



December 22, 2017

*Via Electronic Mail*

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Clerk to the Board  
State Water Resources Control Board  
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Re: Comment Letter – Prohibiting Wasteful Water Use Practices

Dear Ms. Townsend, Chair Marcus, and Water Board Members:

Our firm represents the City of Fairfield (City) in matters related to the Proposed Regulations Prohibiting Wasteful Water Use Practices (Proposed Regulations). As counsel for the City, we submit the following comments on the City's behalf.

The City has strenuously opposed the State Water Resources Control Board's (State Water Board) previously imposed Emergency Water Conservation Regulations (Emergency Regulations). Now, the State Water Board is using those Emergency Regulations to inform the promulgation of the Proposed Regulations. The City has similar criticisms of the Proposed Regulations as well as additional concerns about their concomitant impact on it, and other similarly situated water users throughout the state. The City is also concerned that the Proposed Regulations may constitute an unfunded mandate in violation of California Constitution, Article XIII B, Section 6, thereby making the City, and other water users, eligible for reimbursement for the costs of compliance with certain sections of the Proposed Regulations.

The State Water Board's current, prescriptive approach to water conservation is flawed; it fails to consider important parameters, such as the geographical and meteorological variances throughout California, as well as the diverse community values of the City, and other communities like it. Imposition of the Proposed Regulations would injure the City by disregarding the extensive economic investments the City has made to establish a secure, reliable water supply and maintain both a high aesthetic value and quality of life for its

residents. Based upon the strong concerns and anticipated effects of the Proposed Regulations, the City offers the following comments and suggested revisions.

**1. The proposed prohibition of all run-off onto adjacent property could subject communities in windy areas, such as the City, to enforcement proceedings at a minimal water conservation benefit.**

The Proposed Regulations seek to prohibit numerous ordinary water use practices that are reasonable. One such use is the “application of water to outdoor landscapes in a manner that causes runoff such that water flows onto adjacent property, non-irrigated areas, private and public walkways, roadways, parking lots, or structures[.]” (Proposed Cal. Code Regs., tit. 23, § 963, subd. (b)(1)(A).) This blanket prohibition is overbroad because it would punish communities such as the City that experience persistent windy conditions without a measureable water conservation benefit.

The City prides itself on its development of geographically appropriate urban greenspaces and has a longstanding history of water conservation stewardship. To this end, the City has taken substantial steps towards greater conservation, yet the Proposed Regulations demand the implementation of more, and perhaps unachievable measures, with little relative water conservation benefit. The City includes in all of its landscaping maintenance contracts a prohibition against overspray. Nevertheless, the nearly constant winds in the City inevitably carry irrigation water onto non-irrigated areas (wind-blown overspray), which invariably creates some degree of runoff. To be sure, the amount of run-off is small, but the Proposed Regulations ban run-off on non-irrigated areas outright. Given the geographic location of the City and the significant winds, it is not possible to adequately irrigate the City’s valued public landscaping without any wind-blown overspray accumulating and creating runoff on adjacent, non-irrigated hardscape or other areas.

While the City understands that the intended objectives of the Proposed Regulations include safeguarding urban water supplies and minimizing the potential for wasteful uses of water, as written they simply go too far. The Proposed Regulations would render the City’s current, judicious, irrigation practices noncompliant, and thus subject the City to fines, or other enforcement proceedings, simply due to the accumulation of what is likely to be a small amount of wind-blown overspray on adjacent property. The City cannot prevent, without a substantial and costly overhaul to its entire median landscape scheme, the accumulation of any and all windblown overspray as the Proposed Regulations demand. Indeed, the State Water Board admitted in the Notice of Proposed Regulatory Action, “the potential overall water savings from the [P]roposed [R]egulation[s] are likely to be relatively minor[.]” (Cal. Reg. Notice Register 2017, No. 45-Z, p. 1699 (Notice).) The high financial cost for the City to comply with the Proposed Regulations cannot be justified by the minimal water saving potential. The Proposed Regulations, therefore, are beyond the pale.

Finally, the Proposed Regulations overlook water users, like the City, who have created at great expense and effort, a secure, reliable water supply capable of withstanding the small amount of water lost to wind-blown overspray. Throughout its history and even during the most recent severe droughts, the City has been able to adequately and responsibly serve its constituents' water needs, while also preserving the valued landscape and natural amenities within its community. The Proposed Regulations fail to recognize this level of planning and investment and would instead penalize the City and similarly situated communities for their foresight.

**2. The Proposed Regulations should include definitions of “Turf” and “Community or Neighborhood Function.”**

The Proposed Regulations would prohibit “irrigation of turf on public street medians or publicly owned or maintained landscaped areas between the street and sidewalk [i.e. parkways], except where the turf serves a community or neighborhood function[.]” (Proposed Cal. Code Regs., tit. 23, § 963, subd. (b)(1)(G).) The City opposes this prohibition because it is vague and fails to take into account the important role that turf-landscaped medians and parkways serve in the community by improving quality of life and supporting property values.<sup>1</sup>

Without clear definitions, the regulated community is not able to readily determine what areas of turf are, and are not, exempt from the prohibitions. Neither the term “turf” nor the phrase “community or neighborhood function” is defined in the Proposed Regulations. The most applicable definition of turf may be found in the Department of Water Resources' Model Water Efficient Landscape Ordinance Regulations, which define “turf” as a groundcover surface of mowed grass. (Cal. Code Regs., tit. 23, § 491, subd. (zzz).) Should this, or a similar, definition apply to the term “turf” as used in the Proposed Regulations, then the term should be defined within the text of the Proposed Regulations.

