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December 21, 2017

Chair Felicia Marcus and Board Members
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Jeanine Townsend
Clerk to the Board State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814



Re: Proposed Water Conservation Regulation

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

The East Bay Municipal Utility District (EBMUD) appreciates the opportunity to comment on the State Water Resources Control Board's (State Water Board) proposed water conservation regulation in Title 23 of the California Code of Regulations. EBMUD is a statewide leader in the development of water conservation programs and continues to actively participate in multiple state workshops and stakeholder meetings toward making water conservation a way of life. As a member of the California Urban Water Agencies (CUWA), EBMUD concurs with CUWA's technical comments provided on the proposed regulation's water use prohibitions.

EBMUD believes Section 963 of the proposed regulation, as currently proposed, is not supported by California's Reasonable Use Doctrine. Further, because water saved through implementation of the regulation's water use prohibitions would not be considered "conserved" water pursuant to Water Code section 1011, the regulation's approach could result in the diminishment of water rights for municipal water rights holders. As such, the proposed regulation is contrary to the State's approach to increase water conservation by focusing on incentivizing conservation while protecting water rights. To ensure consistency with the Reasonable Use Doctrine and the legislative intent behind Water Code Section 1011, EBMUD urges the State Water Board to revise the proposed regulation as detailed in the attachment to this letter.

Since 1928, California's Constitution has prevented the waste or unreasonable use or method of use of water and has limited use of the State's waters to "such water as shall be reasonably required for the beneficial use to be served." (Cal. Const., art. X, § 2.) For almost as long, California courts have required a fact-specific inquiry when determining whether a particular use of water violates the Article X, Section 2 prohibition on waste and unreasonable use. See, e.g., the California Supreme Court's interpretation of the constitutional provision in *Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706 ("What is a useful and beneficial purpose and what is an unreasonable use is a judicial question depending on the facts in each case."). This principle has been reiterated in numerous cases through the years, including *Joslin v. Marin Municipal Water District* (1967) 67 Cal. 2d 132, 139 ("[W]hat is a reasonable use or method of

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use of water is a question of fact to be determined according to the circumstances in each particular case”) and *State Water Resources Control Board Cases* (2006) 136 Cal. App. 4th 674 at 762. Indeed, in a recent appellate case considering Article X, § 2, the court of appeal confirmed this requirement, noting that “the reasonableness of any particular use depends largely on the circumstances.” *Light v. State Water Resources Control Board* (2014) 226 Cal. App. 4th 1463, 1479.

Section 963 of the proposed regulation ignores this long-standing basic tenet of the Reasonable Use Doctrine. It instead makes a statewide blanket determination that any violation of the regulation’s prohibited water uses is a per se waste or unreasonable use of water under Article X, § 2. This approach, using a one-size-fits-all method to legislate an unreasonable use of water without regard to the specific facts and circumstances of a given situation, is not consistent with the Reasonable Use Doctrine. We therefore urge the State Water Board to revise the proposed regulation to be consistent with the Reasonable Use Doctrine and ensure that adequate due process is followed in making determinations of reasonable use, with full consideration of the specific facts of a situation.

Revising the proposed regulation to remove its per se waste and unreasonable use determination would ensure consistency with the Reasonable Use Doctrine and would also bring the proposed regulation in line with existing State water conservation policy. That policy is most clearly elucidated in Water Code Section 1011, which incentivizes water conservation efforts without penalizing water rights holders for the resulting reductions in water use that occur. Section 1011 provides that water use reductions resulting from water conservation efforts “shall be deemed equivalent to a reasonable beneficial use of water,” and that “[n]o forfeiture of the appropriative right to the water conserved shall occur.” (Wat. Code § 1011, subd. (a).) The Legislature has, through Water Code section 1011, deemed reductions in water use due to conservation the equivalent to reasonable beneficial use of that water.

The proposed regulation would upend this policy by declaring as “waste and unreasonable use” any water use at odds with the proposed regulation’s prohibitions. As a result, water use reductions resulting from a water utility’s efforts to encourage customer compliance with the prohibitions may not be protected as “conservation” under Section 1011. Instead, those reductions in water use could result in a concomitant diminishment in the utility’s water rights. Such a result will not encourage efforts at compliance; if anything, it will limit the proposed regulation’s success as a driver for water conservation.

While these issues are serious, they may also be easily resolved. To further our mutual interest in enhancing water conservation across the State, we ask the State Water Board to revise the regulation as set forth in the attachment to this letter. The revisions proposed in that attachment would bolster the legality of the proposed regulation and its effectiveness at achieving substantial water use reductions across the State.

