasibility of attainment when: "Naturally occurring pollutant concentrations prevent the attainment of the use" (which is not relevant here) and "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" (40 C.F.R. § 131.10, subd. (g)(3).) While the Regional Board argues that attaining MUN standards in these waters would be difficult, it does not and cannot claim that it would be impossible or more damaging, as it would be required to find under the regulation.

The Staff Report contends that MUN removal is supported by the intermittent or low flow conditions in these water bodies are not conducive to sustaining a public or domestic water system, citing 40 CFR § 131.10(g)(2).[16] The Regional Board does not provide support that this is in fact the case for the water bodies in SLCC.[17] This is unsurprising, as staff only inspected 10% of the waters proposed for dedesignation in the SLCC.[18] Moreover, the Drinking Water Policy has a distinct categorical exemption for this, if 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." (Drinking Water Policy, Exception 1c.) The Regional Board has not demonstrated that it has satisfied the requirements of either justification.

Furthermore, the Staff Report states that the modified water bodies also usually contain dams, diversion and other types of hydrologic modifications that were constructed specifically to support agricultural activities, not municipal or domestic supply activities, citing 40 CFR § 131.10(g)(4).[19] But the regulation reads: "Dams, diversion 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." The Process does not require demonstration that any particular dam or diversion has itself made the MUN designation unattainable.

Finally, the Staff Report notes that some of these conditions in subsection (g) are analogous to the Water Code's requirements for establishing water quality objectives in a Basin Plan (Water Code § 13241), however the Report fails to demonstrate how any of these factors are applicable here. For example, it fails to explain how human-caused degradation "cannot be remedied or would cause more environmental damage to correct than to leave in place."[20] In fact, the Regional Board does acknowledge the requirement under Water Code § 13241 that it must consider the "quality of the water, as well as the conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area." (Water Code § 13241 subds. (b), (c).) This analysis, however, weighs against lowering water quality standards: dedesignation benefits the very dischargers that have historically contributed to the degraded water quality conditions of the region while potentially causing severe impacts for groundwater users, downstream users, and wildlife, as detailed below. In any case, the mere

Comment 3

[16] *Id.*
[17] The regulation also contains a condition that the Regional Board does not address (if low flow may be compensated by increasing effluent discharges). (40 C.F.R. § 131.10(g)(2).
[18] Staff Report at p. 276.
[19] Staff Report at p. 22.
[20] *Id.*

Comment 3 (continued)

citation of this statute does not the use and value assessment required under federal law.

Comment 4

Considerable effort has been expended on programmatic overhauls to improve water quality by improving regulation of discharges from irrigated agriculture, POTWs and storm water runoff, which are the primary discharges at issue for the Regionwide MUN Evaluation Process. These programs include the Irrigated Lands Regulatory Program (ILRP), CV-SALTS, SWAMP (monitoring water quality) and NPDES programs for POTWs and storm water runoff. While these programs are trying to improve water quality by regulating the same dischargers at issue in the Regionwide MUN Evaluation Process, the Process is lowering water quality standards for these same dischargers. The Process undermines the efforts of these other programs and will thwart those programs' objective of improving water quality in the region.

Statement that this issue was raised before the Regional Board: This inconsistency with the categorical exemption in the Drinking Water Policy and the inadequacy of assessment of impacts from dedesignation was raised by multiple parties, including the Baykeeper Letter and the SRSWPP Letter and were addressed by "Broad Issue 3: Consistency with the *Sources of Drinking Water Policy*" in the Response to Comments.

***Statement that the Regional Board's Response was inadequate*:** The Response to Comments made no changes to the Basin Plan Amendments in response to comments and nor did the responses elaborate on information that was provided in the Draft Staff Report. (See, e.g., Response to Broad Comment 1, pp. 4-5; Broad Comment 3, p. 7; Response to Sacramento River Source Water Protection Program, pp. 9-10; Responses, pp. 12-13; Responses, pp. 21-22; pp. 39-41.)

C. The Regional Board Failed to Affirmatively Demonstrate that MUN Uses Are Neither Existing nor Attainable, as Required by Federal and State Law.

Comment 5

The Regional Board applied the wrong standard to demonstrate that MUN uses were neither an existing nor attainable beneficial use for the 231 dedesignated waters in the SLCC district and for future evaluated water bodies in the Regionwide MUN Evaluation Process.

To remove the MUN use designation from a water body, the Regional Board must affirmatively demonstrate that: 1) that the MUN use was not an existing use nor was the water of sufficient quality to support MUN uses since 1975, regardless of whether it was in fact used as a source of drinking water (40 CFR §131.10(h)(1), § 131.3); and 2) that the water quality sufficient to support MUN uses is not attainable by implementing cost-effective and reasonable best management practices for nonpoint source control, overcoming a rebuttable presumption of attainability. (40 CFR § 131.10(d), (h)(2); see also Water Code § 13241.)

The Regional Board must have sufficient evidence to overcome the rebuttable presumptions of attainability. But the Regional Board's assessment focused on whether the water bodies were actually being used as sources for drinking water and not the water quality and its sufficiency to support such uses. The Staff Report concluded that: "Information gathered during the stakeholder process and through staff surveys and monitoring efforts demonstrates that the MUN use has not occurred in the past, is not occurring presently, and is not expected to occur in

the foreseeable future in all the water bodies identified by SLCC."[21] This does not correctly apply the standard.

The Regional Board's approach is inconsistent with the federal regulations and incongruent with the objectives of the Clean Water Act. The concept of a water body having designated uses—that is, desirable and attainable uses—is central to establishing appropriate water quality standards. (40 CFR § 131.3(e); 63 Fed. Reg. 36749, July 7, 1998.) The uses describe the State's management objectives and expectations for its waters and allows the States to identify collective goals. (*Id.*) Federal regulations are structured to ensure that States designate appropriate uses reflecting both the current conditions, past conditions and the potential of a water body to attain a use even if it is not being attained currently. These are goals to strive for because without goals, there will be no movement toward the Clean Water Act's purpose to restore and maintain the Nation's waters. (33 U.S.C. § 1251(a); see also Water Code § 13000.)

Comment 5 (continued)

The Regional Board must make a sufficient evidentiary showing to remove the MUN use designation, satisfying the appropriate burden of proof. The State Board should send these Basin Plan Amendments back to the Regional Board so that it can make such a showing.

Statement that this issue was raised before the Regional Board: This inconsistency with the categorical exemption in the Drinking Water Policy and inadequacy of assessment of impacts was raised by multiple parties, including the Baykeeper Letter and the SRSWPP Letter and were addressed by the Regional Board's "Broad Issue 3: Consistency with the *Sources of Drinking Water Policy*."

***Statement that the Regional Board's Response was inadequate*:** The Response to Comments made no changes to the Basin Plan Amendments in response to comments and nor did the responses elaborate on information that was provided in the Draft Staff Report. (See, e.g., Response to Broad Comment 1, pp. 4-5; Broad Comment 3, p. 7; Response to Sacramento River Source Water Protection Program, pp. 9-10; Responses, pp. 12-13; Responses, p. 20; Responses, p. 25; pp. 39-41.)

D. The Regionwide MUN Evaluation Process Will Leave Some Water Bodies Without Water Quality Standards, as the MUN Beneficial Use Is the Only Designation for the Water Body.

The Court of Appeal has held that a blanket stripping of all uses from water bodies could leave the State "in violation of its obligation under the Clean Water Act to adopt water quality standards." (*California Assn. of Sanitation Agencies v. State Water Resources Control Bd.* (2012) 208 Cal.App.4th 1438, 1458.) This Process will have exactly this result.

The Regional Board uses the "tributary rule" to determine the beneficial use for streams not listed in their respective Basin Plan. Under the rule, tributary "streams" have the same beneficial uses as the streams, lakes or reservoirs to which they are tributary. (*California Assn. of Sanitation Agencies*, *supra*, 208 Cal.App.4th at 1445-47, 1458-63 (finding the tributary rule to be a reasonable means of protecting the beneficial uses of the waters of the region).) The Regional

Comment 6

[21] Staff Report at pp. viii, xxi.

