

Comment Summary and Responses

Comment Deadline: July 24, 2017

Amendment to the Water Quality Control Plan for the Tulare Lake Basin to Remove the Municipal and Domestic Supply (MUN) and Agricultural Supply (AGR) Uses from Groundwater within a Horizontal and Vertical Portion of the Tulare Lake Bed

List of Commenters:

Comment Reference	Organization	Representative
1	Central Valley Salinity Coalition	Daniel Cozad
2	California Independent Petroleum Association	Bob Gore
3	Leadership Counsel for Justice & Accountability, Clean Water Fund and Community Water Center	Michael Claiborne

Response to Comments:

No.	Author	Comment	Response
1.	CV Salinity Coalition	In support of the Basin Plan Amendment	Support noted
2.	California Independent Petroleum Association	In support of the Basin Plan Amendment	Support noted
3.1	Leadership Counsel for Justice & Accountability et al.	The Central Valley Water Board did not comply with the <i>Federal Antidegradation Policy</i> because, “it is likely that discharges into the delineated groundwater will affect surface water quality ¹ during [flood] years ... [t]here is thus a sufficient hydrological connection between the groundwater at issue	Leadership Counsel, et al. have not previously raised any concern regarding a potential nexus between groundwater quality and surface water quality in the project area, and as such, this comment is not timely. Nevertheless, the Staff Report and its appendices contain an extensive analysis of the groundwater in the area affected by the proposed Basin Plan Amendment. This analysis includes an exhaustive survey of groundwater

¹ The “surface water” that Leadership Counsel, et al. refer to is the water body, “colloquially known as the ‘phantom’ Tulare Lake.”

		and a surface water body, requiring analysis of the Federal Antidegradation policy.”	<p>flow directions, cones of depression and influence of domestic and irrigation wells, and a 3D model of groundwater quality. There is no evidence, hypothetical or otherwise, suggesting that groundwater quality has any influence on surface water quality, even during flood periods, which are also discussed in the Staff Report and its appendices.</p> <p>Furthermore, there are no surface water bodies in the area subject to the proposed Basin Plan Amendment that would be considered a “water of the US” subject to the <i>Federal Antidegradation Policy</i>. For these reasons, the <i>Federal Antidegradation Policy</i> does not apply.</p>
3.2	Leadership Counsel for Justice & Accountability et al.	The Central Valley Water Board did not comply with the <i>State Antidegradation Policy</i> because, “[w]hile the Regional Board considered existing uses of the relevant groundwater, and purports to consider future uses, it does not properly consider economic and other impacts to anyone other than dischargers.” Among those impacts that the Board allegedly failed to consider is “whether the proposed amendment would degrade groundwater to such an extent that restoration of a portion of Tulare Lake overlying the relevant horizontal boundary would become economically or practically infeasible.”	<p>The Board performed an exhaustive survey of wells that could potentially be affected by the proposed Basin Plan Amendment, and found that the proposed Basin Plan Amendment would have <u>no impact</u> on any well user, now or into the future. This is documented in the Staff Report and its appendices.</p> <p>Second, Leadership Counsel, et al. have not previously articulated any concerns regarding the “restoration” of the historical Tulare Lake (not in their comments during CEQA scoping, not in their oral comments at the hearing, and not in their written comments), and as such, their comment related to the “restoration” of Tulare Lake is not timely.</p> <p>However, the Board notes that the former Tulare Lake was deprived of its source waters <u>decades before the <i>State Antidegradation Policy</i> was adopted</u> in 1968. No analysis of the feasibility of restoring the “portion of Tulare Lake overlying the relevant horizontal boundary” is required pursuant to the <i>State Antidegradation Policy</i>.</p>
3.3	Leadership Counsel for	The Board cannot rely on the exceptions in the <i>Sources of Drinking Water Policy</i> to de-	Whatever ambiguity that may have existed as to whether the exceptions in <i>Sources of Drinking Water Policy</i> can

