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***VIA ELECTRONIC
AND UNITED STATES MAIL***

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: Comment Letter – Proposed “Prohibiting Wasteful Water Use Practices” Regulation

Dear Ms. Townsend:

On behalf of the San Francisco Public Utilities Commission (“SFPUC”) and the Bay Area Water Supply & Conservation Agency (“BAWSCA”), we submit the following comments on the State Water Resources Control Board’s (“SWRCB”) proposed “Wasteful and Unreasonable Water Use Practices” regulation (“Regulation”). The proposed Regulation would be added as Section 963 of Title 23 of the California Code of Regulations if approved by the Office of Administrative Law. As the SWRCB is aware, SFPUC and BAWSCA are state leaders in urban water conservation and strongly support the Governor’s and the SWRCB’s objective of making conservation a way of life in California, including the implementation of enhanced conservation efforts to maximize the beneficial use of water in the State. However, SFPUC and BAWSCA strongly oppose the Regulation to the extent it relies on the Reasonable Use Doctrine to declare certain water uses and practices per se “wasteful and unreasonable” by means of a permanent statewide regulation. Such a regulation is contrary to law, inequitable to water right holders affected by the Regulation, and contrary to the current State policy of encouraging water conservation without impacting water rights. The Regulation is a dangerous and unnecessary

precedent at a time when the SWRCB and water users should be working together to solve the State's water shortage problems. We urge the SWRCB to amend the Regulation to better align it with established law and the State's policy of encouraging (or even mandating) water conservation while protecting water rights.

1. The Regulation is an Improper Exercise of the SWRCB's Authority to Prevent Waste and Unreasonable Use.

Article X, Section 2 of the California Constitution states in pertinent part that:

It is hereby declared that because of the conditions prevailing in this State the general welfare requires 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. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

(Cal. Const., Art. X, § 10; See also, Wat. Code § 100.) The purpose behind Article X, section 2 is to limit the amount of water diverted and used to a quantity that is reasonably necessary for a beneficial purpose. The SWRCB is authorized to take action to prevent waste and the unreasonable use of water, including the authority to enact regulations to promote the reasonable and beneficial use of water to the maximum extent possible. (Wat. Code § 275; *Light v. SWRCB* (2014) 226 Cal.App.4th 1463.) The SWRCB cannot, however, adopt a permanent statewide regulation declaring a particular activity or category of water use per se wasteful or unreasonable without undertaking some form of process to determine the factual basis of waste and unreasonable use on a case by case basis. To do so restricts the vested rights of water right holders to the use of water without due process.

a. Waste and Unreasonable Use Determinations Must Provide a Process Whereby the SWRCB Considers All of the Relevant Facts.

Determining what constitutes unreasonable use or waste is a question of fact that is decided according to the specific circumstances of a particular situation. (*Gin S. Chow v. City of Santa Barbara* (1933) 217 Cal. 673, 706 [“This is but another way of saying that what is a useful and beneficial purpose and what is an unreasonable use is a judicial question depending upon the facts in each case” (emphasis added)]; *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 139 [“What is a reasonable use or method of use of water is a question of fact to be

determined according to the circumstances in each particular case”] (emphasis added)¹; *State Water Resources Control Board Cases* (2006) 136 Cal.App. 674, 762 [same]; *Light*, 226 Cal.App. 4th at 1479 [“California courts have never defined, nor as far as we have been able to determine, even attempted to define what constitutes an unreasonable use of water, perhaps because the reasonableness of any particular use depends largely on the circumstances”] (emphasis added); See also, SWRCB Revised Order WRO 2002-0013, p. 80 [“the reasonableness doctrine embodied in article x, section 2 of the Constitution calls for consideration of all relevant facts” (emphasis added)].) This foundational principle is directly related to the principle that a reasonable use determination (i.e., whether a quantity of water diverted and used is reasonable) may change with changed circumstances.² (See, *Tulare Dist. v. Lindsay-Strathmore Dist.* (1935) 3 Cal.2d 489, 567; *Light*, 226 Cal.App.4th at 1479, 1488.)