Board adopted the tributary rule as a functional tool to allow it to make decisions involving surface waters that are not identified in the Basin Plan with their existing and potential beneficial uses and for which the Regional Board possesses little detailed information at the time decisions concerning those waters need to be made. (*Id.*) Other than the tributary rule, the only beneficial use given for water bodies that are not identified in their respective Basin Plan is the MUN beneficial use.[22]

However, the Regional Board does not interpret constructed agricultural drains to be "streams" for purposes of the tributary rule.[23] Thus, while the Regional Board considers the flow through these drains to be waters of the United States, for purposes of the Clean Water Act and NPDES permitting, the Regional Board has not designated beneficial uses to such drains, unless explicitly identified in Table II-1 in the Basin Plan.[24]

Water bodies classified as C1, Constructed Ag Drains/Combo (drainage and supply) would definitively not be covered by the tributary rule and, thus, prior to the application of this Process, would only be designated as supporting MUN uses. After dedesignation of MUN, those waters would have no designated beneficial use. It is unclear whether the Regional Board would interpret water bodies as "streams" for purposes of the tributary rule for category C2 (constructed agricultural supply) or whether all water bodies in categories M1 or M2 (modified agricultural drain and supply channels and supply channels only, respectively) would be considered "streams" for the tributary rule. The Regional Board must clarify whether those waters are subject to the tributary rule. And if they are not, the Regional Board must revise the Process to comply with its obligation under the Clean Water Act and Porter-Cologne to designate beneficial uses for all waters.[25]

Comment 6 (continued)

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[22] Basin Plans, Beneficial Uses at pp. II-2.00-01.

[23] State Water Board WQO 2002-0016 at p. 5; Regional Board Order No. R5-2010-0002-01, City of Turlock Water Quality Control Facility at pp. 3-4.

[24] Regional Board Order No. R5-2010-0002-01 at pp. 3-4; Resolution R5-2017-0088, Att. 1 at pp. 5, 34 (water bodies with a designated beneficial use identified in the Table II-1 of the Basin Plan are not eligible for evaluation under the Regionwide MUN Beneficial Use Process). The Regional Board has determined that it may, in its own judgment, determine that the designated use of a downstream identified water body is not appropriate to for its tributary and, thus, "on a case-by-case basis" determine the tributary rule does not apply. (Basin Plans, Beneficial Uses, p. II-2.00-01; *see also California Assn. of Sanitation Agencies, supra*, 208 Cal.App.4th at 1460.) But the Regional Board is not allowed to evaluate the appropriate beneficial use "on a case-by-case basis," such as during a permitting proceeding. It must be done in the context of a basin plan amendment. (*California Assn. of Sanitation Agencies, supra*, 208 Cal.App.4th at 1447, fn. 7.) "The designated uses of a water body are integral components of the water quality standards for that water body, and, therefore, must be specified in the Basin Plan (i.e., the Regional Board cannot simply designate uses in the course of, for example, drafting a permit, without first adopting the uses into the Basin Plan through an appropriate public process)." (Sacramento River and San Joaquin River Basin Plan, Appendix, United States Environmental Protection Agency, Region IX, to State Water Resources Control Board, dated May 26, 2000, Disapproving Portion of Basin Plan Amendments made through 1995, Attachment A, at p. 2.)

[25] In doing so, the Regional Board must keep in mind that in "no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States." (40 C.F.R. § 131.10(a).)

Comment 6 (continued)

Thus, for example, of the 231 water bodies dedesignated as supporting MUN uses in the SLCC district, 230 were in category C1 for constructed agricultural drains and irrigation supply. (Resolution R5-2017-0088, at pp. 14-28.) When assessing the impacts of MUN dedesignation, the Staff Report does not address whether the removal of the MUN designation will leave that water body without any use designation, potentially violating the the Clean Water Act and Porter-Cologne. (40 CFR § 131.6; Water Code § 13241; *California Assn. of Sanitation Agencies*, 208 Cal.App.4th at 1458.) Many of these water bodies, although it is presently unknown how many, in the SLCC District and many others eligible for removal of the MUN use designation may be left without water quality standards and requisite protections for existing and potential uses, including fish and wildlife habitat, groundwater recharge, or even irrigation supply.[26] The Staff Report justified the removal of the MUN use designation on grounds that it did not change other beneficial use designations, but it did not address the fact that no such designations may have been made.

Comment 7

Irrigation ditches provide important habitat for fish, vertebrates, invertebrates, and plants. In fact, the pictures in Appendix E to the Staff Report show several of the dedesignated waters (all listed as C1 Constructed Ag/Drain Combo) with abundant plant life; amphibian, insect, fish, and bird life is likely abundant. Indeed, the federally threatened giant garter snake uses irrigation ditches and canals as habitat.[27] Moreover, these channels are connected to groundwater that is itself designated as supporting MUN uses, which was not assessed in the Staff Report, as discussed in more detail below.

Moreover, while removing a non-fishable/swimmable use designation does not ordinarily require preparation of a UAA, when the minimum level of protections provided by the fishable/swimmable uses are absent, a different level of assessment must occur. Federal regulations state: "A State must conduct a use attainability analysis as described in § 131.3(g) and paragraph (g) of [40 CFR 131.10], whenever: (1) The State designates for the first time, or has previously designated for a water body, uses that do not include the uses specified in section 101(a)(2) of the Act [fishable/swimmable uses]." (40 CFR § 131.10(j)(1); see also 40 CFR § 131.3(g) (use attainability analysis is a structured scientific assessment of the factors affecting the attainment).) Where the MUN use designation is being removed or changed to a LMUN (as discussed below), and no fishable/swimmable use has been designated to that water body, a UAA assessment seems to be required. In any event, some water quality standard must be established.

Finally, pursuant to 40 CFR §131.10(g) and (h), it would not be appropriate for waters that require a UAA to dedesignate a MUN beneficial use if such waters do not meet any of the criteria in subsection (g) of 40 CFR § 131.10.[28]

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[26] Uses intended to protect wildlife and other aquatic life include WARM, COLD, MIGR, SPWN, and WILD. Uses intended to protect groundwater recharge are GWR and those intended to protect agricultural supply are (AGR). (Basin Plans, Beneficial Uses, p. II-1.00.)

[27] See Programmatic Formal Consultation for U.S. Army Corps of Engineers 404 Permitted Projects with Relatively Small Effects on the Giant Garter Snake within Butte, Colusa, Glenn, Fresno, Merced, Sacramento, San Joaquin, Solano, Stanislaus, Sutter and Yolo Counties, California (1997) at pp. 2, 9-10, available at https://www.fws.gov/sacramento/es/Consultation/Programmatic-Consultations/Documents/ggs%20programmatic%20bo.pdf

[28] EPA Water Quality Standards Handbook, Removal of Designated Uses, at p. 8, fig. 2-12.7.

Comment 8

The Regional Board adopted a *process* to *evaluate* protections required for water bodies it defines as "agriculturally dominated," yet it did not assess that actual protections provided (or lack thereof) for these waters nor did it construct a process that could capture such deficiencies. The Regional Board seemed more concerned about a short path to convenience and strayed from the purposes of the Clean Water and Porter-Cologne Acts, which is to *improve* water quality. (33 U.S.C. § 1251(a)(2); 80 Fed. Reg. 51020-01 (emphasis added).)

Statement that this issue was raised before the Regional Board: This inconsistency with the categorical exemption in the Drinking Water Policy and inadequacy of assessment of impacts and protection of other beneficial uses was raised by multiple parties, as addressed by the Regional Board's Broad Issues 1: Monitoring Impacts and 3: Consistency with the *Sources of Drinking Water Policy*, and Comments by EPA and the San Francisco Baykeeper Letter.

***Statement that the Regional Board's Response was inadequate*:** The Response to Comments made no changes to the Basin Plan Amendments in response to comments and nor did the responses elaborate on information that was provided in the Draft Staff Report. (See, e.g., Response to Broad Comment 1, pp. 3-5, Broad Comment 3, p. 7; Response to Sacramento River Source Water Protection Program, pp. 9-10; Responses, pp. 12-13; Responses, pp. 21-22, p. 25, pp. 39-41.)

II. The LMUN Designation Violates Federal and State Law.

Summary of comments 9 & 11

The Basin Plan Amendments established a new beneficial use subcategory of MUN uses, Limited-MUN (LMUN), for agriculturally dominated water bodies that do not meet the criteria for exemption under the Drinking Water Policy Exception 2b, but which purportedly have limited potential as a source of MUN due to "inherent characteristics." (See, e.g., Staff Report at p. 43.) The category was developed primarily because dischargers (predominantly irrigated agriculture, POTWs and permittees for storm water runoff (Staff Report at pp. 1-2)), wanted relief from required compliance of water quality standards for MUN uses, such as maximum contaminant levels (MCLs) under title 22 of the California Code of Regulations. (See Staff Report at pp. 1-2, 43-46.) However, the LMUN category does provide the requisite water quality protections for receiving waters, downstream uses, or groundwater that are require of water quality standards under state and federal law. Its sole water quality objective is a statement that water quality will be protected consistent with the state antidegradation policy, which is a circular and inexecutable standard.