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Thank you for considering these comments. If you have any questions, please contact me at rsykes@ebmud.com, or (510) 287-1629.

Sincerely,

A handwritten signature in cursive script that reads "Richard G. Sykes".

Richard G. Sykes
Director of Water & Natural Resources

RGS:dec

Attachment

PROPOSED TEXT OF REGULATION

Title 23. Waters

Division 3. State Water Resources Control Board and Regional Water Quality Control Boards

Chapter 2. Appropriation of Water

~~Article 22. Prevention of Waste and Unreasonable Use~~

Chapter 3. Determination of Right to the Use of Water

Article 2. Adjudications Under Water Code Sections 2500 Through 2900

Chapter 3.5. Conservation and the Prevention of Waste and Unreasonable Use

Article 1. Prevention of Waste and Unreasonable Use

~~§ 955. Claims to Water Supplied by District or Water Company. [Renumbered]~~

~~§ 855. § 955. Policy and Definition.~~

(a) In investigating any uses of water and making the determinations required by this article, the board shall give particular consideration to the reasonableness of use of reclaimed water or reuse of water.

(b) As used in this article, “misuse of water” or “misuse” means any waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.

Authority cited: Section 1058, Water Code.

Reference: Sections 100, 275, 1240, 1251, 1253 and 1257, Water Code; and Section 2, Article X, California Constitution.

~~§ 956. Divided Interests. [Renumbered]~~

~~§ 856. § 956. Investigations.~~

The board staff shall investigate an allegation of misuse of water:

- (1) when an interested person shows good cause, or
- (2) when the board itself believes that a misuse may exist.

Authority cited: Section 1058, Water Code.

Reference: Sections 100, 183, 275 and 1051, Water Code; and Section 2, Article X, California Constitution.

~~§ 957. Undivided Interests. [Renumbered]~~

~~§ 857. § 957. Notifications, Hearings and Orders.~~

(a) If the investigation indicates that a misuse of water has occurred, the board staff shall notify interested persons and allow a reasonable period of time in which to terminate such misuse or demonstrate to the satisfaction of the board staff that misuse has not occurred.

(b) At the end of the time set by the board staff, and upon application of any interested person or upon its own motion, the board may hold a hearing to determine if misuse has occurred or continues to occur.

(c) If the misuse is alleged to have occurred or to continue to occur in connection with exercise of rights evidenced by a permit or license issued by the board, the board shall notice the hearing as a permit revocation hearing pursuant to Water Code Section 1410.1, or as a license revocation hearing pursuant to Water Code Section 1675.1, as appropriate; or as a preliminary cease and desist order hearing pursuant to Water Code Section 1834.

(d) The board may issue an order requiring prevention or termination thereof.

Authority cited: Section 1058, Water Code.

Reference: Sections 100, 275, 183, 1051, 1401, 1675.1 and 1834, Water Code.

~~§ 958. General Requirements for Proofs of Claims. [Repealed]~~

~~§ 858. § 958. Noncompliance with Order Regarding Misuse Under Water Right Entitlement.~~

If a permittee or licensee does not comply with any order issued pursuant to Section ~~857957~~ within such reasonable period of time as allowed by the board, or such extension thereof as may for good cause be allowed by the board, and if such order includes a finding that waste, unreasonable use, method of use, or method of diversion has occurred in connection with exercise of a right evidenced by a permit or license issued by the board, a revocation action may be commenced by the board:

(a) If the hearing has been noticed as a permit or license revocation hearing, and if the board finds that misuse has occurred or continues to occur, the board may order the permit or license revoked or impose appropriate additional or amended terms or conditions on the entitlement to prevent recurrence of the misuse;

(b) If the hearing pursuant to Section ~~857957~~ has been noticed as a preliminary cease and desist order hearing, and if the board finds that misuse has occurred or continues to occur, the board may issue a preliminary cease and desist order.

Authority cited: Section 1058, Water Code.

Reference: Sections 1410, 1675 and 1831, Water Code.

~~§ 959. Specific Requirements for Irrigation Proofs. [Repealed]~~

~~§ 859. § 959. Noncompliance with Other Order.~~

If a person other than a permittee or licensee does not comply with any order issued pursuant to Section ~~857957~~ within such reasonable period of time as allowed by the board, or such extension thereof as may for good cause be allowed, and if such order includes a finding that such person has misused or continues to misuse water, the board may request appropriate legal action by the Attorney General.

