

December 18, 2017

VIA EMAIL TO: commentletters@waterboards.ca.gov

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The Honorable Felicia Marcus, Chair
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, Ca. 95814

SUBJECT: Comment letter prohibiting wasteful water use.

Dear Chair Marcus:

I am submitting these comments on behalf of the El Dorado County Water Agency (ECWA) and the Calaveras County Water District (CCWD). ECWA's member agencies include: a) the South Tahoe Public Utilities District; b) the County of El Dorado; c) the Georgetown Divide Public Utilities District and; d) the El Dorado Irrigation District.

My clients provide public water supplies to communities within the County of El Dorado and the County of Calaveras. They individually and cumulatively provide water supplies for municipal and agricultural uses, as well as for hydroelectric generation through the development of water rights - both pre-1914 and post-1914. As water rights holders and public agency suppliers, they have a direct and vested interest in SWRCB determinations of what constitutes a wasteful and unreasonable use of water under the authority of Article X, Section 2, of the California Constitution.

We wish to affirm their strong commitment to the utilization of all water resources for beneficial uses in the most efficient manner that is both practical and cost effective. They also wish for the Board to appreciate and recognize that during the recent severe drought, they exceeded the amount of water required to be saved under the Board's emergency conservation criteria illustrating in a most convincing manner their commitment to the doctrine of beneficial and efficient use of water resources – surface and groundwater.

ECWA and CCWD are progressive, efficient stewards of the water resources they manage, even within the fiscal constraints of economically disadvantaged areas within their service areas. It should be noted that some of the proposed regulations duplicate local water management practices already implemented by these agencies. However, there are differences based upon local conditions (hydrologic, geographic, institutional, weather and fiscal to name a few) and needs that should be recognized in any regulations, based on Article X Section 2 of the California Constitution.

What is or is not a wasteful and unreasonable use of water is a matter not to be taken lightly. There should be a prudent reflection of the guidance of the courts on this issue and recognition as to what use and amount of use is reasonable and what is not. The U.S. Supreme Court¹ found that a 75% loss of applied irrigation water and a 68% loss of conveyed water was not wasteful based upon the facts of the case.

One commonly hears laypersons complain of water being lost through conveyance system leaks, but that water is neither lost, or universally wasted according to California's own courts² which found unlined canal seepage beneficially supported non-indigenous vegetation consistent with Article X, Section 2. It also becomes relevant as to the amount of water being wasted based on specific local conditions, per the 1971 decision *Erickson v. Queen Valley Ranch Co.*³ In this instance the court determined that a conveyance loss amounting to over 80% of the water carried in an irrigation ditch system violated California prohibition against waste and such waste was unreasonable. Therefore, we should consider on a case specific basis, how much water may be being wasted to render a judicious application of constitutional prohibitions.

Let us then consider the total annual statewide savings that would result from the proposed regulations. The total amount of water to be "saved" through the combined application of these regulations – statewide - is just over 12,000 acre-feet per year. According to the Board's own analysis, the annual savings in the San Joaquin hydrologic region would be just 840 acre feet, or about .0467% of the average annual unimpaired runoff of the upper San Joaquin River. In the South Coast region⁴ the annual savings would be approximately one quart of water per person each day. These savings are not representative of large amounts of water alleged to being "wasted" or used "unreasonably" statewide, by hydrologic region, or even by personal consumption standards. By comparison, Californians collectively flush their toilets to the tune of about one hundred forty-two billion, three hundred and fifty million gallons of water a year. That's about four hundred and thirty seven thousand-acre feet per year or about thirty six times the amount of water that would be saved by these regulations each year.

In short, the amount of water that would be saved statewide each year, via the new regulations is small, very small. Instead of invoking waste and unreasonable use sanctions, the Board could strongly recommend, and perhaps legislatively find methods to achieve more significant savings.

The potential, for ongoing defense of one's water rights over perhaps a quart of water per day per person alleged to be wasted, could in itself waste millions of dollars and tens of thousands of hours of work, every year and to what end?