Both the courts and the SWRCB have rejected the notion that a broad per se reasonable use determination can be made for particular water uses. In the *State Water Resources Control Board Cases*, the court examined the argument that any use of water from New Melones Reservoir to dilute salinity levels in the San Joaquin River constituted an unreasonable use of water (i.e., such use was per se unreasonable in all circumstances).

To the extent the San Joaquin County parties can be understood to argue that *any* use of New Melones water to dilute salinity levels at Vernalis amounts to an unreasonable use of water, that argument fails. “What is a reasonable use or method of use of water is a question of fact to be determined according to the circumstances in each particular case.” [Citation.] Here, the Board determined that permitting the Bureau to use water from New Melones to dilute salinity levels at Vernalis was reasonable, and the San Joaquin County parties have not shown any error in that determination. Their reliance on *Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1270, 54 Cal.Rptr.2d 340, is misplaced because the court's assertion in that case that “[u]se of upstream water to wash out salts downstream is an unreasonable use of water” was an overstatement, given that reasonable use is a question of fact depending on the particular circumstances in each case. There certainly may be cases in which the release of water to dilute saline levels is unreasonable, but that is not always the case.

¹ While the court in *Joslin* found a specific use of water to be unreasonable as a matter of law, the court's determination was limited to the specific facts before it. (*Joslin*, 67 Cal.2d at 140 [“We are satisfied that in the instant case the use of such waters as an agent to expose or to carry and deposit sand, gravel and rock, is as a matter of law unreasonable within the meaning of the constitutional amendment”] [emphasis added].)

² This principle is simply a recognition that the consideration of changed factual circumstances *may* alter a reasonable use determination. A different reasonable use determination is not a given under changed circumstances but may occur and the possibility for such must therefore be recognized. This possibility precludes a blanket per se reasonable use determination that attempts to cover all circumstances.

(*State Water Resources Control Board Cases*, 136 Cal.App. at 762 [original italics] [underlined added].) In Revised Order WRO 2002-0013, the SWRCB addressed a request by a petitioner for the SWRCB to provide assurance that it would not reassess reasonable use during the period of the petitioner's water transfer absent a change in irrigation practices or irrigation efficiency technology. In refusing to provide the requested assurance, the SWRCB pointed out that "the reasonableness doctrine embodied in article X, section 2 of the Constitution calls for consideration of all relevant facts, not just a single fact such as irrigation efficiency." (Revised Order WRO 2002-0013, p. 80, 81 [emphasis added].) The SWRCB listed a number of other facts relevant to the reasonableness of the petitioner's water use, including the amount of water available, the fact that return flows contributed to flooding, and the fact that conservation measures were available. (*Id.* at p. 80.) The SWRCB also pointed out its "ongoing responsibility" to assess the reasonableness of the petitioner's water use based on the principle that a reasonable use determination may change with changed circumstances. (*Id.* at p. 81.)

The court's decision in *Light v. SWRCB* is consistent with the conclusion that the Reasonable Use Doctrine does not authorize the SWRCB to make blanket per se reasonable use determinations for particular water uses and actions. In discussing the Reasonable Use Doctrine, the court in that case noted the foundational principles that (1) the reasonableness of a specific use depends on the circumstances at issue, and (2) a reasonable use determination may change with changed circumstances. (*Light*, 226 Cal.App.4th at 1479.) More importantly, the SWRCB regulation reviewed and approved in that case had a limited focus on diversions from the Russian River for frost protection during specific times of the year and was not a permanent blanket per se reasonable use determination that applied statewide. The regulation at issue in that case delegated authority to local governing bodies to "develop and implement methods for monitoring 'stage,' or height, of the affected watercourses, determining when that stage poses a threat to young salmon, and responding with 'corrective actions' to reduce a threat once detected." (*Id.* at 1475-1476.) The regulation provided for a number of potential corrective actions and provided that diverters shall implement the corrective actions in accordance with a corrective action plan or cease diverting water for frost protection if the governing body determined that diversions for frost protection had the potential to cause stranding mortality. (*Id.* at 1476.) A diversion only constituted an unreasonable method of diversion and use if it was done in violation of the regulation. (*Id.*) Thus, the regulation was limited in scope, and the reasonable use determination was made only after consideration of various relevant factors (e.g, water levels, threats to salmon, corrective actions) that had to be considered to determine if diversions were made in violation of the regulation.

