Westlands Water District

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Via Email and U.S. Mail

Ms. Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-2000

Email: commentletters@waterboards.ca.gov

Re: Westlands Water District's Comment Letter – Changes to Proposed Regulations Prohibiting Wasteful Water Use Practices

Dear Ms. Marcus and Members of the State Water Resources Control Board:

Thank you for the opportunity to provide comments on the State Water Resource Control Board's ("State Water Board") proposed regulation establishing a new chapter 3.5 within title 23, division 3, on Conservation and the Prevention of Waste and Unreasonable Use and a new article 2 within chapter 3.5 pertaining to Wasteful and Unreasonable Water Uses ("proposed regulations").

As the largest agricultural district in the nation, Westlands Water District's ("Westlands") farmers provide food to the world and account for about $3.6 billion of economic output, much of which directly benefits our State and its residents. Like every Californian, Westlands and the families and farmers it serves have an acute interest in the responsible administration and stewardship of our natural resources, including water. Unlike every Californian, however, our families and farmers have an intimate connection with the soil, sun, and water and fully appreciate the complexities involved in the sublime presence of a bowl of salad on the dinner table. These complexities range from the hydrologic and the regulatory to the infrastructural and economic. Our farmers operate inside this asymmetric institution of putting food on the table because it is their calling – a calling as real as the Imam's or the cellist's. It is in honor to that calling that these comments are offered.

The proposed regulations on waste and unreasonable use, in part attempting to regulate the homeowner in Smith River and the tenant in Land Park while opening the door to regulating the rice farmer in Williams and the pistachio grower in Huron, are not about water or beneficial uses of water or about conservation. They are about the power of the State Water Board to abrogate the California Constitution, to expand its powers beyond that constituting instrument, and to erode fundamental conceptions of due process enshrined in well-established California water law. The attempt to clothe this arrogation in the cloak of "conservation" smacks of when

we were told as young soldiers that we were invading Iraq to "free" the Iraqi people – a narrative even an 18-year-old RTO found hard to believe.[1]

The proposed regulations suffer from a number of deficiencies, arrogations, conflations, and usurpations of long-standing principles that form the pillars of the institutions that guarantee liberty and recognize individual dignity.

1. The Proposed Regulations Upend Fundamental and Well-Established Concepts of Water Law in California as They Relate to the Case-Specific Determination of Unreasonable Use.

The proposed regulations purport to wield article X, section 2, of the people's Constitution – a document intended to *limit* the powers of government[2] – as a weapon to make determinations outside the purview of an impartial, fact-finding adjudicator. There is a long line of law supporting the rule that reasonable use determinations cannot be made in the abstract, but require an analysis of the particular circumstances. (See, e.g., *Tulare Dist. V. Lindsay-Strathmore* (1935) 3 Cal.3d 489, 567 ["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."]; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140 ["A reasonable use of water depends on the circumstances of each case…"]; *Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194 ["What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes."]; *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354, internal citations omitted ["[I]t appears self-evident that the reasonableness of a riparian use … [cannot] be made in vacuo isolated from statewide considerations of transcendent importance." – What consideration is of greater "transcendent importance" than the integrity of the document that constitutes us as Californians and the protections that document affords?)

The proposed regulations, however, in discord with the law established above, do not distinguish between areas where or times when water is present in excess and those where it is scarce. Their application is not dependent on the circumstances of each case, unless the case be advanced as the continuing menace of an exigency that last year's record precipitation extinguished.[3] Nor do the proposed regulations allow for changes across time and space. The premise is that the water "conserved" by the proposed regulations will go to other, yet-to-be-identified, reasonable beneficial uses. What are these other reasonable and beneficial uses against which the identified ones, now suddenly deemed "wasteful and unreasonable," have been

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[1] Lord Tennyson's admonishment proved small comfort to him.

[2] *See* Methodist Hosp. of Sacramento v. Saylor, (1971) 5 Cal. 3d 685, 687 ("The California Constitution is a limitation on the powers of the legislature.").

