

San Luis & Delta-Mendota Water Authority



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February 14, 2018

VIA E-MAIL AND U.S. MAIL

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

E-mail: commentletters@waterboards.ca.gov

Re: Comment Letter – Changes to Proposed Regulation Prohibiting Wasteful Water Use Practices

Dear Ms. Townsend:

The San Luis & Delta-Mendota Water Authority (“Water Authority”) has reviewed the State Water Resources Control Board’s (“State Water Board”) proposed regulations for “Water Conservation and the Prevention of Waste and Unreasonable Use” (hereinafter “Proposed Regulations”). The Proposed Regulations, in the name of conservation, would prohibit certain water use practices by determining them wasteful and unreasonable. The unreasonable use doctrine is the wrong tool to promote water conservation, and its use renders the Proposed Regulations fundamentally flawed. The Water Authority therefore urges the State Water Board to decline to adopt the Proposed Regulations.

1. Whether a Use of Water Is Waste or Unreasonable Use Is a Factual Determination.

Article X, Section 2 of the California Constitution dictates that “[t]he right to water or to the use of flow of water in or from any natural stream or water course in this State . . . does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.” (See also Wat. Code, § 100.) What constitutes a reasonable or unreasonable use or method of use is a question of fact, one that depends upon an evaluation of the facts in light of regional circumstances. (*United States v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 130, n. 24; *Environmental Def. Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.) “[S]uch an inquiry cannot be resolved *in vacuo* from statewide

considerations of transcendent importance.” (*Joslin v. Marine Mun. Water Dist.* (1967) 67 Cal.2d 132, 140.)

The State Water Board has acknowledged that “[t]he ‘reasonableness’ of the diversion and use of water . . . cannot be determined in the abstract or by some inflexible standard.” (SWRCB Water Right Decision 1600 (June 1984), p. 22.) “[I]n determining the ‘reasonableness’ of water usage” within a specific geographic area, the State Water Board has explained, “the law requires an examination of the ascertainable facts concerning such water usage and an evaluation of such facts in view of the increasing need for water conservation within California.” (*Id.*, p. 23.) The Proposed Regulations would declare certain categories of water use unreasonable, *in vacuo* from the factual circumstances. This approach is inconsistent with the well-established law of waste and unreasonable use cited above.

2. Water Code section 1058 Does Not Authorize the State Water Board to Adopt the Proposed Regulations.

The Proposed Regulations identify Water Code section 1058 as the sole authority for their adoption. Water Code section 1058 provides: “The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code.” Section 1058 provides the State Water Board with the general authority to make rules. It does not authorize the State Water Board to determine that certain categories of water use are unreasonable. Further, none of the “references” cited in the Proposed Regulations—Article X, Section 2, California Constitution; Civ. Code, §§ 4080, 4100, 4110, 4150, 4185, and 4735; Wat. Code, §§ 102, 104, 105, 275, 350, and 10617; *Light v. State Water Res. Control Bd.* (2014) 226 Cal.App.4th 1463—justify the *in vacuo* action. To the contrary, in *Light* the court acknowledged that “the reasonableness of any particular use depends largely on the circumstances.” (*Light, supra*, 226 Cal.App.4th at p. 1479, citing *Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368.) The *Light* court upheld the regulations before it in part because those regulations did not declare all diversions of water for frost protection unreasonable, but instead tied the unreasonableness determination to a violation of a regional water demand management program. (*Id.* at p. 1489.)

3. The Proposed Regulations Are Based on an Incorrect Assumption that Declaring Certain Uses of Water Wasteful and Unreasonable Will Reduce Consumption and Increase In-Stream Flows.

The November 2, 2017 Notice of Proposed Regulatory Action (“NOP”) asserts that “water conservation can directly protect watersheds by reducing consumption and dedicating those savings to in-stream[] flows.” (NOP (Nov. 2, 2017), p. 6.) Not necessarily so. The Water Code defines “water conservation” as “the use of less water to accomplish the same purpose or purposes of use allowed under the existing appropriative right.” (Wat. Code, § 1011(a).) If a water user has “conserved” water, then under Water Code section 1011 that water user has

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beneficially used water, and may sell, lease, exchange, or otherwise transfer that water. "Conserving" water does not necessarily reduce consumption. Nor does "conserving" water necessarily result in more water being dedicated to in-stream flow.

Further, determining that certain uses of water are wasteful and unreasonable does not actually, legally "conserve" water. The Proposed Regulations would determine that certain uses of water constitute waste and unreasonable use. As others pointed out in their comments on the NOP, declaring that certain uses of water are per se unreasonable could effectively diminish water rights associated with the now unreasonable use, reducing the rights in a manner that is not "conservation" under Water Code section 1011.

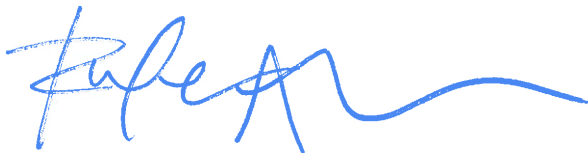
Labeling a particular use as wasteful or unreasonable, irrespective of whether or not doing so constitutes "conservation," will not necessarily reduce consumption or increase water available for in-stream flows. In circumstances where a particular use, for example, is adjudicated as wasteful or unreasonable, the water right holder may fully use his or her water right for another, beneficial use. It is wrong to assume that water previously associated with a wasteful or unreasonable use will become unappropriated water available to increase in-stream flows.

Conclusion

The approach taken in the Proposed Regulations is unlawful, and extends well beyond the State Water Board's authority. Avenues for promoting conservation and prohibiting wasteful practices are available to the State Water Board that do not depend on decades of waste and unreasonable use law. For these reasons, the Water Authority requests the State Water Board decline to adopt the Proposed Regulations.

Thank you for the opportunity to provide comments.

Regards,



Rebecca Akroyd, Deputy General Counsel