Authority cited: Section 1058, Water Code.

Reference: Section 275, Water Code.

~~§ 960. Uses Other than Irrigation. [Repealed]~~

~~§ 860. § 960. Alternative Procedure.~~

The procedure established in this article shall be construed as alternative to, and not exclusive of, the procedures established in Chapter 5 of Title 23, California Administrative Code, in accordance with Section 4007 therein.

Authority cited: Section 1058, Water Code.

Reference: Section 275, Water Code.

~~§ 961. Signature of Deponent. [Renumbered]~~

~~§ 962. Objections. [Renumbered]~~

~~§ 862.~~ § 962. Russian River, Special.

Budding grape vines and certain other crops in the Russian River watershed may be severely damaged by spring frosts. Frost protection of crops is a beneficial use of water under section 671 of ~~this chapter~~ 2 of this division. During a frost, however, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users may contribute to a rapid decrease in stream stage that results in the mortality of salmonids due to stranding. Stranding mortality can be avoided by coordinating or otherwise managing diversions to reduce instantaneous demand. Because a reasonable alternative to current practices exists, the Board has determined these diversions must be conducted in accordance with this section.

(a) After March 14, 2012, except for diversion upstream of Warm Springs Dam in Sonoma County or Coyote Dam in Mendocino County, any diversion of water from the Russian River stream system, including the pumping of hydraulically connected groundwater, for purposes of frost protection from March 15 through May 15, shall be diverted in accordance with a board approved water demand management program (WDMP). For purposes of this section, groundwater pumped within the Russian River watershed is considered hydraulically connected to the Russian River stream system if that pumping contributes to a reduction in stream stage to any surface stream in the Russian River watershed during any single frost event.

(b) The purpose of the WDMP is to assess the extent to which diversions for frost protection affect stream stage and manage diversions to prevent cumulative diversions for frost protection from causing a reduction in stream stage that causes stranding mortality. The WDMP, and any revisions thereto, shall be administered by an individual or governing body (governing body) capable of ensuring that the requirements of the program are met. Any WDMP developed pursuant to this section shall be submitted to the board by February 1 prior to the frost season.

(c) At a minimum, the WDMP shall include (1) an inventory of the frost diversion systems within the area subject to the WDMP, (2) a stream stage monitoring program, (3) an assessment of the potential risk of stranding mortality due to frost diversions, (4) the identification and timelines for implementation of any corrective actions necessary to prevent stranding mortality caused by frost diversions, and (5) annual reporting of

program data, activities, and results. In addition, the WDMP shall identify the diverters participating in the program and any known diverters within the area subject to the WDMP who declined to participate. The WDMP also shall include a schedule for conducting the frost inventory, developing and implementing the stream stage monitoring program, and conducting the risk assessment.

(1) Inventory of frost diversion systems: The governing body shall establish an inventory of all frost diversions included in the WDMP. The inventory, except for diversion data, shall be completed within three months after board approval of a WDMP. The inventory shall be updated annually with any changes to the inventory and with frost diversion data. The inventory shall include for each frost diversion:

- (A) Name of the diverter;
- (B) Source of water used and location of diversion;
- (C) A description of the diversion system and its capacity;
- (D) Acreage frost protected and acres frost protected by means other than water diverted from the Russian River stream system; and
- (E) The rate of diversion, hours of operation, and volume of water diverted during each frost event for the year.

(2) Stream stage monitoring program: The governing body shall develop a stream stage monitoring program in consultation with National Marine Fisheries Service (NMFS) and California Department of Fish and Game (DFG). For the purposes of this section, consultation involves an open exchange of information for the purposes of obtaining recommendations. The governing body is authorized to include its own expert scientists and engineers in the consultation, and request board staff to participate, when desired.

The stream stage monitoring program shall include the following:

- (A) A determination of the number, type, and location of stream gages necessary for the WDMP to monitor and assess the extent to which frost diversions may affect stream stage and cause stranding mortality;
- (B) A determination of the stream stage that should be maintained at each gage to prevent stranding mortality;
- (C) Provisions for the installation and ongoing calibration and maintenance of stream gages; and
- (D) Monitoring and recording of stream stage at intervals not to exceed 15 minutes.

(3) Risk assessment: Based on the inventory and stream stage information described above, and information regarding the presence of habitat for salmonids, the governing body shall conduct a risk assessment that evaluates the potential for frost diversions to cause stranding mortality. The risk assessment shall be conducted in consultation with NMFS and DFG. The governing body is authorized to include its own expert scientists and engineers in the consultation, and request board staff to participate, when desired. The risk assessment shall be evaluated and updated annually.