¹ *Colorado v. New Mexico*, 467 U.S. 319, 319 (1984)

² *Cf. Krieger v. Pacific Gas and Electric Co.*, 119 Cal. App. 3d 137 (3d Dist. 1981)

³ 22 Cal.App.3d 578 (1971)

⁴ Population 19,578,208, California State Water Plan Update 2013, Volume 2, Regional Reports, South Coast Region

Some of the uses identified as wasteful, do not recognize either existing case law to the contrary, or the utility of using the identical restriction as a public outreach information tool during times of a true water supply emergency. One example is the proposed restriction on serving customers a glass of water in private or public venues where food and beverages are served. People expect to receive water at these establishments so when they are advised they will have to ask for it, it removes a learning moment for the local water agency to inform their customers and those visiting their service area, that there is a supply shortage. If people get that “don’t ask – don’t get” message every day, even in extremely wet years, they will become inoculated in a fashion to the message to conserve, when there really is a need. The SWRCB runs the risk of “crying wolf” every day with little actual savings and predictable long-term results with consumers.

We therefore urge the Board to not adopt the regulations as written and specifically any universal finding that water use in such small amounts be determined to be individually and cumulatively significant as to the point of invoking the Constitutional provisions regarding waste and unreasonable use. However should the Board choose to move ahead with new regulations we hope that the regulations would follow our suggestions.

The attached edited version of the draft regulations reflects our recommendations of those areas to be deleted as shown in strikeout format. New text is represented as underlined and bold text.

For each section that contains edits we have provided brief reasoning below.

§963(b)(1)(C) Clarifying - Non-paved driveways often have dust abatement water applications during dry months in rural areas. Dust abatement is not a waste of water but rather a protection of air quality and oft times a mitigation measure applied on commercial, recreational and industrial uses as well.

§963(b)(1)(E) Clarifying - Some storm events (occurring during the summer and in isolation) would meet this threshold, but could occur in foothill and mountain areas when soil and vegetation moisture-levels are extremely low, irrespective of small amounts of rain. We also clarify between native grasses and non-native, ornamental grasses. We also provide for exceptions in conditions of certain wildfire conditions as determined by state or local officials.

§963(b)(2)(A) Clarifying - The use of water for cleaning sidewalks for health and safety reasons should also enable non-public sidewalks to be cleaned. Such sanitary protections must be afforded to non-public surfaces inasmuch as sanitation is ownership neutral.

The use of water for maintaining fire resistant wildfire fuel breaks and buffer zones in areas designated as very high or high fire hazard on CAL FIRE Fire Hazard Severity Zone Maps or to maintain areas of defensible space around homes as may be required by local, regional or state fire officials is also a public safety matter.

§963(b)(2)(B) Permits and/or entitlements covered with this exception must include local permits as well. Local permits and entitlements often include provisions that reflect the “teeth” needed to implement General Plan policies, local ordinances, and so on. They are equally as important as state permits.

§963(b)(2)(C) The agricultural use exception language should also include non-commercial agricultural uses. A profit function within a marketplace fails to recognize the growing of agricultural products for home consumption which is functionally as important to the grower for personal use and perhaps more so, than to a commercial grower.

§963(b)(2)(D) New language - Water use necessary to implement final CEQA and/or NEPA mitigation measures should not be classified as wasteful and unreasonable uses of water.

§963(b)(2)(E) New language - Air quality as compromised by dust is a public health concern. The use of water to lessen the impacts of dust should not be classified as wasteful and unreasonable uses of water. It is not uncommon for municipal water – and water taken from fire hydrants – to be used to supply dust abatement programs.

§963(b)(2)(F) New language - Any water use when the purpose is to meet an emergency related need during any local, state or federally declared emergency is by definition not waste or unreasonable use. To the contrary, it is the highest and best use of that water under those conditions at that particular time.

We wish to thank the Board and its staff for providing the opportunity to submit written comments on this initiative. If there are any questions, we would be happy to answer them at your convenience.