If the water bodies do not meet the criteria for an exemption from the Drinking Water Policy and do not otherwise quality for dedesignation of MUN use, then the Regional Board should not try to effectively exempt them from complying with MUN protections through a backdoor.

A. LMUN is an Improper Beneficial Use Subcategory and Fails to Provide Protections Required of Water Quality Standards.

Comment 9

The Regional Board is clearly authorized to create subcategories of beneficial uses, although such subcategories must provide the requisite protections under federal and state law

for water quality standards. (40 CFR § 131.10(c); 40 CFR § 131.6; Water Code § 13241; Water Code § 13050.) The Regional Board may select the level of specificity it desires, but the subcategory must be at least as specific as the uses listed in the Clean Water Act under sections 101(a) (fishable/swimmable) and 303(c) (non-fishable/swimmable, such as public drinking water and agriculture supply). (USEPA, 1990a.) The typical subcategories are the distinctions between warm and cold water fisheries and between contact recreation (in the water) and non-contact recreation (on the water).

The LMUN use is defined as: "Uses of water for municipal and domestic supply in agriculturally dominated water bodies where the use is limited by water body characteristics such as intermittent flow, management to maintain intended agricultural use and/or constituent concentrations in the water body."[29] (Resolution R5-2017-0088 at pp. 1, 30.) The water quality objective established to protect LMUN uses is: "Water quality and downstream beneficial uses will be protected consistent with the state antidegradation policy." (Resolution R5-2017-0088 at pp. 4, 33.)

Under the Basin Plan Amendments, water bodies supporting LMUN uses are Constructed Ag Supply (C2), Modified Ag Supply (M2), Natural Ag Drainage/Combo (drainage and supply) (B1) and Natural Ag Supply (B2). (Resolution R5-2017-0088, pp. 5, 35, Table X.)

By comparison, the definition of MUN uses is: "uses of water for community, military, or individual water supply systems including, but not limited to, drinking water supply." (Sacramento/San Joaquin River Basins, Basin Plan, Beneficial Uses at p. II-1.00.) Its water quality objectives are maximum contaminant levels (MCLs), as provided in title 22 of the California Code of Regulations, as well as other numeric and narrative protections.

The primary characteristic of the LMUN use is its distinction as not supporting MUN uses or providing protection at comparable level as the MUN use designation. (See Staff Report at pp. 1-2, 43-46.) The LMUN use has essentially the same effect as MUN dedesignation, but without the respective protections that are afforded such waters, such as assurance that at least fishable/swimmable protections are provided, as discussed above, and requisite monitoring under Exception 2b, as discussed in more detail below. However, the use and value assessment for MUN dedesignation, which is insufficient for that purpose as discussed above, lacks substantive demonstration for the change of a MUN designation to LMUN.[30] There is even less basis to allow what is essentially a dedesignation of MUN for water bodies that clearly do not meet the criteria for exemption for such water quality standards.

Comment 9 (continued)

The genesis of the new subcategory was to relieve dischargers from compliance with the

[29] The definition encompasses a broader category of waters than commonly characterized in the Staff Report, which is Ag dominated water bodies that do not meet the Sources of Drinking Water Policy exceptions, but that "have inherent limiting conditions, such as low or intermittent flows and/or elevated natural background constituent concentrations." (See, e.g. Staff Report, p. 3.)

[30] In a late revision, the Regional Board changed its characterization of the redesignation to LMUN. It now describes the change as a "refinement" to LMUN. This change is purely cosmetic and appears to be intended to make the redesignation appear less dramatic than what it actually is: a backdoor dedesignation of the MUN use from a very large category of waters.

Comment 9 (continued)

relatively strict water quality standards under MUN designations. The Staff Report lacks an adequate use and value assessment of the waters that will have their use designation changed from MUN to LMUN, but it justifies the change on grounds that it enables the respective water bodies 'to be fully utilized for their intended purpose." (See, e.g., Staff Report, p. 21.) However, such use and value is essentially described as a conveyance for agricultural drainage, which is not allowed under federal regulations. (40 CFR § 131.10(a) ("In no case shall a State adopt waste transport or waste assimilation as a designated use for any waters of the United States.")

Comment 10

Moreover, the State Board is currently considering a variance policy that would allow some deviation to achieve beneficial uses. It appears that the LMUN standard may simply provide a variance from the MUN designation without the protections afforded by a formal variance (e.g., time limitation on variance, requirement to plan to achieve beneficial use in the future). A variance procedure may be a more appropriate vehicle to address the issues that the Board is attempting to shoehorn into the LMUN dedesignation.

Comment 11

Ultimately, if water bodies do not meet the criteria for a categorical exemption of MUN designation, provided under the Drinking Water Policy or other provision of law, then they should not have their MUN designation removed or relaxed. If they meet criteria for a categorical exemption, then such criteria must be demonstrated. Otherwise, the LMUN subcategory serves only as a backdoor exemption to MUN designation without justification. As discussed above, the objective of the Clean Water and Porter-Cologne Acts is to *improve* water quality, which is the basis for requirements for water quality standards and the obligation that States designate water bodies with the highest uses attainable. (33 U.S.C. § 1251(a); 40 CFR § 131.3(e); 63 FR 36749, July 7, 1998.) The concept of a water body having designated uses—that is, desirable and attainable uses—is central to establishing appropriate water quality standards. (40 CFR § 131.3(e); 63 FR 36749, July 7, 1998.)

The Regional Board should not lower water quality standards for a significant number of water bodies, particularly for water bodies that are clearly attributing to the overall degradation of water quality in the Central Valley. As stated, the Staff Report indicates that 6,000 water bodies may be eligible for the Regionwide MUN Evaluation Process (both MUN dedesignation and change to LMUN uses), which would have a significant impact on overall water quality in the Central Valley. Due to the already degraded conditions and the crisis the Central Valley is facing in residents' access to safe and clean drinking water, this Process will in all likelihood thwart efforts to improve water quality and lead to further degradation.

Statement that this issue was raised before the Regional Board: This issue was raised by several parties, as indicated by the Broad Issue 4: Application and Protection of the Limited-MUN Beneficial Use in the Regional Board's responses to comments and the SRSWPP Letter and the Baykeeper Letter.

***Statement that the Regional Board's Response was inadequate*:** The Response to Comments made no changes to the Basin Plan Amendments in response to comments and nor did the responses elaborate on information that was provided in the Draft Staff Report. (*See, e.g.*, Response to Comments, pp. 8-11, p. 20, p. 25, pp. 39-41.)

B. The Water Quality Objective Associated with the LMUN Designation Is Circular

and Unlawful.

The water quality objective associated with LMUN is "[w]ater quality and downstream beneficial uses will be protected consistent with the state antidegradation policy." (Resolution R5-2017-0088, pp. 4, 33.) However, this water quality objective is impossible to apply because consistency with the antidegradation policy requires a standard upon which water quality can be compared, as established by the water quality objective.

As an initial matter, the state antidegradation policy only applies when a "high quality water" may be degraded. However, "high quality" and "degradation" are relative terms. To determine whether waters are high quality, the Regional Board must compare "the best quality that has existed since 1968 to the water quality objectives." (*Asociacion de Gente Unida por el Agua v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 1255, 1270 ("*AGUA*").) For the MUN use, the comparison is thus the best water quality that has existed since 1968 against the water quality objectives established in the Basin Plan for MUN use. By removing the MUN numeric MCLs and establishing the Antidegradation Policy as the water quality objective, the Regional Board has created a circular and inexecutable standard: to apply the policy, the board must determine whether high quality waters exist and to make that determination the Board must refer to a water quality objective, which *is the Antidegradation Policy itself.*[31] Agencies abuse their discretion when they make decisions that do not follow from evidence. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (2012) 11 Cal.3d 506, 515.) To rely on such circular logic is therefore a clear abuse of discretion.

Moreover, if the purpose for changing the use designation from MUN to LMUN is to relax water quality standards, then it is unclear whether the antidegradation policy would apply to LMUN designated water bodies *categorically.* Thus, for no other reason than that the water body was designated as supporting LMUN uses, they water body may be deemed to not be "high quality waters" and the antidegradation policy would not be applicable for the water body itself.

Should LMUN water bodies be deemed high quality waters, a determination of consistency with the antidegradation policy requires an assessment whether any degradation of such waters is in the maximum benefit of the people of the state, will not unreasonably affect beneficial uses, and will not violate water quality standards. (*AGUA*, 210 Cal.App.4th at 1262.) Such an assessment cannot be made without a standard upon which "maximum," "unreasonable" and compliance with water quality standards can be measured. Lastly, the antidegradation policy requires best practical treatment and control measures to be applied to prevent violation of with water quality standards and attainment of the highest water quality consistent with the maximum benefit to the people. (*Id.*) The LMUN water quality objective is impossible to apply and, thus, does not satisfy the basic requirements for establishing such a standard, which is to establish the level of protection necessary to protect a water body's beneficial uses. (Water Code § 13050.)