[3] It is well established in the scientific community that California experiences regular climatic variability marked by periods of drought and periods of high precipitation. This extreme and natural climatic variability further supports the importance of a reasonable use doctrine that changes with the facts. The facts tend to change with the weather, what is an unreasonable use during a period of drought may be reasonable during a period of high precipitation; *See generally* Richard Seager *et al.,* NOAA Assessment Report Causes and Predictability of the 2011-14 California Drought.

weighed? What entity is making, and what evidence and support is being used to make, this broad determination? The Judiciary? No. The Legislature? No. The Executive? Not really. As such, the proposed regulations, on their face, purport to create a new regime operating outside our Constitution that is in direct contradiction to fundamental concepts upon which our State and our society has been built.

2. The Proposed Regulations Conflate the State Water Board's Authority to Make Rules Under Water Code Sections 1058 and 1058.5 with the Power to Make Broad Determinations that Entire Categories of Water Use are Per Se Wasteful or Unreasonable. Furthermore, the Regulations Attempt to Wield Emergency Powers Before the Emergency has Presented Itself and After the Exigency has Passed.

Water Code section 1058 states "[t]he [State Water Board] may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its power and duties under this code."[4] The reliance on this code section for the proposed regulations as a lawful delegation of authority from the Legislature is misplaced. While this code section allows the State Water Board to promulgate rules and regulations, those rules and regulations are to operate within its "powers and duties," and do not include the authority or obligation to promulgate rules that designate broad categories of beneficial uses, across time and space, as wasteful or unreasonable. As stated above and made clear in the law, the State Water Board lacks the power it purports to arrogate to itself.

Far more disturbing, the State Water Board attempts to perpetuate emergency powers after the exigent circumstances have passed by relying on Water Code section 1058.5. But that section, presumably to prevent a state of perpetual emergency, states that "[a]ny emergency regulation adopted by the [State Water Board] to which this section applies may remain in effect for up to 270 days[.]"[5] But the proposed regulations purport to categorically define certain beneficial uses of water as wasteful and unreasonable as of "January 1, 2025" – apparently when the emergency will present itself – and do not state they expire 270 days afterward (September 27th, 2025). True emergencies in fact may require, in order to preserve liberty and ensure the public safety, the consolidation of power and abrogation of protections that govern in times of peace. When that emergency passes, however, a free and dignified people command a return to democratic and liberal order. There is a time for Cincinnatus to return to his plow.[6]

Furthermore, a reliance on the Governor's various Executive Orders during the drought as authority for these proposed regulations is also misplaced, as it is well-established that

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[4] Water Code, § 1058.
[5] Water Code § 1058.5 (c).
[6] *See* Livy, *History of Rome*, Book III, §§ 26-29. (Cincinnatus was called from his fields when Rome was in imminent danger and the exigency required robust, centralized, and largely-unchecked authority to protect the Roman people. When the foe had been vanquished, at the height of power and glory, that great statesman laid aside the imperial sceptor and returned to his plow, and therefore ensured his name not be recalled alongside Justinian and Stalin.)

Executive Orders cannot provide authority to the State Water Board that it does not already have.[7]

3. The Proposed Regulations Attempt to Arrogate to the State Water Board the Power to Pierce Through Lawful Regulation of the Water Right Holder to Unlawfully Regulate the End User and Therefore Act in a Manner Outside Its Jurisdiction.

The law is clear that the State Water Board's jurisdiction is limited to regulating water *rights*, beginning with the California Constitution:

> 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 diversion of water.[8]

The language in the animating Constitutional provision makes clear that the prohibition against waste and unreasonable use applies to water right holders; it points specifically to the use of water from streams and water courses, which is legally accomplished through the exercise of an appropriative or riparian right. In conformance with the Constitution, Water Code section 100 reinforces the limitation on the State Water Board's jurisdiction to water right holders by repeating the constitutional provision of article X, section 2.