Sincerely,

John S. Mills

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Suggested Edits
California Code of Regulations
Title 23. Waters
Division 3. State Water Resources Control Board

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§963. Wasteful and Unreasonable Water Use Practices.

The State Water Resources Control Board (State Board) has determined that it is a waste and unreasonable use of water under Article X, section 2 of the California Constitution to divert or use water inconsistent with subdivision (a) regardless of water rights seniority given the ~~need for the water to support other more beneficial uses~~ importance of using the subject water resources for other beneficial uses by the water rights holder.

(a) As used in this article:

(2) “Total potable water production” means all potable water that enters into a water supplier’s the distribution system supplied by an urban water supplier, by any Community Water System, Non-Transient Non-Community Water System, Transient Non-Community Water System¹, multiple customer private water system, or mutual water system, excluding water placed into storage and not withdrawn for use during the reporting period, or water exported outside the supplier’s service area.

(b)(1) The use of water by the retail customers of an urban water supplier, or a Community Water System, Non-Transient Non-Community Water System, Transient Non-Community Water System², multiple customer private water system, or mutual water system is prohibited as identified in this subdivision for any of the following actions:

(C) The application of potable water directly to paved driveways and sidewalks.

(E) The application of water to irrigate non-native California grass turf and ornamental landscapes during and within 48 hours after measureable rainfall of at least ~~one~~ two-tenths of one inch of rain as determined by the local water supplier, except under conditions of high wildfire

¹ U.S.E.P.A. Classifications of public water systems

² IBID

hazard as may be determined by local or state officials³. In determining whether measurable rainfall of at least one-tenth of one inch of rain occurred in a given area, enforcement may be based on records of the National Weather Service the closest CIMIS station to the parcel, or any other reliable source of rainfall data available to the entity undertaking enforcement of this subdivision;

~~(F) The serving of drinking water other than upon request in eating or drinking establishments, including but not limited to restaurants, hotels, cafes, cafeterias, bars or other public places where food or drink are served and/or purchased.~~

(2) Notwithstanding subdivision (b)(1) the use of water is not prohibited by this article under **any** of the following circumstances:

- (A) To the extent necessary to address an immediate health and safety need. This may include but is not limited to, street sweeping and **the pressure washing of public and private sidewalks or paved walking paths, the application of water to maintain wildfire fuel breaks or buffers in areas designated as very high or high fire hazard severity on CAL FIRE, Fire Hazard Severity Zone Maps, or to maintain areas of defensible space as may be required by local or state fire protection agencies,** and the use of potable water in a fountain or water feature when required by law to be potable.
- (B) To the extent necessary to comply with a term or condition on a permit, **or entitlement as** issued by a **local,** state or federal agency.
- (C) When the water is used for commercial agricultural use⁴ meeting the definition of Government Code section 51201, subdivision (b).
- (D) **To enact mitigation measures as may be required under any finalized CEQA and/or NEPA process.**
- (E) **To conduct dust abatement for residential, commercial, or industrial activities, or certain recreational activities**⁵.
- (F) **For any purpose as may be needed during any local, state or federally declared emergency.**

³ See also, Govt. Code §51175 et seq.

⁴ Agriculture is a beneficial use of water even if it does not result in profit. (*Nelson v. Anderson-Cottonwood Irr. Dist.*, 51 Cal. App. 92, 96, 196 P. 292.) Domestic use, irrigation of pasture, irrigation of a garden and fruit trees and watering of livestock, are all beneficial uses of water. (See cases collected 1 Rogers & Nichols, *op. cit.*, pp. 262-63.) Watering of barnyard animals not kept for profit is a beneficial domestic use. (*Deetz v. Carter*, 232 Cal. App. 2d 851, 856, 43 Cal.

⁵ Christopher Wolfe, Brenda Buck, Aubrey Miller, James Lockey, Christopher Weis, David Weissman, Alexander Jones, Patrick Ryan. **Exposure to naturally occurring mineral fibers due to off-road vehicle use: A review.** *International Journal of Hygiene and Environmental Health*, 2017; DOI: 10.1016/j.ijheh.2017.07.003