Comment 12

[31] Nor do the Basin Plan Amendments contemplate what would happen if the analysis revealed that those waters were low-quality. In that case, the Antidegradation Policy would not apply. And without a water quality objective other than the Antidegradation Policy, there would be no prohibition on discharge that further degraded water quality. This would violate the State's obligation to designate and protect beneficial uses.

Comment 12 (continued)

The Regional Board justifies the LMUN's water quality objective on grounds that it protects downstream uses and allows agriculturally dominated water bodies "to be fully utilized for their intended purpose." (*See, e.g.*, Staff Report, p. 21.) However, water quality objectives are required to protect *receiving* waters, as well as downstream uses. (40 CFR § 131.10(b).)

Comment 13

The Regional Board further contends that the LMUN use protects water bodies' potential to be used as MUN in the future. This justification is equally unavailing, primarily because the Staff Report does not provide support for the contention. In addition, the LMUN subcategory effectively strips the protections of MUN water bodies and relaxes water quality standards accordingly, most notably MCLs and CTRs.[32] The Regional Board fails to demonstrate how such action will protect the water bodies' potential use as sources of drinking water in the future, which is the function of the MUN use designation. Moreover, the Basin Plan Amendments appear to make it an impossibility to exceed the water quality objective of LMUN uses. (Resolution R5-2017-0088, pp. 12, 41.) And as discussed below, the monitoring requirements associated with the LMUN designation are insufficient. A water quality standard that cannot be assessed or enforced cannot provide protection to water quality.

Statement that this issue was raised before the Regional Board: This issue was raised by several parties, as indicated by the Broad Issue 4: Application and Protection of the Limited-MUN Beneficial Use in the Regional Board's responses to comments and the SRSWPP Letter and the Baykeeper Letter.

***Statement that the Regional Board's Response was inadequate*:** The Response to Comments made no changes to the Basin Plan Amendments in response to comments nor did the responses elaborate on information that was provided in the Draft Staff Report. (*See, e.g.*, Response to Comments, pp. 8-9, 20, 25, pp. 39-41.)

III. The Basin Plan Amendments Do Not Comply with Exception 2b Because They Do Not Require Monitoring to Assure Compliance with Downstream Water Quality Objectives and Groundwater.

Summary of comments 14 - 18

The Basin Plan Amendments' monitoring provisions are insufficient because they do not require that "the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards."[33] The monitoring provisions as described in Surveillance and Monitoring Chapter of the Staff Report for both waters where the Regional Board is dedesignating MUN and for waters where the Board is redesignating the beneficial use as LMUN fail to comply with this Policy.[34]

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[32] The Staff Report contends that this part of the amendment would be consistent with the *Sources of Drinking Water Policy* because the Board continues to designate the MUN use rather than removing it altogether.

[33] Sources of Drinking Water Policy at p. 2.

[34] Moreover, monitoring under other programs is conducted for purposes of particular discharges being regulated. If an exceedance is not associated with the particular discharges regulated by discharges under the particular permit, such exceedances will not be addressed. For example some programs are only geared towards monitoring for current discharges and are not focused on exceedances that may be the result of historical contamination. Some NPDES permit monitoring, for example, may not be looking for

A. Monitoring Is Insufficient in Dedesignated Waters.

Summary of comments 14 - 17

The Drinking Water Policy Exception 2b allows a Regional Board to dedesignate MUN uses only where "discharge… is monitored to assure compliance with all relevant water quality objectives…."[35] Basin Plans must conform to state policies for water quality control. (Water Code § 13240.) For waters that the Regional Board is proposing to dedesignate as MUN, therefore, the Board must require monitoring that will ensure that downstream waters comply with objectives.

There are two flaws with the Basin Plan Amendments' approach. First, it applies the wrong standard: instead of requiring monitoring that assures that discharges in the dedesignated waters are not causing or contributing to exceedances of water quality objectives in downstream waters, it asks whether the *dedesignation itself* is contributing to "unreasonable impacts" downstream.[36] Second, the proposed monitoring plan can satisfy neither the Regional Board's incorrect standard nor the correct one.

1. The Regional Board Applies the Wrong Standard to Assess the Adequacy of Its Monitoring Plan.

Comment 14

The Basin Plan Amendments misstates the obligation that the Sources of Drinking Water Policy places on the Board when considering a dedesignation. The Amendments state that the Regional Board will:

> …ensure that water quality monitoring data are sufficient to demonstrate that neither the dedesignation of the MUN beneficial use nor the change of a MUN to a LMUN beneficial use designation will result in unreasonable impacts to downstream water bodies designated as supporting the LMUN or MUN beneficial uses.[37]

Rather than focus on whether downstream waters comply with water quality objectives and whether discharges from the dedesignated system are causing or contributing to those exceedances, the Board asks whether the *change* in designation affects downstream uses. In addition, the Board inappropriately substitutes an "unreasonable impacts" standard for the correct standard, which is whether water quality objectives will be exceeded. The term "unreasonable impacts" does not appear in the Policy.[38]

Both distinctions are important. Porter-Cologne, the Sources of Drinking Water Policy and the Clean Water Act are each designed to protect water quality and in fact require protection

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particular constituents: a waste treatment plant may not be looking for pesticide pollution.

[35] Sources of Drinking Water Policy at p. 2.
[36] Resolution R5-2017-0088, Attach. 1, at p. 11.
[37] Resolution R5-2017-0088, Attach. 1, at p. 11.
[38] Neither the Staff Report not the Response to Comments discuss the monitoring requirements focus on avoiding "unreasonable impacts" rather than assuring compliance with WQOs.

Comment 14 (continued)

of downstream water quality through attainment of objectives. From the perspective of downstream users, it is unimportant whether the change in designation affects the water quality: what is important is whether standards are met. The policy is clear: if discharge from a system is causing or contributing to downstream exceedances, the Policy does not permit the Regional Board to dedesignate that system.

2. The Monitoring Plan Is Inadequate Under Any Standard.

To comply with the mandate that discharges from dedesignated systems are monitored to assure compliance with downstream water quality objectives: 1) monitoring must be capable of tracing exceedances back through the system to at least the specific dedesignated waters, if not the specific dischargers; 2) there must be monitoring for all constituents of concern; and 3) the monitoring must be mandatory. The monitoring required by the Basin Plan Amendments does not satisfy these requirements. In fact, the monitoring required under the Amendments could not even achieve the lower standard that the Board applied, which was that the change in the designation does not produce unreasonable impacts downstream.

A highly analogous Court of Appeal decision recently found a monitoring program to be legally inadequate. The court analyzed a monitoring program designed to determine whether dairy operations were degrading groundwater. (*AGUA*, *supra*, 210 Cal.App.4th at 1276-67.) Three of the Court's reasons for finding the program inadequate are relevant here. First, the monitoring was not detailed enough to trace discharges to the discharger. The dairy order provided for monitoring from irrigation supply wells, which are screened across multiple depths and therefore allow for mixing of waters in the sample. This made it impossible to tell whether pollution in the groundwater was from new (shallow) discharges or old (deeper) discharges. (*Id*. at 1275-76.) Second, the monitoring did not test for all constituents of concern. (*Id*. at 1275.)[39] Third, the Court also found that the fact that the Regional Board's executive officer had the authority to order more monitoring did not save the order. Discretionary monitoring, without "mandatory standards," "does not ensure that no further degradation" will occur. (*Id*. at 1277.)

The same analysis applies to the dedesignation of waters supporting MUN use because the monitoring required by the Amendments cannot trace water quality exceedances to specific dedesignated waters or specific dischargers. This is the clear result when reviewing the dedesignation of MUN uses for the waters in the San Luis Canal Company's District, as the monitoring does not screen for critical constituents, and the Regional Board's authority to order more monitoring is discretionary.[40]

The Staff Report relies on existing monitoring programs under the Irrigated Lands Regulatory Program ("ILRP").[41] However, these programs are insufficient to determine both

Comment 15

[39] The information sheet for the dairy order in *AGUA* listed the primary constituents of concern as "ammonia, nitrates, phosphorus, chloride, boron, salts, pathogens, and organic matter." (*AGUA*, *supra*, 210 Cal.App.4th at 1276.) But the monitoring program required testing only for "nitrate, electrical conductivity (which measures salts) and phosphorous." (*Id.*)
[40] Staff Report at pp. xxi-xxii.
[41] Staff Report at p. 70.