The State Water Board interprets, in guidance only, the neighborhood and community function exception. In the published “Frequently Asked Questions Regulation on Waste and Unreasonable Water Uses” (FAQs), the community and neighborhood function exception is limited to those areas which “provide[] functional and recreational benefits[,]” such as places where concerts, sports, and other public gatherings can be held. (See State Water Board, FAQs (Nov. 20, 2017) p. 2.) The City recommends that the definition of this exception be integrated into the text of the Proposed Regulations.

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<sup>1</sup> The City is further concerned that the prohibition on irrigating turf areas not subject to the neighborhood and community function exception may result in an unfunded mandate because turf in these areas would have to be removed and replaced with other landscaping. Thus, the City believes that the costs incurred from the removal and replacement of the turf areas would be eligible for reimbursement from the state, pursuant to California Constitution Article XIII B, Section 6.

Further, the State Water Board’s interpretation of “neighborhood and community function” is too narrow. The examples provided in the FAQs necessitate road closures in order for the medians and parkways to serve the neighborhood and community functions provided, which severely limits the applicability of the exclusion and, in a sense, renders the spaces no longer medians or parkways but rather gathering spaces generally. The narrow interpretation of the exception also fails to consider the significance that median and parkway turf has to communities in the form of both increased property values and aesthetic value. Many of the City’s turf median and parkway landscapes were developed decades ago as part of large-scale planned development projects.<sup>2</sup> The turf areas that remain are an important part of the quality of life in the City and are closely tied to the values of commercial and residential real estate therein. Additionally, these areas often include trees, which need the existing irrigation systems and water to survive. In such areas, if the trees remain, and the City removes the turf, the City will still apply the same amount of water to support the existing, mature trees, and removal of the turf will have impaired the aesthetic value of the area without generating meaningful water savings. Therefore, the City recommends that the community and neighborhood function exception be interpreted more broadly to account for these additional values that turf medians and parkways provide to communities.

**3. The prohibition on irrigating turf in medians and parkways should not apply to turf areas installed prior to the notice date of the Proposed Regulations.**

The prohibition on irrigating turf in medians and parkways should not apply to turf installed in those areas prior to the promulgation of the Proposed Regulations. As stated previously, many of the turf medians and parkways in the City were developed decades ago as part of planned development projects. These projects were integral to the City’s growth due to the high aesthetic value they provide, which in turn increases the quality of life in the City and attracts residents. These residents reasonably expect the high quality of life to be maintained, or at the very least, not overtly diminished. The Proposed Regulations would diminish the quality of life for local residents. Additionally, the Proposed Regulations have a retroactive effect. They punish the City, and other communities, that have previously installed and irrigated turf in medians and parkways in compliance with laws in effect at the time by effectively mandating the removal of these areas and disregarding the substantial investments and community planning made to install and maintain them. Accordingly, the prohibition on irrigating turf in medians and parkways should not apply to those areas that were installed and maintained prior to the notice date of the Proposed Regulations.

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<sup>2</sup> In response to the Emergency Regulations, the City removed turf from most landscaped median strip areas save for two substantial gateway medians that lead into the Rancho Solano and Green Valley communities, which utilize non-potable water. The City still maintains turf in “parkways” along miles of roadway within its service area. The City irrigates these parkways with both potable and non-potable, raw water.

**4. Whether the prohibition on irrigating turf in medians and parkways applies only to turf areas installed after the notice date of the Proposed Regulations, or applies to all turf medians and parkways, the prohibition should nonetheless only apply to the application of potable water to said turf areas.**

The Proposed Regulations are more stringent than the Emergency Regulations on the issue of turf irrigation. There, only the use of potable water on turf areas was prohibited; now, however, the Proposed Regulations seek to prohibit the irrigation of turf on virtually all medians and parkways, no matter the water source. (See Cal. Code Regs., tit. 23, § 864, subd. (a)(7); FAQs, supra, at p. 2.) Notwithstanding the City's comment that the prohibition of irrigating turf medians and parkways should only apply to new turf areas, expanding the prohibition to include the application of non-potable water would adversely affect the City and undermine the spirit of alternative resources and the advantages of irrigating with non-potable water. Non-potable water is a beneficial resource to be sure, however, because its use is more limited than potable water, it should not be held to the same standard of conservation as potable water. The City has made considerable efforts to preserve the potable water supplies therein, and prohibiting irrigation of turf medians and parkways ignores the apposite beneficial uses of non-potable supplies, which the City, and communities like it, have developed and utilized expressly for this purpose – irrigation. The City recommends an amendment to the Proposed Regulations limiting the prohibition of irrigating turf to irrigation with potable water only.

**5. Proposed Amendments**

The City respectfully offers the following amendments to improve both the clarity and effectiveness of the Proposed Regulations.


1. Eliminate from the run-off prohibition forms of run-off caused by wind-blown overspray.
2. Define “community and neighborhood function” in the text of the Proposed Regulations as spaces that contribute to the overall quality of life within the area, which includes but is not limited to spaces that support: recreational and leisure activities; aesthetic value; and aid in the maintenance or enhancement of nearby property values, both commercial and residential.
3. Limit the prohibition on irrigating turf in medians and parkways to areas of turf that were installed after the notice date of the Proposed Regulations.
4. Limit the prohibition on irrigating turf in medians and parkways to irrigation with potable water only.

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The City understands the intended purpose of the Proposed Regulations, but believes that without the amendments discussed herein, the Proposed Regulations neglect important community values, and economic investments. As such, they are too prescriptive.

Thank you for the opportunity to comment. Please contact me at (916) 469- 3837 should you have any questions.

Sincerely,

  
Aaron A. Ferguson  
Attorney

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