(4) Corrective Actions: If the governing body determines that diversions for purposes of frost protection have the potential to cause stranding mortality, the governing body shall notify the diverter(s) of the potential risk. The governing body, in consultation with the diverters, shall develop a corrective action plan that will prevent stranding mortality. Corrective actions may include alternative methods for frost protection, best management practices, better coordination of diversions, construction of offstream storage facilities,

real-time stream gage and diversion monitoring, or other alternative methods of diversion. Corrective actions also may include revisions to the number, location and type of stream stage monitoring gages, or to the stream stages considered necessary to prevent stranding mortality. In developing the corrective action plan the governing body shall consider the relative water right priorities of the diverters and any time delay between groundwater diversions and a reduction in stream stage. The corrective action plan shall include a schedule of implementation. To the extent feasible, the corrective action plan shall include interim corrective actions if long-term corrective actions are anticipated to take over three years to fully implement. The diverters shall implement corrective actions in accordance with the corrective action plan, or cease diverting water for frost protection.

(5) Annual Reporting: The governing body shall submit a publically available annual report of program operations, risk assessment, and corrective actions by September 1 following the frost season that is the subject of the report. The report shall include:

- (A) The frost inventory, including diversion data.
- (B) Stream stage monitoring data.
- (C) The risk assessment and its results, identification of the need for any additional data or analysis, and a schedule for obtaining the data or completing the analysis.
- (D) A description of any corrective action plan that has been developed, any corrective actions implemented to date, and a schedule for implementing any additional corrective actions.
- (E) Any instances of noncompliance with the WDMP or with a corrective action plan, including the failure to implement identified corrective actions. The report shall document consultations with DFG and NMFS regarding the stream stage monitoring program and risk assessment and shall explain any deviations from recommendations made by DFG or NMFS during the consultation process. In addition, the annual report shall evaluate the effectiveness of the WDMP and recommend any necessary changes to the WDMP, including any proposed additions or subtractions of program participants. Any recommendations for revisions to the WDMP shall include a program implementation plan and schedule. The board may require changes to the WDMP, including but not limited to the risk assessment, corrective action plan, and schedule of implementation, at any time.

(d) The governing body may develop and submit for the Deputy Director for Water Rights' approval, criteria, applicable to any participant in its WDMP, for identifying groundwater diversions that are not hydraulically connected to the Russian River stream system. The governing body may submit to the Deputy Director a list of groundwater diverters that appear to meet these criteria and could be exempted from this section. The Deputy Director is authorized to exempt the listed groundwater diverters, or identify the reason for not exempting the listed groundwater diverters. Beginning three years from the effective date of this section, if an individual groundwater diverter can independently demonstrate to the satisfaction of the Deputy Director that the diversion is not hydraulically connected to the Russian River stream system, the Deputy Director is authorized to exempt the groundwater diverter from this section.

(e) Compliance with this section shall constitute a condition of all water right permits and licenses that authorize the diversion of water from the Russian River stream system for purposes of frost protection. The diversion of water in violation of this section, including the failure to implement the corrective actions included in any corrective action plan developed by the governing body, is an unreasonable method of diversion and use and a violation of Water Code section 100, and shall be subject to enforcement by the board. The board has continuing authority to revise terms and conditions of all permits and licenses that authorize the diversion of water for purposes of frost protection should future conditions warrant.

Authority cited: Section 1058, Water Code.

Reference: Section 2, Article X, California Constitution; and Sections 100, 275 and 1051.5, Water Code.

Article 2. Wasteful and Unreasonable Water Uses Water Conservation

§ 963. ~~Wasteful and Unreasonable Water Use Practices.~~ End User Requirements in Promotion of Water Conservation

The State Water Resources Control Board (State Board) has determined that the end-user water use prohibitions and requirements set forth in this section are conservation measures that further the purpose of Article X, section 2 of the California Constitution that water resources of the State be put to beneficial use in a manner that is reasonable and not wasteful. This regulation shall not be used in any future administrative or judicial proceedings as evidence or findings of waste and unreasonable use of any individual water user or water supplier subject to this regulation, and is not to affect or otherwise limit any rights to water conserved under applicable law, including without limitation, water conserved consistent with Water Code section 1011.