Comment 15 (continued)

whether specific dedesignated waters are discharging pollutants into downstream waters and to determine which dischargers are contributing to exceedances. For instance, the current Waste Discharge Requirements for the Eastern San Joaquin Region for water year 2016 only contains 38 monitoring sites, which monitor all surface waters in a geographical area consisting of approximately 1 million acres of irrigated agricultural lands.[42] In its Second Draft of the Waste Discharge Requirements, proposed for adoption in January, the State Board reviewed the existing monitoring in the Eastern San Joaquin Region and found that it is not "of sufficient density (spatially and temporally) to identify general locations of possible pollution."[43] The State Board concluded that current surface monitoring programs lacks the capacity to detect exceedances and track them through the watershed. The State Board went on to propose convening a new expert panel to develop a new methodology for monitoring surface waters. It is difficult to square the State Board's proposed finding that existing monitoring is insufficient for the purposes of regulating agricultural pollution in the Eastern San Joaquin region with the Regional Board's reliance on existing monitoring programs to implement the MUN dedesignation throughout the entire Central Valley.

Comment 16

The application of the Regional Board's process to the 231 water bodies dedesignated in the San Luis Canal Company's territory illustrates the insufficiency of the process outlined in the Basin Plan Amendments. Amendment.[44] The monitoring review for downstream water bodies revealed that the major downstream waters, Salt Slough and the San Joaquin River, contained exceedances for several drinking water contaminants.[45]

The Staff Report makes clear that the Regional Board is not interested in tracing these exceedances back to the specific dedesignated water bodies or specific dischargers that are causing or contributing to these exceedances. In fact, based on the monitoring data available, making such a determination is impossible. There is only one monitoring site within the San Luis Canal Company's territory. It is in Salt Slough, downstream of most of the water bodies

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[42] Modified Eastern San Joaquin Draft Waste Discharge Requirements (Second Staff-Proposed Draft), App. A, Attach. B, at pp. 5-7.

[43] In the Matter of Review of Waste Discharge Requirements General Order No. R5-2012-0116 for Growers Within the Eastern San Joaquin River Watershed that are Members of the Third-Party Group, Second Draft, at p. 58-62 ("ESJ WDRs Second Draft") available at https://www.waterboards.ca.gov/public_notices/petitions/water_quality/a2239_sanjoaquin_ag.shtml

[44] The case-by-case monitoring assessments are intended to "ensure that relevant water quality objectives will be monitored to prevent potentially unreasonable water quality impacts." (Response to Comments at p. 4.) Evaluating the case studies therefore is a valid way to assess the Basin Plan Amendment evaluation process.

[45] Staff Report, Appendix E, at 277. Salt Slough tested as impaired for electrical conductivity, total dissolved solids, *E. coli*, dissolved oxygen, boron, chlorpyrifos, DDE, DDT, dimethoate, and diuron. Downstream portions of the San Joaquin River are listed as impaired in the California 2010 303(d) integrated Report for boron, chlorpyrifos, DDE, DDT, diazinon, diuron, EC, group A pesticides, mercury, selenium, temperature, toxaphene, unknown toxicity, and alpha-BHC/alpha-HCH. (*Id.* at 277-8.) Although the Staff Report states that "many of these constituents are being addressed by a TMDL control program," the 2012 California 303(d) integrated report lists TMDLs as having been approved only for chlorpyrifos and diazinon. (*Id.* at 280; 2012 California 303(d) Integrated Report, available at https://www.waterboards.ca.gov/water_issues/programs/tmdl/integrated2012.shtml.)

proposed for designation.[46] If exceedances are detected at that monitoring site (as they have been), there is no way to trace those exceedances back to the operations that discharged them into the waters. In other words, if nothing changes, exceedances will continue. The monitoring program for dedesignation of water bodies in the SLCC, therefore, does not meet the requirement that discharges from dedesignated systems be monitored to "assure compliance with all relevant water quality objectives."[47]

Additionally, the single monitoring site on Salt Slough does not test for several constituents of concern in the San Joaquin basin.[48] Missing constituents include chloride, perchlorate, sodium, sulfate, total dissolved solids, aluminum, iron (total), manganese (total), mercury, alpha-BHC/alpha-HCH, bis (2-ethylhexyl) phthalate, trihalomethanes, DDE, DDT, diazinon, dimethoate, dieldrin, chlordane, endrin, heptachlor, heptachlor epoxide, lindane, endosulfan (total), and toxaphene.[49] Of these missing constituents, downstream waters are impaired for TDS, DDE, DDT, dimethoate, toxaphene, and alpha-BHC/alpha-HCH. Although several of these are monitored farther down the San Joaquin River, by that point discharges will have been mixed with discharges from other (possibly dedesignated) water systems, making it impossible to determine whether SLCC, let alone any particular operation within SLCC, was the source of those discharges.

Moreover, the Regional Board's finding that there were "no data gaps" with the monitoring program for the SLCC dedesignations is both illogical and lacking in the requisite evidentiary support for dedesignating water bodies.[50] These missing constituents are clear examples of a data gap. The Regional Board's use of the SLCC dedesignation as a successful case study, despite these clear deficiencies, throws the entire program's analytical framework into doubt.

Comment 16 (continued)

Finally, the Basin Plan Amendments give the Regional Board authority to order additional monitoring if it determines that existing data is insufficient.[51] But this is not enough to save the monitoring program. As discussed above, mere discretionary authority to order additional monitoring cannot save a program that does not in fact require enough data to determine whether discharges are leading to water quality impacts. (See *AGUA*, *supra*, 210 Cal.App.4th at 1277.) Moreover, the Regional Board's discussion of the monitoring in the SLCC territory clearly demonstrates that the Regional Board is not requiring the necessary evidentiary support to dedesignate MUN uses from waters, let alone assuring adequate monitoring is ordered to comply with the requirement for dedesignation set forth in the Drinking Water Policy.

Comment 17

[46] Staff Report, Appendix D, at 162 (map of Monitoring Sites in the Lower San Joaquin Basin showing only one site in SLCC's territory.)
[47] Sources of Drinking Water Policy at p. 3. The Regional Board appears to be treating the entire SLCC network as one "system" for the purposes of the monitoring analysis. But the rest of the analysis treats each water body within the SLCC as separate water bodies subject to separate evaluation using the flow charts. There is no discussion of this inconsistency in the Staff Report.
[48] Compare Appendix C, Constituents of Concern in Lower San Joaquin River, with Appendix D, Lower San Joaquin River Comprehensive Monitoring Guide.
[49] *Id.*
[50] Staff Report, Appendix E, at p. 278.
[51] (Resolution R5-2017-0088, Attach. 1 at 12.)

Comment 17 (continued)

The Sources of Drinking Water Policy does not give the Regional Board authority to dedesignate waters unless it can be assured that discharges from those waters into waters supporting MUN uses are not causing or contributing to exceedances of water quality objectives. The State Board must direct the Regional Board to order sufficient monitoring, based on the appropriate evidentiary support, at the time any MUN use is designated in order to ensure that downstream uses will be protected, as required.

Statement that this issue was raised before the Regional Board: The inadequacy of monitoring was raised by the Baykeeper Letter[52] and the Sacramento River Water Protection Program Letter.[53]

Statement that the Regional Board's response to this comment was inadequate: The Response to Comments document does not document any changes to the monitoring program as a result of the comments raised.[54]

B. The LMUN Beneficial Use Unlawfully Fails to Require Monitoring.

Comment 18

The Amendments' approach to monitoring LMUN waters is inadequate. In fact, there is no mandatory monitoring, which is particularly inappropriate since this new designated use subcategory is essentially a MUN dedesignation for waters that are not exempted from MUN designation under the Drinking Water Policy, as discussed above.[55] The Regional Board stated that it may use "triggers" to evaluate compliance with water quality objectives, but specified that such "triggers" will not represent regulatory levels of exceedances for any constituents.[56] This statement is inconsistent with federal and state law for several reasons.

First, "triggers" are the indication that a narrative, as opposed to numerical, water quality objective has been violated. Thus, a "trigger" would represent a regulatory level exceedance for a constituent. Second, the "triggers" that the Regional Board uses in the context of evaluating water quality for waters supporting LMUN uses are in fact violations of water quality objectives for *other* beneficial uses for the same water body. Thus, the "trigger" in this regard is also a regulatory level exceedance for the particular constituent. Third, the fact that the Regional Board contends that no level of any constituent would constitute a violation of the water quality objective established to protect the uses of these waters itself demonstrates that both the use designation and the associated water quality objective adopted to protect that use are inconsistent with minimum requirements for water quality standards under both federal and state law.