Based on the above, the SWRCB can only make a reasonable use determination pursuant to its authority under the Reasonable Use Doctrine after it has undertaken some process to consider all of the relevant facts associated with the use(s) being assessed. A permanent per se reasonable use determination that applies statewide and that is made as part of a quasi-legislative

proceeding does not allow for the necessary process and assessment required by the Reasonable Use Doctrine.

b. The Regulation is Too Broad.

The Regulation would permanently declare particular water uses and actions per se wasteful and unreasonable on a statewide basis:

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)³ regardless of water right seniority, given the need for the water to support other more critical uses.

(Proposed 23 Cal.CodeRegs §963, Preamble.) The Regulation then lists a number of specific uses of water that are prohibited as waste and unreasonable use, as well as a number of prohibited actions that will purportedly cause waste and unreasonable use of water. (See, *Id.* at § 963(b)(1), (d)(1), (e).)

The Regulation does not itself consider or allow for the consideration of the myriad of relevant facts particular to each of the numerous potential situations that could arise involving the particular water uses and actions it targets. Nor has the SWRCB undertaken a process to establish a factual basis of waste and unreasonable use for every potential situation to which the Regulation may apply (i.e., to establish that at all times in all circumstances in all geographic areas of the State the prohibited uses constitute waste and unreasonable use). As demonstrated by the authority discussed above, the relevant facts for each situation may vary in number and character and cannot be addressed prospectively by a blanket per se reasonable use determination applying statewide.⁴ Further, the blanket reasonable use determination is permanent and fails to recognize the long-established principle that a reasonable use determination may change with changed circumstances. The SWRCB acknowledged this principle and its associated obligation in Revised Order WRO 2002-0013 wherein it stated that it would not bind itself to a long-term reasonable use determination because circumstances may change and to do so would be an abdication of its ongoing responsibility to assess reasonable use. (Revised Order WRO 2002-0013, p. 81.) The fact is that while the prohibited uses and actions targeted by the Regulation

³ It appears that the reference to subdivision “(a)” is an error, as that subdivision is a definitions section.

⁴ The dialogue among SWRCB members, SWRCB staff and stakeholders at the SWRCB’s November 21, 2017 public workshop about the need to exempt or carve out certain otherwise prohibited activities is proof that a statewide regulation cannot possibly account for all of the factors that go into a waste and unreasonable use determination. In addition, the proposed regulatory package cites various “benefits” that will result from the proposed Regulation, such as increased instream flows and fisheries benefits. However, there is no factual basis for these considerations in most parts of the State that would be affected by the proposed Regulation. Moreover, the regulatory package documents admit that one of the objectives of the proposed Regulation is to reallocate water to the environment, without providing any factual basis or due process.

may constitute waste and unreasonable use (i.e., the use of too much water) under some circumstances, there may be other circumstances wherein they are entirely reasonable.⁵ Therefore, the Regulation's blanket prohibition of particular water uses and actions is not authorized by the Reasonable Use Doctrine, and the Regulation constitutes an improper exercise of the SWRCB's authority under the Reasonable Use Doctrine.⁶

c. The Regulation Will Unnecessarily Diminish Water Rights and Prevent Water Right Holders from Receiving Credit for Conservation.

The Regulation and its supporting documents interchangeably characterize the prohibited actions as “waste and unreasonable use,” on the one hand, and as mandated “conservation” measures on the other hand. However, there is a significant legal difference between these two characterizations. The rule of reasonableness is a measure of a water right, and thus a water right cannot include the waste or unreasonable use of water. (*Central Delta Water Agency v. State Water Resources Control Board* (2004) 124 Cal.App.4th 245, 259 [“The state Constitution provides that the right to water or to use water is limited to such water as is ‘reasonably required for the beneficial use to be served,’ and does not extend to ‘the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water’”] (emphasis added); See also, *Joslin*, 67 Cal.2d at 138, 145, 146; *Light*, 226 Cal.App.4th at 1488.) If a water use is determined to be a waste or unreasonable use of water, the water right associated with the use will not include the use (i.e., it will be diminished). Thus, water savings resulting from the Regulation could not be deemed “conservation” to which a water right holder retains the right pursuant to Water Code section 1011.⁷ Instead, the savings would be lost to the water right

⁵ The exceptions to the Regulation (found in proposed Section 963(b)(2)) are extremely limited and do not allow for the consideration of the relevant facts particular to each situation or for a changed reasonable use determination under changed circumstances.