~~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 right seniority, given the need for the water to support other more critical uses.~~

(a)As used in this article:

(1)“Commercial agricultural use meeting the definition of Government Code section 51201, subdivision (b)” includes irrigation, frost protection and heat control, but does not include cleaning, processing or other similar post-harvest activities.

(2)“Total potable water production” means all potable water that enters into a water supplier’s distribution system, excluding water placed into storage and not withdrawn for use during the reporting period, or water exported outside the supplier’s service area.

(3)“Urban water supplier” means a supplier that meets the definition set forth in Water Code section 10617, except it does not refer to suppliers when they are functioning solely in a wholesale capacity, but does apply to suppliers when they are functioning in a retail capacity.

(4)“Water year” means the period from October 1 through the following September 30. Where a water year is designated by year number, the designation is by the calendar year

number in which the water year ends.

(b)(1) To promote water conservation, the use of water is prohibited as identified in this subdivision for any of the following actions:

(A) 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;

(B) The use of a hose that dispenses water to wash a motor vehicle, except where the hose is fitted with a shut-off nozzle or device attached to it that causes it to cease dispensing water immediately when not in use;

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

(D) The use of potable water in an ornamental fountain or other decorative water feature, except where the water is part of a recirculating system;

(E) The application of water to irrigate turf and ornamental landscapes during and within 48 hours after measurable rainfall of at least one-tenth of one inch of rain. 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; (G) The irrigation of turf on public street medians or publicly owned or maintained landscaped areas between the street and sidewalk, except where the turf serves a community or neighborhood function; and

(2) Notwithstanding subdivision (b)(1), the use of water is not prohibited by this article under 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 pressure washing of public sidewalks 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 in a permit issued by a state or federal agency.

(C) When the water is used exclusively for commercial agricultural use meeting the definition of Government Code section 51201, subdivision (b).

(c) To promote water conservation, operators of hotels and motels shall provide guests with the option of choosing not to have towels and linens laundered daily. The hotel or motel shall prominently display notice of this option in each guestroom using clear and easily understood language.

(d)(1) To prevent the waste and unreasonable use of water and to promote water conservation, any homeowners' association or community service organization or similar entity is prohibited from:

(A) Taking or threatening to take any action to enforce any provision of the governing documents or architectural or landscaping guidelines or policies of a common interest development where that provision is void or unenforceable

under section 4735, subdivisions (a) and (b) of the Civil Code;

(B) Imposing or threatening to impose a fine, assessment, or other monetary penalty against any owner of a separate interest for reducing or eliminating the watering of vegetation or lawns during a declared drought emergency, as described in section 4735, subdivision (c) of the Civil Code; or

(C) Requiring an owner of a separate interest upon which water-efficient landscaping measures have been installed in response to a declared drought emergency, as described in section 4735, subdivisions (c) and (d) of the Civil Code, to reverse or remove the water-efficient landscaping measures upon the conclusion of the state of emergency.

(2) As used in this subdivision:

(A) "Architectural or landscaping guidelines or policies" includes any formal or informal rules other than the governing documents of a common interest development.

(B) "Homeowners' association" means an "association" as defined in section 4080 of the Civil Code.

(C) "Common interest development" has the same meaning as in section 4100 of the Civil Code.

(D) "Community service organization or similar entity" has the same meaning as in section 4110 of the Civil Code.

(E) "Governing documents" has the same meaning as in section 4150 of the Civil Code.

(F) "Separate interest" has the same meaning as in section 4185 of the Civil Code.

(3) If a disciplinary proceeding or other proceeding to enforce a rule in violation of subdivision (d)(1) is initiated, each day the proceeding remains pending shall constitute a separate violation of this regulation.

(e) To prevent the waste and unreasonable use of water and to promote water conservation, any city, county, or city and county is prohibited from imposing a fine under any local maintenance ordinance or other relevant ordinance as prohibited by section 8627.7 of the Government Code.

(f) The taking of any action prohibited in subdivision (b) (d) or (e), or the failure to take any action required in subdivision (c), is an infraction punishable by a fine of up to five hundred dollars (\$500) for each day in which the violation occurs. The fine for the infraction is in addition to, and does not supersede or limit, any other remedies, civil or criminal.

(g) A decision or order issued under this article by the Board or an officer or employee of the Board is subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the Water Code.

Authority: Section 1058, Water Code.

References: Article X, Section 2, California Constitution; Sections 4080, 4100, 4110, 4150, 4185, and 4735, Civil Code; Sections 102, 104, 105, 275, 350, and 10617, Water

Code: *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463.