Nevertheless, even if such "triggers" were appropriate, a monitoring program that is based on a lack of enforceable standards is not allowed and is an abuse of a Regional Board's discretion. (*AGUA*, *supra*, 120 Cal.App.4th at 1277.) The Regional Board's Response to

[52] Baykeeper Letter, at pp. 2-3.
[53] SRSWPP Letter at pp. 3, 7-10.
[54] Response to Comments at pp. 4-5.
[55] Resolution R5-2017-0088, Attach. 1, at p. 12.
[56] *Id.*

Comments highlights the problems with the lack of mandatory monitoring. A key paragraph begins, "if a discharge to an LMUN water body that is upstream of a MUN water body is causing a slight amount of degradation in downstream water quality in a waterbody that is considered high quality for the constituent at issue…."[57] The rest of the paragraph goes on to detail how the Regional Board would respond to such a situation. However, given the fact that there is no mandatory monitoring of discharges into LMUN waters, it is highly unlikely that the Regional Board will know which of the many discharges into the water are causing the degradation. In fact, as discussed above, given the extremely thin coverage of monitoring sites in the Central Valley, the Board will be unlikely to know whether any particular LMUN water body is contributing to downstream degradation if such exceedance is detected at all.

Furthermore, neither the Regional Board nor any discharger would be required to review or enforce exceedances of waters that undergo or have undergone Regionwide MUN Evaluation process, as the Basin Plan only requires the review of monitoring "[a]s resources permit." (Staff Report, p. xxi.)

The Process, therefore, does not provide sufficient monitory to ensure that downstream waters meet water quality objectives. The Regional Board refuses to order sufficient monitoring to determine which discharges are causing degradation. And, without the requisite monitoring data, the Regional Board makes an unsubstantiated claim that discharges into waters supporting LMUN uses will not degrade downstream uses and, thus, is allegedly consistent with the state antidegradation policy (which, as discussed above, is legally insufficient). The evidence in the record does not support this. And the application of the Process to the SLCC waters demonstrates the Process's flaws. The State Board should direct the Regional Board to develop a monitoring program that will allow it to trace downstream degradation to discharges into LMUN waters.

Comment 18 (continued)

***Statement that this issue was raised before the Regional Board*:** Sufficiency of the monitoring for redesignated areas was raised by the SRSWPP Letter, at p. 7. The inadequacy of the LMUN designation to protect downstream uses was raised in the Baykeeper Letter at p. 4.

***Statement that the Regional Board's response to this comment was inadequate*:** The Response to Comments identified no significant changes to the Basin Plan Amendment or staff report in response to these comments.

IV. The Amendments Do Not Assess Groundwater Impacts.

The Central Valley is currently in a drinking water crisis. Nitrate and other toxic chemical pollution impacts hundreds of thousands of wells, many of which serve low-income populations and communities of color. The Staff Report contains insufficient discussion of the impact that dedesignation will have on discharges of pollutants to groundwater, including seepage from canals and drains to groundwater, increases in pollutants in downstream floodplains that will then discharge to groundwater, and the cumulative effects of dedesignation across the Basins.

Summary of comments 19 & 20

A. The Staff Report Fails to Analyze Impacts on Groundwater Quality.

[57] Response to Comments at p. 9.

The Staff Report, which as noted below serves as a Supplemental Environmental Document, makes no mention of impacts on groundwater quality. As such, it fails as an environmental analysis, and cannot support a proper Antidegradation analysis.

There is a direct and demonstrable connection between agricultural dominated waterways and groundwater. (See, e.g., F. Edwin Harvey & Steven S. Sibray, *Delineating ground water recharge from leaking irrigation canals using water chemistry and isotopes*, 39 GROUND WATER 408 (May 2001) (chemical and isotopic results used to delineate canal, surface, and ground water and indicate leaking canal water recharges the underlying Brule Aquifer); Mirudhula K, Impact of Lined/Unlined Canal on Groundwater Recharge in the Lower Bhavani Basin, 3 International Journal of Engineering Research & Technology 1327 (Sept. 2014) (analyzing groundwater recharge from agricultural canals); SUSAN A. THIROS, *Conceptual Understanding and Groundwater Quality of the Basin-Fill Aquifer in Salt Lake Valley, Utah*, U.S. Dept. of the Interior Professional Paper 1781, p. 20 (Dec. 2010) ("Seepage losses from canals can recharge both the shallow and deeper parts of the basin- aquifer because the canals flow mainly through secondary recharge areas. Groundwater recharge has increased by almost one-third from that of predevelopment conditions, primarily due to the addition of canal seepage and excess irrigation water.").)[58]

While there appears to be a lack of data specifically related to the leaching of contaminants within agricultural dominated water bodies to groundwater, these same studies strongly suggest such a connection. (See Thiros, *supra*, at p. 25 (Under modern conditions, canal seepage and infiltration of excess irrigation water have contributed to higher concentrations of dissolved solids (greater than 1,000 mg/L) in some areas in this part of the valley."); *Harvey*, *supra* (analyzing water chemistry to determine canal leakage).)

Further, it is indisputable that contamination in surface water can impact water quality in groundwater. (See, e.g., C. Winter, J.W. Harvey, O.L. Franke & W.M. Alley, *Ground Water and Surface Water a Single Resource*, U.S. Geological Survey Circular 1139 (1998).)[59]

Despite this established connection between groundwater and surface water quality, the Staff Report does not acknowledge the impact of removing water quality objectives in agricultural dominated surface water bodies. It is highly likely that failing to ensure that surface water quality is protected—through water quality objectives and robust monitoring requirement—will have a negative impact on underlying groundwater.

As the Staff Report does not acknowledge – let alone analyze – the impact of dedesignating agricultural dominated water bodies on underlying groundwater quality, it is inadequate as an SED. Further, the analysis in the SED cannot support a legally compliant Antidegradation analysis, because it does not consider impacts on high quality groundwater, or whether permitting degradation of groundwater is consistent with the maximum benefit to the people of California. This is especially true given the flaws with the proposed Limited MUN designation, which are discussed above, and the fact that the LMUN designation will by its own

Comment 19

[58] Available at https://pubs.usgs.gov/pp/1781/pdf/pp1781_section2.pdf.
[59] Available at https://pubs.usgs.gov/circ/circ1139/htdocs/title.htm.

Comment 19 (continued)

terms only protects downstream beneficial uses with no mention of groundwater beneficial uses.

Statement that this issue was raised before the Regional Board: The insufficiency of the groundwater protection was raised by several parties, including the Valley Water Management Company and San Francisco Baykeeper.

***Statement that the Regional Board's Response to this comment was inadequate*:** The Response to Comments identified no significant changes to the Basin Plan Amendment or staff report in response to these comments. (*See*, Response to Comments, pp. 36-37; pp. 39-41.)

B. The Staff Report Fails to Consider the Disparate Impact of the Proposed Amendment on Communities of Color, Low-Income Communities and Disadvantaged Communities.

Comment 20

Perhaps because the Staff Report fails to acknowledge potential impacts on groundwater quality, it also fails to discuss the fact that those impacts are likely to be disproportionately borne by disadvantaged communities. As evidenced by the SWRCB's Human Right to Water Portal, many rural low-income and disadvantaged communities in the Central Valley cannot afford to treat groundwater contamination, and thus do not have access to safe and affordable drinking water. These communities are typically majority communities of color, and suffer the most severe impacts from groundwater contamination.

Impacts on groundwater quality caused by the proposed Amendment will thus likely have a disparate impact on low-income communities, communities of color and disadvantaged communities. As a result, the proposed Amendment violates our State's commitment to equality and freedom from discrimination. (See Gov. Code § 11135(a) ("No person in the State of California shall, on the basis of sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state.").)

Furthermore, the failure to adequately protect groundwater threatens California's Fair Employment and Housing Act, California Government Code 12900, et seq., which guarantee all Californians the right to hold and enjoy housing without discrimination based on race, color or national origin. (See also Gov. Code § 65008 (Any discriminatory action taken "pursuant to this title by any city, county, city and county, or other local governmental agency in this state is null and void if it denies to any individual or group of individuals the enjoyment of residence, landownership, tenancy, or any other land use in this state…"); Government Code §§ 12955, subd. (l) (unlawful to discriminate through public or private land use practices, decisions or authorizations).)

Statement that this issue was raised before the Regional Board: The insufficiency of the groundwater protection and disparate impacts on low-income communities and communities of color was raised by San Francisco Baykeeper.