	<p>Justice & Accountability et al.</p>	<p>designate the MUN beneficial use because the <i>Sources of Drinking Water Policy</i>, “does not ... set forth any criteria for <i>de-designation</i> of the MUN beneficial use after groundwater has been designated as supporting that use (emphasis added).” Leadership Counsel, et al. also contend that, “there is no precedent for utilization of [the <i>Sources of Drinking Water Policy</i>’s] general exceptions as a tool for de-designations.”</p>	<p>be used to justify the de-designation of the MUN beneficial use, that ambiguity has been conclusively resolved through the actions of the State Water Board.</p> <p>The following are several actions where the State Water Board has approved the use of an exception in the Sources of Drinking Water Policy as justification for the de-designation of the MUN beneficial use:</p> <ul style="list-style-type: none"> • De-designation of the MUN beneficial use from certain ground waters contained in the San Joaquin, Etchegoin, and Jacalitos Formations, Central Valley Board Resolution R5-88-051, subsequently approved by State Water Board Resolution No. 90-5. • De-designation of the MUN beneficial use from certain ground waters in the vicinity of Kern Oil and Refining Company Injection, Central Valley Water Board Resolution 89-98, subsequently approved by State Water Board Resolution 90-4. • De-designation of the MUN beneficial use from certain ground waters in the vicinity of the Liquid Waste Management, Inc. Site, Central Valley Water Board Resolution 89-98, subsequently approved by State Water Board Resolution 90-111. • De-designation of the MUN beneficial use from certain ground water in the Fruitvale Oil Field, Central Valley Water Board Resolution 91-101, subsequently approved by State Water Board Resolution 91-86. <p>(All four of the above actions contained a finding in the State Water Board resolution stating that, “[t]he State Board adopted Resolution No. 88-63, <i>Sources of Drinking Water Policy</i> on May 19, 1988, which defines the criteria for removing the beneficial use designation</p>
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			<p>Municipal Use and Domestic Supply (MUN) from surface and ground waters.”)</p> <ul style="list-style-type: none"> • De-designation of the MUN beneficial use from 12 water bodies in the Sacramento River watershed pursuant to Exception 2b of the <i>Sources of Drinking Water Policy</i>, Central Valley Water Board Resolution R5-2015-0022, subsequently approved by State Water Board Resolution 2015-0055. • De-designation of the MUN beneficial use from certain channelized surface waters designed or modified to collect storm water runoff in the Los Angeles Basin, Los Angeles Water Board Resolution R4-1998-18, subsequently approved by the State Water Board Resolution 99-020. • De-designation of the MUN beneficial use from certain ground waters beneath the Naval Air Weapons Station China Lake, Lahontan Water Board Resolution R6V-2015-0005, subsequently approved by State Water Board Resolution 2015-0063.
3.4	Leadership Counsel for Justice & Accountability et al.	The “reasonable and beneficial use doctrine” applies to the action because, “the Staff Report does not demonstrate that no existing or future users of groundwater or hydrologically connect surface water will be affected.”	<p>The Staff Report and its appendices contain an extensive discussion which demonstrates that not a single groundwater user will be adversely affected by the proposed Basin Plan Amendment.</p> <p>But more to the point, as stated in the Board’s response to comments prepared for the April 2017 Board meeting, there is <i>nothing</i> in the proposed Basin Plan Amendment that would infringe upon any existing or future right to use groundwater; the proposed Basin Plan Amendment will not affect the applicability of the doctrine of reasonable and beneficial use to groundwater extractions in any way.</p>

3.5	Leadership Counsel for Justice & Accountability et al.	The public trust doctrine applies to the action for the same reason that the federal Antidegradation Policy applies to the action (due to a potential hydrologic connection between groundwater and the “phantom” Tulare Lake), and also states that because California, “has begun to regulate groundwater as a public resource” and has adopted the Human Right to Water, California now has the “duty to manage groundwater quality for the benefit of the public trust.”	<p>This comment suggests that any connection between surface water and groundwater triggers the applicability of the public trust doctrine. In support of this, Leadership Counsel, et al. cites to a trial court decision in <i>Environmental Law Foundation v. State Water Resources Control Board</i>. (Sacramento County Super. Ct., 2014, Case No. 34-2010-80000583-CU-WM-GDS).² Reliance on the reasoning in this case is misplaced.</p> <p>In <i>Environmental Law Foundation</i>, the environmental petitioners argued that groundwater extractions in the vicinity of the Scott River in Siskiyou County were depleting the base flow of the river, which threatened sensitive species (salmon, steelhead).³ Following a complex procedural history, Siskiyou County wound up taking the position that the State Water Board could not assert jurisdiction over these groundwater extractions based on the public trust doctrine. The trial disagreed, concluding that “the [State Water] Board <i>does</i> have the authority and duty under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in a navigable river. (emphasis in original)”</p> <p>However, the Court did <u>not</u> grant the environmental petitioners a complete win, and denied their argument that groundwater is a resource that is itself protected by the public trust doctrine. In an Order on Cross Motions for Judgment on the Pleadings (incorporated by reference into the final Order), the Sacramento County Superior Court found:</p> <p>“The public trust doctrine protects navigable waters from harm caused by groundwater extraction, where</p>
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² Discussions at the April 2017 Board meeting alluded to a different case in Siskiyou County that also dealt, in part, with the scope of California’s public trust obligations, *Siskiyou County Farm Bureau vs. Fish and Wildlife* (2015) 237 Cal.App.4th 411.

³ First Amended Petition for Writ of Mandamus and Complaint for Declaratory and Injunctive Relief at 7-8, *Envtl. Law Found. v. State Water Res. Control Bd.* (Sacramento County Super. Ct., Case No. 34-2010-80000583-CU-WM-GDS).

			<p>the groundwater is so connected to the navigable water that its extraction adversely affects public trust uses. This formulation is slightly different than the declaration Petitioners seek. Petitioners request a declaration groundwater hydrologically connected to navigable surface flows is protected by the public trust doctrine. However, the court does not find groundwater itself is a resource protected by the public trust doctrine.” (July 15, 2014 Order After Hearing on Cross Motions for Judgment on the Pleadings)</p> <p>Looking at the proposed Basin Plan Amendment and associated documents, there is nothing to support the argument that altering groundwater beneficial uses would in any way impact surface waters, even when there is flooding in the basin.</p> <p>Despite Leadership Counsel, et al.’s arguments to the contrary, just because California has taken a more active role in regulating groundwater does not mean that groundwater has itself become subject to the public trust.</p>
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