February 23, 2017

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

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

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

Dear Mr. Meeks and Ms. Soto:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> All surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards with the exception of:
>
> 1. <u>Surface and ground waters where:</u>
>   a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Boards to supply a public water system.

…

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

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

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

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

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

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

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

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

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

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

C. <u>The "Reasonable And Beneficial Use" And "Public Trust" Doctrines Apply.</u>

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.

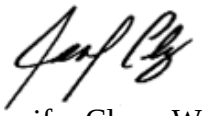
* * * * *

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

Respectfully submitted,

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

Deborah Ores, Attorney & Legislative Advocate
Community Water Center



Jennifer Clary, Water Programs Manager
Clean Water Fund