***Statement that the Regional Board's Response to this comment was inadequate*:** The Response to Comments identified no significant changes to the Basin Plan Amendment or staff report in response to these comments. (*See*, Response to Comments, pp. 36-37; pp. 39-41.)

V. The Basin Plan Amendments Must Undergo Peer Review.

The Regional Board has improperly determined that the Basin Plan Amendments do not need to undergo peer review, as required under Health & Safety Code § 57004, as they allegedly do not rely on scientific findings or assumptions. Such a contention by the Regional Board is problematic for not only the 231 water bodies for which it removed the water quality standards necessary to protect sources of drinking water, but even more so for its creation of a Regionwide process to evaluate and lastly, for its creation of a beneficial use subcategory and associated water quality objective to necessary to protect those uses. Moreover, determination of the criteria and protocols to assess sufficient monitoring is complex. Last, for all water bodies not interpreted as "streams," a UAA is required which. A UAA is a structured scientific evaluation of use attainability, based on chemical and other scientific findings. (40 CFR §§ 131.3, subd. (g); 131.10, subd. (g); 131.10, subd. (j).)

Health & Safety Code § 57004 requires that an agency submit the "scientific portions of" a new rule to an external scientific body for peer review. A "rule" is explicitly defined as a policy that is adopted by the State Water Resources Control Board or Regional Boards "pursuant to the Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000) of the Water Code) that has the effect of a regulation and that is adopted in order to implement or make effective a statute." (Health & Saf. Code § 57004, subd. (a)(1)(B).) These Basin Plan Amendments are clearly such a "rule." The "scientific portions" of a rule include "foundations of a rule that are premised upon, or derived from, empirical data or other scientific findings, conclusions, or assumptions establishing a regulatory level, standard, or other requirement for the protection of public health or the environment." (Heath & Saf. Code § 57004, subd. (a)(2).)

The Regional Board has not sufficiently justified why the proposed Basin Plan Amendments, in contrast to other basin plan amendments, would not undergo peer review.[60] In its No Peer Review Justification,[61] the Regional Board states that it has not made any scientific findings: the Basin Plan Amendments are a pure "policy determination by the Board."[62] The Board further states that the dedesignation of MUN does not "establish a new standard" because the dedesignation is consistent with exception 2b to the Sources of Drinking Water Policy.[63]

Comment 21

[60] E.g. The San Joaquin River Organophosphorous (OP) Pesticide TMDL - Peer Review Report (2005), Peer Review available at https://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/san_joaquin_op_pesticide/peer_review_report/index.shtml; Central Valley Pyrethroid Pesticides TMDL and Basin Plan Amendment, available at https://www.waterboards.ca.gov/centralvalley/water_issues/tmdl/central_valley_projects/central_valley_pesticides/pyrethroid_tmdl_bpa/.

[61] Staff Report, Appendix K, at pp. 320-22.

[62] *Id.* at 321.

[63] *Id.* at 321-22.

Yet, clearly the Basin Plan Amendments involve, or should involve, findings based on scientific evidence. In addition, the Amendments clearly rely on "scientific findings, conclusions, or assumptions" to "establish a new "regulatory level or standard, or other requirement for the protection of public health or the environment." (Health & Saf. Code § 57004, subd. (a)(2).) The No Peer Review Justification states that the only portions of the Basin Plan Amendments that "establish a new standard" are those re-designating water bodies as LMUN.[64] Removal of the MUN designation, however sets a new standard in the de-designated waters by excising the requirement to meet the MCLs required by the MUN designation. The Clean Water Act is clear: "A water quality standard defines the water quality goals of a water body, or portion thereof, by designating the use or uses to be made of the water and by setting criteria that protect the designated uses." (40 CFR § 131.2.) Thus, removing a designated use, and hence the MCLs, is "setting a new standard" (in this case, a lower one). The fact that the Regional Board is making use of an existing policy to affect the dedesignation is irrelevant because these waters will be losing protection.

And while the Regional Board says that it does not rely on any empirical data, scientific findings, conclusions, or assumptions to dedesignate or redesignate water bodies, it should do so. This is clear from the face of the flowcharts that are at the heart of the program. The question of whether instream aquatic life beneficial uses exist, and their timing, are scientific questions, as are instream water quality and constituents of concern. In effect, the Regional Board would like to use its refusal to perform scientific evaluation of the effect of dedesignation and re-designation to insulate itself from the peer review requirement.

Moreover, the monitoring and surveillance program proposed by this amendment must meet specific requirements to assure protection of water quality objectives, including downstream uses. Whether or not the monitoring proposed in this amendment sufficiently meets that standard is a scientific finding that must undergo peer review. In the Response to Comments, the Regional Board admits that it reviews monitoring data.[65] Determining whether the monitoring data supports a finding that downstream water quality objectives are being protected must rely on evaluation of this data. This is a scientific determination that requires peer review. The Response to Comments also states that staff has "appropriate expertise" to make this evaluation.[66] However, staff's expertise is irrelevant: the Legislature has determined that the public is entitled to review by outside scientists. When a Regional Board sets a new standard that relies on empirical data, it must send that determination out for peer review.

Redesignating waters to LMUN requires specific findings that the waterbodies have inherent limiting conditions that justify less-protective designations. Such a finding should be based on scientific evidence. Yet the Regional Board would make and implement this finding absent peer review. As written, the Basin Plan Amendments would allow Regional Board staff to change the MUN designation to LMUN, and that designation could be implemented without Regional Board approval and without peer review, yet this action undoubtedly establishes a "regulatory level, standard, or other requirement for the protection of public health or the environment." (Health & Safety C. § 57004.) Thus, approving this process without peer review would violate Health and Safety Code requirements.

Comment 21 (continued)

[64] *Id.* at 321.
[65] Response to Comments at p. 41.
[66] *Id.* at 33.

Statement that this issue was raised before the Regional Board: The Regional Board's failure to perform required peer review was raised in the Baykeeper letter at pages 4-5 and the SRSWPP letter at 11.

Statement that the Regional Board's response was inadequate: The Regional Board addressed the peer review issue in the Response to Comments at pages 14, 33-34, 41. As discussed above, these discussions are inadequate and made no changes to the Basin Plan Amendments.

VI. The Basin Plan Amendments Improperly Delegate Discretionary Decisions and Basin Plan Amendments to Staff.

Comment 22

The Basin Plan Amendments allow Regional Board staff to determine whether the MUN designation should be removed for a specific waterbody. Under Porter Cologne and the Clean Water Act, designated uses are WQOs that must be approved by the Regional Board, State Board, and EPA. (Water Code § 13245; 33 U.S.C. § 1313, subd. (c); 40 CFR §131.10, subd. (c).) The Regional Board cannot lawfully delegate the authority to establish designated uses to staff. (Water Code § 13223.) The de-designations are only approved by the Regional Board in Step 3 of the Implementation Process after they are in effect and being implemented. (Draft Staff Report at 61.) Therefore, before the Regional Board adopts the de-designations formally into the Basin Plan, the de-designations may be used for all regulatory purposes, including permits. Labelling the staff decisions as "interim designations" cannot save this process. The de-designations are changes to water quality objectives and cannot be implemented until the Regional Board, State Board, and EPA have approved them.

Statement that this Issue was Raised before the Regional Board: This issue was raised in the Baykeeper Letter at 4.
Statement that Regional Board's Response is Insufficient: The Response to Comments, at pp. 40-1, made no substantive changes.

VII. Basin Plan Amendments Do Not Comply with CEQA.

Summary of comments 23 - 26

A project that qualifies as a certified regulatory program must prepare a substitute environmental document ("SED") that identifies significant environmental impacts and, if there are significant or potentially significant impacts, assess project alternatives and feasible mitigation measures. (Pub. Res. Code § 21080.5; Cal. Code Regs. tit. 14, § 15252; *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133.) The Environmental Review contained in Chapter 13 of the Staff Report and the Environmental Checklist in Appendix L fail to comply with CEQA because they do not contain sufficient discussion of important environmental impacts, several of which are potentially significant.

The Environmental Review concludes that the Basin Plan Amendments would have a less than significant impact on water quality and biological resources.[67] With respect to water quality, the Regional Board concludes that agricultural dischargers have been routinely ignoring water quality objectives and discharging waste as if Exception 2b to the Sources of Drinking Water

[67] Staff Report at pp. 93, 96.

policy was self-executing.[68] The Environmental Review does not address the fact that dischargers discharge into waters that do not meet Exception 2b and, thus, will have the beneficial use changed to MUN, have also been routinely ignoring the water quality objectives. Given this already heavily polluted baseline, the Regional Board assumes that de- and redesignating the water bodies at issue will create no new significant impacts. The Environmental Checklist's conclusion that the change would have no impact on "compliance with water quality standards" misses the point: water quality in the dedesignated and redesignated water bodies will decline.[69] The Regional Board must analyze this impact.