Case law is also clear the State Water Board's jurisdiction is limited to regulating water rights. (See *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242 [The constitutional amendment therefore declares the basic principles defining water rights]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.Ap.3d 82 [Article X, section 2, applies to all water rights enjoyed or asserted in the state, whether the same be grounded on the riparian right or the appropriative right]; *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429, citing to Water Code, § 275 ["The SWRCB does have authority to prevent unreasonable and wasteful uses of water, regardless of the basis under which the right is held."].) Case law and the State Water Board's actions reinforce the fact that the Reasonable Use Doctrine has properly only been applied to water right holders, and not the water user.[9]

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[7] *See* 63 Ops.Cal.Atty.Gen. 583 (1980). "[T]he Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation." (75 Ops.Cal.Atty.Gen. 263 (1992).) Any finding to the contrary would violate the separation of powers doctrine. (*Lukens v. Nye* (1909) 156 Cal. 498, 501 (when the Governor is acting in his capacity as an executive officer, "he is forbidden to exercise any legislative power or function except as in the constitution expressly provided.").) If the Governor attempts "to exercise powers not given, his act will be wholly ineffectual and void for any and every purpose." (*Id.* at p. 502.)

[8] Cal. Const., art. X, § 2 [emphasis added].

[9] *See* Joslin v. Marin Municipal Water Dist. (1967) 67 Ca..2d 132; Imperial Irrigation Dist. v. State Water Resources Control Bd. (1990) 225 Cal.App.3d 548; SWB D-1600; People ex rel. State Water Resources Control Bd. v. Forni (1976) 54 Cal.App.3d 744; In re Waters of Long Valley Stream Sys. (1979) 25 Cal.3d 339; Peabody v. City of

4. The Proposed Regulations Conflate Other Regimes and Frameworks with Waste and Unreasonable Use.

Worryingly, the proposed regulations conflate the distinct regimes of the Reasonable Use Doctrine with the Public Trust Doctrine, the Rule of Priority, and Conservation. Each are distinct regimes which require distinct analyses.

a. Conflating Unreasonable Use with the Public Trust Doctrine.

The Unreasonable Use Doctrine in the California Constitution and the Public Trust Doctrine as developed by the courts are two distinct considerations. While the State Water Board has the duty to take the public trust into account when making water right determinations,[10] that calculus is distinct from a reasonable use determination. The weighing of public trust considerations presumes any water uses at issue are reasonable. Otherwise, those uses are *de facto* unlawful as no right inheres under California law in an unreasonable use of water, and no weighing of considerations follows. The premise of the public trust is that some species of property are held by the state in trust for the people – but there is no property interest that inheres in the unreasonable use of water. (*In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 354 ["[After the people passed article X, section 2] there can no longer be any property right in the unreasonable use of water."].) The determination that a species of property – perhaps such as the use of water in California – is held in trust for the public is not immune from a subsequent analysis of whether that species of property so held in trust is reasonably required for the beneficial use to be served. This latter determination must be made in accordance with law issuing from the California Supreme Court (see *Environmental Defense Fund, supra*, 26 Cal.3d at 194 ["What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes.") and this body itself (SWRCB Water Right Decision, D-1600, 8.3 at 22 ["A reasonable use of water depends on the circumstances of each case…."].) It therefore follows that the state cannot hold an unreasonable use in trust for the people. The two analyses are distinct.

b. Conflating Unreasonable Use with the Rule of Priority.

The proposed regulations purport to find 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…" (Proposed Regulations, § 963 [emphasis added].) But the two regimes require distinct analyses. The rule of priority states that "the one who first appropriates water has the sole right to use the same for the purpose for which it was appropriated, to the exclusion of any subsequent appropriation for the same purpose or for any other use of the water."[11] The rule of priority therefore presumes a valid water right. But, as stated above, no water right inheres in a use of water that is found under the circumstances and in

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Vallejo (1935) 2 Cal.2d 351; Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist. (1980) 26 Cal.3d 183); and United States v. State Water Resources Control Bd. (1986) 182 Cal.App.3d 82.