⁶ It is also questionable whether the Regulation is necessary under the circumstances. In its Notice of Proposed Regulatory Action (“Notice”), the SWRCB discussed the purported benefits of the Regulation. The Notice states that “[t]hrough the potential overall water saving[s] from the proposed regulation are likely to be relatively minor, the water savings associated with the proposed regulation would nonetheless realize or promote a number of the aforementioned benefits.” (Notice, p. 5.) However, the Notice acknowledges that “[t]he proposed regulation would not by itself necessarily achieve a significant level or amount of these benefits,” but “can reasonably be expected to have a positive impact.” (*Id.*) Boiling this down, the Regulation (1) will not result in any significant water savings, and (2) will not achieve a significant level of the benefits it aims to promote. Further, as stated by SWRCB staff in their November 21, 2017 presentation at the public workshop discussing the Regulation, the majority of the practices targeted by the Regulation are already prohibited by a majority of water suppliers. (See, 11-21-17 SWRCB Staff Presentation for Item #8, Slide 14.)

⁷ Water Code section 1011 states in relevant part that:

When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. No forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to water

holder, and theoretically could not be reported as conservation on annual statements of water diversion and use.

Given that the conserved water will not be credited to water right holders who comply with the Regulation's directives, the Regulation is unnecessarily punitive and appears designed to affect and limit water rights rather than simply achieve water savings while providing water right holders with credit for their conservation efforts. This is inconsistent with prior actions by the SWRCB wherein it took steps to ensure that conservation regulations would not impact water rights.

The California Constitution declares, at article X, section 2, that the water resources of the state must be put to beneficial use in a manner that is reasonable and not wasteful. Relevant to the current drought conditions, the California Supreme Court has clarified that "what may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." (*Tulare Dist. v. Lindsay Strathmore Dist.* (1935) 3 Cal.2d 489, 567.) In support of water conservation, the legislature has, through Water Code section 1011, deemed reductions in water use due to conservation as equivalent to reasonable beneficial use of that water. Accordingly, this regulation is in furtherance of article X, section 2 during this drought emergency. This temporary emergency regulation is not to be used in any future administrative or judicial proceedings as evidence or finding of waste and unreasonable use of any individual water user or water supplier subject to this regulation, and are 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.

(SWRCB Resolution Nos. 2015-0032 ["To Adopt an Emergency Regulation for Statewide Urban Water Conservation"], ¶ 15 (emphasis added); 2016-0029 [Same], ¶ 21; 2017-0004 ["To Adopt a Regulation for Statewide Urban Water Conservation"], ¶ 13.) As discussed in Section 2 below, we suggest the SWRCB take a similar approach in this case to ensure that water right holders are credited for their conservation efforts.

appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriated prior to December 19, 1914.

(Wat. Code § 1011(a).)

2. The SWRCB should Amend the Regulation to Encourage or Even Require “Conservation.”

SFPUC and BAWSCA strongly support the policy of making water conservation a way of life in California, and request that the SWRCB amend the Regulation so that it focuses on encouraging or mandating conservation rather than unlawfully attempting to broadly determine and prohibit waste and unreasonable use. Such an approach could require the elimination of inefficient water use practices as conservation in furtherance of maximizing the beneficial use of water while protecting water right holders’ rights to conserved water. This would be consistent with the SWRCB’s authority to implement Article X, section 2 of the California Constitution by encouraging or mandating conservation in furtherance of maximizing the beneficial use of water while providing water right holders the protection afforded by Water Code section 1011. Attachment A submitted herewith includes proposed revisions to the Regulation consistent with SFPUC’s and BAWSCA’s requested approach.

SFPUC and BAWSCA appreciate the opportunity to comment on the Regulation.

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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.

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.

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- (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.~~

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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

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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 page 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,

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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 pages, 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.

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(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

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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

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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

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