The Regional Board justifies the no significant impact finding by arguing that the existing Irrigated Lands Regulatory Program and other regulatory programs will protect downstream waters. This letter explains why that argument fails above. However, the Environmental Review is insufficient because it fails to address impacts to water quality and biological resources in the receiving waters themselves.[70] These waters are part of the environment and the Regional Board must discuss the impact to them.

Summary of comments 23 - 26 (continued)

The State Board should direct the Regional Board to address those issues, and if potentially significant impacts will exist, assess alternatives and mitigation measures.

A. Biological Resources.

With respect to biological resources, the Environmental Review fails to identify which, if any, waters proposed for de- or redesignation are currently listed for the wildlife supporting uses (e.g. WARM, COLD, WILD, BIOL, RARE, MIGR, SPAWN).[71] For waters that are designated as supporting wildlife uses, it is reasonable to expect that the Regional Boards will protect those uses, to the extent such water bodies have been designated for beneficial uses. However, for waters which are not listed (especially, as discussed above, those not classified as "streams"), it is reasonable to expect the Regional Board to revise permits to allow for degradation of water quality. For instance, the Environmental Checklist states that the Regional Board will protect wildlife uses "where applicable," without specifying where those uses apply.[72] The Regional Board must analyze the potential impacts to water quality as a result of such degradation.

Comment 23

B. Water Quality.

The discussion of water quality impacts is insufficient because it fails to address groundwater impacts whatsoever. In the Environmental Checklist, the Regional Board finds that there will be "no impact" on groundwater supplies.[73] As discussed above, seepage from irrigation canals to groundwater is a significant contributor to groundwater pollution. Moreover, the Central Valley is currently in a drinking water crisis, with many people, especially in low income communities and communities of color, relying on contaminated drinking water wells.

Comment 24

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[68] *Id* at pp. 93-4.
[69] *Id*., App. L, at p. 341.
[70] This letter also addresses impacts to biological resources above.
[71] Staff Report at pp. 96-98.
[72] Staff Report, App. L, at p. 333.
[73] *Id.* at 341.

Comment 24 (continued)

The Staff Report acknowledges that many people in the region rely on groundwater for drinking water, and yet the Environmental Review ignores this issue.[74]

The Environmental Review discusses the potential for increased water reuse due to dedesignation.[75] This could result in greater agricultural water efficiency but also higher concentrations of pollutants in dedesignated water bodies. The Regional Board, however, presents no data that would allow the public to judge the magnitude of such an increase. Given the potential for impacts to biological resources and groundwater, the public has a right to know how much of an increase in "constituent concentrations related to the MUN beneficial use" to expect. Without such demonstration, it is impossible to assess whether this change will be significant or not.

C. Social Impacts.

Comment 25

The Staff Report is required to analyze disparate social impacts related to physical impacts. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.*, 215 Cal. App. 4th 1013 (2013) ("If a project causes a direct or indirect in a physical condition in an area, any social impact on humans related to that physical change may be considered by a lead agency in determining whether the physical change is "significant" under CEQA.); CEQA Guidelines, § 15360 (significant effects may be either direct or indirect).) Thus, as discussed above, the failure to discuss impacts of potential degradation of groundwater used for drinking water violates CEQA.

D. Cumulative Impacts.

Comment 26

The Regional Board is required to evaluate cumulative impacts as part of its environmental review. A cumulative impact "consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts." (15 CCR § 15130, subd. (a)(1).) "Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time." (15 CCR § 15355, subd. (b).) The Environmental Review fails to consider the cumulative effect of the massive number of water bodies subject to dedesignation or redesignation and the effect of ongoing planning and regulatory efforts in the Central Valley.

Up to 6,000 water bodies are potentially eligible to lose MUN protection under the proposed Basin Plan Amendments.[76] While the Staff Report analyzes several case studies, it does not provide analysis of what the changes to statewide water quality would be with such a large-scale change. As discussed elsewhere in this letter, the monitoring networks under either ILRP, POTW or storm water discharge permits are not robust, particularly not so far as having capability to track exceedances back to dischargers covered by those respective permits, let alone non-covered dischargers. In addition, the affected region is huge: there are 2.36 million acres of irrigated agriculture in the Sacramento Valley, 2.1 million acres in the San Joaquin Valley, and up to 10 million acres in the Tulare Basin.[77] Thus, even small changes in water quality in the

[74] E.g. Staff Report at p. 36.
[75] Staff Report at p. 94
[76] Staff Report at p. 30.
[77] Staff Report at pp. 7, 9, 11.

ditches and canals proposed to lose their MUN designation are highly likely to result in significant effects on wildlife and groundwater. The Board must analyze these impacts.

Finally, the Regional Board must consider the possibility that other planning efforts in the Central Valley will cause cumulative impacts.

> The following (three) elements are necessary to an adequate discussion of cumulative impacts: (1) A list of projects producing related or cumulative impacts, including those projects outside the control of the agency; (2) A summary of the expected environmental effects to be produced by those projects with specific reference[s] to additional information where that information is available, and (3) A reasonable analysis of the cumulative impacts of the relevant projects."

(*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 73 (agency abused its discretion by applying an unreasonably narrow list of relevant projects.).)

For instance, the CV-Salts proceedings have been taking place for years. In addition, the State Board is currently considering revised Waste Discharge Requirements for irrigated lands in the Eastern San Joaquin Region, which would be precedential for all ILRP permits statewide going forward. These proceedings will potentially change the face of water quality regulation in the Central Valley and the Regional Board must consider their cumulative effects that these changes, along with this Basin Plan Amendment, will have on the environment.

Comment 26 (continued)

Statement that this issue was raised before the Regional Board: The Sacramento River Source Water Protection Program letter raised the issue of CEQA compliance at pages 10-12.

Statement that the Regional Board's Response was inadequate: In the Response to Comments, the Regional Board noted non-substantive changes to the Environmental Review and Checklist. These changes do not resolve the problems, noted above, with CEQA compliance.

VIII. Basin Plan Amendments Do Not Comply with the Human Right to Water, Pursuant to Water Code §106.3 or Regional or State Board Policies.

Water Code §106.3 states that Regional and State Boards must consider the impacts of its actions on human right to accessible, clean, affordable drinking water. In addition, the Legislature declared that water used for domestic purposes is deemed the highest beneficial use. (Water Code §106.) Moreover, the State and Regional Boards have both adopted resolutions. Furthermore, Water Code §§ 174 and 179 have been amended to ensure the State and Regional Boards' coordination of their functions pertaining to both water quality control and people's access to safe and clean drinking water.

As discussed above, the Regionwide MUN Evaluation Process will lower water quality standards for potentially over 6,000 water bodies, which impact surface and groundwater that are existing and potential sources of drinking water. The Regional Board's failure to address groundwater, in particular, in its assessment of impacts or implementation of monitoring requirements is an indication that people's right to drinking water was not seriously considered when adopting these Basin Plan Amendments.

Comment 27

Statement that this issue was raised before the Regional Board: The insufficiency of the groundwater protection and disparate impacts on low-income communities and communities of color was raised by San Francisco Baykeeper.

***Statement that the Regional Board's response to this comment was inadequate*:** The Response to Comments identified no significant changes to the Basin Plan Amendment or staff report in response to these comments. (*See*, Response to Comments, pp. 36-37; pp. 39-41.)

IX. Basin Plan Amendments Are Inconsistent with Reasonable Use and Public Trust Doctrines

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."].)

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.

Comment 28

Statement that this issue was raised before the Regional Board: The reasonable use and public trust doctrines are legal issues implicated by many deficiencies with the Basin Plan Amendments, addressed above. As such, it is not required that they be raised by name in comments to the Regional Board.

***Statement that the Regional Board's response to this comment was inadequate*:** As discussed above, the Regional Board's responses to comments were insufficient and, as such, did not resolve inconsistencies with the reasonable use and public trust doctrines.

X. CONCLUSION.

For the reasons discussed above, the Basin Plan Amendments do not meet the

requirements of the Clean Water Act, Porter-Cologne, the Drinking Water Policy and the other statutes discussed in this letter. We therefore request that the State Board send this matter back to the Regional Board for further consideration.

Thank you for your time and consideration of the matters addressed above. If you have questions or want to discuss any of these matters, please contact Lynne Saxton at lynne@saxtonlegal.com, 415-317-6713 or Nathaniel Kane at nkane@envirolaw.org, 510-208-4555.

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