[10] *See* National Audubon Society v. Superior Court (1983) 33 Cal.3d 419.

[11] Wells Hutchins, *The California Law of Water Rights* (1956) at 154.

accordance with established law, to be unreasonable.[12] It is only to valid rights that the rule of priority, and that only between appropriators, applies.[13] Two other categories of water rights, riparian and overlying, are subject to notions of correlative use and safe yield and not to "first in right," and are similarly distinct from reasonable use determinations. Only if a use of water is reasonable may it result in a right to use water; and only once that right is established is its relationship to other rights subjected to the relative rights of others inside that same category.

c. Conflating Unreasonable Use with Conservation.

The proposed regulations purport to be focused on "conservation," hoping that water users will cower to some incantation of sacred text. But the sacred text is found in this State's Constitution and requires no incantation: a finding of an unreasonable use of water is a factual determination that results in the termination of the right to divert water. Again, there is no right in California law to a use of water that is found, under the circumstances and in accordance with established law, to be unreasonable.[14] While conservation ought very well to be a way of life in all societies save the sybaritic, our law states that the water right holder retains the right to the conserved water.[15] Therefore, the proposed regulations not only once again purport to upend established law, but also betray an ethic of wielding the law as a weapon instead of incentivizing conservation by allowing the conserving water right holder to retain the right to the conserved water. Instead, that conserved water apparently becomes labeled as "unreasonable" as to that conserver, and presumably therefore the right extinguishes and inheres to the State, which, to Point (a) above, is attempting to immunize itself from the reasonable use requirement of the California Constitution under the guise of administering the public's trust.

Finally, it is imperative to understand a fundamental philosophical fallacy that animates the growing power of government in California, of which these proposed regulations are a symptom, and which betrays a naïve misunderstanding of tyranny's modern expression. James Madison understood that the consolidation of the judicial, legislative, and executive functions in a single body is the very definition of modern tyranny,[16] and as such our framers designed the federal Constitution accordingly, sluicing the powers between disparate branches.[17] The California Constitution follows the same pattern.

Familiar with classical and modern political philosophy, James Madison and the other Founders understood that Hobbes' Leviathan only rises amidst enervated institutions and an indolent people who, to escape the state of nature and secure for themselves a peaceful existence,

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[12] *See* Joslin, supra, 67 Cal.2d at 144-45; In re Waters of Long Valley Creek Stream System, supra, 25 Cal.3d at 354.
[13] *See* Pasadena v. Alhambra (1949) 33 Cal.2d. 908, at 926. ("As between appropriators … the one first in time is the first in right, and a prior appropriator is entitled to all the water he needs, up to the amount that he has taken in the past, before a subsequent appropriator may take any.").
[14] *See* In re Waters of Long Valley Creek Stream System, supra, 25 Cal.3d at 354.
[15] Water Code, § 1011.
[16] The Federalist No. 47 (James Madison) ("[T]he accumulation of all powers, legislative, executive, and judiciary in the same hands … may justly be pronounced the very definition of tyranny.").
[17] The Federalist No. 9 (Alexander Hamilton) (Alexander Hamilton listed the "balances and checks" that would "distinctly characterize the American system of separation of powers.").

exchange certain liberties for that security. [18] But Hobbes' flaw was in not understanding that we as individuals are primarily animated, not from fear, but from an intense sense of personal dignity. Hobbes' flaw was in not understanding who "this new man – this American[]"[19] actually is, thereby assuming that she will submit herself to be deprived of a voice through procedural machinations. The Founders understood this new creature of legal fiction, and designed our Constitution premised on what the ancients at least as far back as Homer called *arete* or our desire 'to be seen as excellent;' Aristotle called *eros*; Hegel called *thumos* or the 'desire for recognition;' and Nietzsche called 'the will to power.'

The American is the ultimate expression of the institutionalized recognition of a human desire as primal as hunger: the desire that our dignity as free men and women be recognized both by our neighbor and by our government, and as a result insists on the same for all mankind. *That* is the light that shines forth from that towering Lady in New York Harbor calling to the fearful masses huddled in a dark world descending into despotism.[20] Mr. Hobbes got it wrong from the beginning, and that mistaken premise undermines his entire work. For Leviathan only rises amidst Monsieur Tocqueville's "flock of timid and industrious animals;"[21] it cannot rise amidst the heirs of Patrick Henry[22] and Rosa Parks[23] and inside the institutionalized protections and reservations our constituting instruments guarantee.

These proposed regulations are not about "conservation." As righteous as the intent of making "conservation a way of life" may be, the State Water Board is still obligated to serve the

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[18] The Federalist No. 51 (James Madison) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.").

[19] *See* St. John de Crevecoeur, *Letters from an American Farmer* (6 ed. 1997).

[20] Willie Nelson, *Living in the Promiseland* (1986) ("Give us your tired and weak, and we will make them strong.... Living in the Promiseland/ Our dreams are made of steel/ The prayer of every man is to know how freedom feels").

[21] Alexis d'Tocqueville, *Democracy in America* (15 ed. 2000) ("After having thus successfully taken each member of the community in its powerful grasp and fashioned him at will, the supreme power then extends its arm over the whole community. It covers the surface of society with a network of small complicated rules, minute and uniform, through which the most original minds and the most energetic characters cannot penetrate, to rise above the crowd. The will of man is not shattered, but softened, bent, and guided; men are seldom forced by it to act, but they are constantly restrained from acting. Such a power does not destroy, but it prevents existence; it does not tyrannize, but it compresses, enervates, extinguishes, and stupefies a people, until each nation is reduced to nothing better than a flock of timid and industrious animals, of which the government is the shepherd.").

[22] Thomas Kidd, *Patrick Henry: First Among Patriots* (2011) at 52. (Who among us are not familiar with that attorney's resounding call: "If we were base enough to desire it, it is now too late to retire from the contest. There is no retreat but in submission and slavery! Our chains are forged! Their clanking may be heard on the plains of Boston! The war is inevitable and let it come! I repeat it, sir, let it come.... Gentlemen may cry Peace, Peace. But there is no peace.... What is it that gentlemen wish? What would they have? Is life so dear, or peace so sweet, as to be purchased at the price of chains and slavery? Forbid it, Almighty God! I know not what course others may take; but as for me, give me liberty or give me death!")

[23] What greater expression of individual dignity, at the cost of peace and safety, can be found in a black woman from Mississippi in 1955 refusing to simply stand in the back of the bus? For what real harm amounts to simply going to the back and 'not causing a ruckus?' None – if we are nothing more than cattle. But, if we are of the "family of the lion and the tribe of the eagle," (*see* Abraham Lincoln, "The Perpetuation of our Political Institutions" (1838).) then the insult cuts directly to our inherent and God-given dignity and cannot be tolerated, even at great personal peril.

people as their steward inside the institutionalized constraints by which the people have bound it. These proposed regulations represent the dangerous erosion of core pillars of an institution premised on the dignity of every individual – the institution of a limited government that has been "oblig[ated] to restrain itself"[24] and one that ensures fundamental notions of fairness and due process are being afforded in the appropriate fora.

If the California people – as the source of all governmental authority in our free society – desire the State Water Board to have the authority through rulemaking to prevent every person from Yreka to Lee Vining to La Jolla from washing their driveways with a hose so that their children can play Moana and Frozen, then they have but to speak and the power will be granted. Our silence is deafening, and we and our posterity, to whom we hope to bequest the same blessings of liberty we have enjoyed, urge you to heed it. What you are doing is dangerous.

These times require the very best from each of us. It is a profound honor to serve alongside the State Water Board and its dedicated public servants as we navigate these challenging times. Thank you for your consideration and for your service.

Sincerely,

Philip A. Williams
General Counsel
Westlands Water District

[24] Federalist No. 51 (James Madison).