

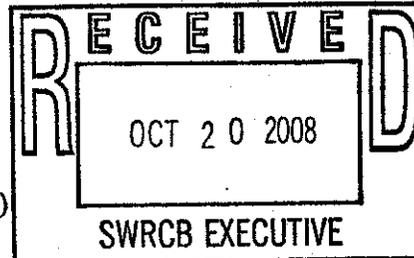


UNITED STATES MARINE CORPS
MARINE CORPS INSTALLATIONS WEST
GOVERNMENTAL AND EXTERNAL AFFAIRS/WESTERN REGIONAL
ENVIRONMENTAL COORDINATION OFFICE
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CAMP PENDLETON, CALIFORNIA 92055

IN REPLY REFER TO:
5090
OGEA/WREC
20 Oct 2008

Sent by Electronic and U.S. Mail

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



SUBJECT: SWRCB PROPOSAL TO MANDATE WATER CONSERVATION MANAGEMENT PRACTICES

Dear Ms. Townsend:

Please find below brief comments on the subject SWRCB proposal. These comments are submitted on behalf of Marine Corps installations in California. Like the proposal that forms the basis for this comment letter, the comments provided herein are preliminary in nature, and we are still reviewing the possible legal and policy implications of the subject proposal vis-à-vis Marine Corps installations and their attendant water/property rights. Accordingly, we reserve the right to amend or supplement the comments expressed herein as California's efforts to develop an enforceable water conservation program take on greater regulatory clarity. We thank you for this opportunity to comment.

The regulation of military installation water use is likely to be a far more complicated subject than the analysis that pertains for non-federal water suppliers and users. The inherent complexity of military water use—which can, and often does, serve a myriad of federal purposes on military enclaves—is compounded by the variety of ways in which Department of Defense (DoD) installations receive their water. In California, DoD installations may obtain water by, among other things, exercising water rights (state and federal¹, statutory and common law), purchasing water from municipal suppliers/water districts, or by entering into water delivery contracts with the Bureau of Reclamation or other state/federal agencies. Many military installations utilize a combination of these methods. Thus, mandating water conservation on a military base is a proposition that will require careful study and extensive coordination—if indeed such a program is feasible and legally enforceable vis-à-vis DoD facilities.

1. Prescriptive Versus Performance Based Conservation Regulations:

Because military installations are so different from the state and local water suppliers that provide water deliveries to most urbanized areas of the state, a “command and control” system of prescriptive

¹ As used herein, a “federal” water right is the legally protected right of a federal installation to utilize water independent of state law governing water allocation. *E.g., Winters v. United States*, 207 U.S. 564 (1908).

BMPs would be a particularly poor fit on military lands. Military facilities often do not charge their tenants/residents for water—particularly in the residential housing context—thereby obviating the effectiveness of metering and conservation based rate structures. Strict BMPs implemented via command and control regulation would also risk tying the hands of urban water suppliers that sell water to military installations. A local water supply agency would often be unable to compel a military installation to implement BMPs related to end-user rates and capital outlays for retrofits, nor would it be in a meaningful position to implement or oversee military education and outreach programs related to water conservation.

On the other hand, a performance based water conservation program—which allows military installations and private/local water suppliers alike to seek flexible solutions to decrease potable water demand at the lowest possible cost—would provide a better vehicle for ensuring that local water suppliers get reduction “credit” for military water conservation efforts that reduce urban water demand. A performance based system would also better respect the unique federal procurement and construction requirements applicable to DoD activities. However, whatever form the SWRCB’s water conservation program ultimately takes, it must authorize “credit” to military installations that take (or previously took) early actions to conserve water in accordance with a federal program or a local initiative. Additional mandates of water cuts at an already water efficient facility may require exponentially more expensive water reductions than would otherwise pertain and may risk interference with accomplishment of the military mission.

2. Applicability of Existing California Water Allocation Programs to Federal Agencies:

In the “Key Issues and Questions” section of the SWRCB Discussion Paper of 22 August 2008 (hereinafter “Discussion Paper”), Issue number 2 queries whether the current definition of “Urban Water Supplier” provides an adequate scope of coverage for a SWRCB managed water conservation program. While the definition of Urban Water Supplier in Wat. Code § 10617 does not indicate an intent to regulate military installations, per se, the language of §10617 could be read to apply to military bases that utilize volumes of water in excess of 3,000 acre feet per year. While some DoD installations have prepared Urban Water Management Plans as a matter of comity, it is our view, as explained in paragraph 3 *infra*, that military installations cannot be compelled to prepare such plans. Therefore, to avoid future confusion and regulatory conflict, we recommend that any future definition of urban water supplier utilized in a SWRCB water conservation regulatory program should recognize that military installations are not formally subject to regulation under Wat. Code § 10610 et seq.

3. Federalism in the Field of Water Allocation:

As SWRCB staff are likely aware, federal agencies are only subject to state regulation to the extent that Congress has manifested an unambiguous intention for such regulation to occur. There does not appear to be an unambiguous waiver that would compel DoD facilities to conserve water under a prescriptive state program,² though military facilities are certainly encouraged to do so (and indeed *are* doing so) under a variety of *federal* programs. See, e.g., 42 U.S.C. §§ 8252, 8256(c) (encouraging federal agency participation in water conservation programs); Exec. Order No. 13,123 (requiring federal agencies to develop goals for “reduc[ing] water consumption . . . in their facilities.”); Exec. Order 13423. Indeed, utilizing federal authorities, Marine Corps installations in California are in the process of

² See generally J.N. Jungreis, ‘Permit’ Me Another Drink: A Proposal for Safeguarding the Water Rights of Federal Lands in the Regulated Riparian East, 29 HARV. ENVTL. L. REV. 369, 396 (2005) (discussing theories of federal sovereign immunity waiver and concluding that none of the theories can articulate an unambiguous intention on the part of Congress to waive federal sovereign immunity for state administrative processes related to water allocation).

implementing water conservation/recycling programs that are anticipated to save many millions of gallons of water per day in the near future.³

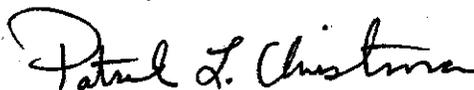
4. SWRCB Regulations Should Facilitate Transport, Storage and Wheeling of "Conserved" Water While Ensuring That Conservation Efforts Do Not Yield Adverse Water Right Consequences:

Any conservation policy ultimately adopted should ensure that voluntary conservation of water does not imperil state law water rights that would otherwise pertain (e.g., the regulations should clarify that presumptions of forfeiture or non-use will not apply where water is conserved in order to free up additional supply). While the current trend in California is to remove obstacles to conservation in the processing and administration of water rights, the SWRCB should provide legally enforceable assurances in its proposed conservation policy that voluntary water conservation measures taken today will not jeopardize future assertions of state law water rights (particularly riparian rights) in future adjudications and permit decisions.

Additionally, if significant reductions in "imported" water from Northern California and/or the Colorado River are to be achieved via conservation, the SWRCB must take robust action to facilitate transport, storage and use of recycled and reclaimed water in Southern California watersheds and aquifers. While certain aspects of the SWRCB's Draft Recycled Water Policy are promising in this regard (e.g., the potential for greater regulatory flexibility via "salt management plans,") numerous SWRCB and Regional Board initiatives, such as the nutrient numeric endpoints (NNE) approach to the setting of nutrient objectives and TMDLs, have the potential to frustrate water reclamation efforts by establishing nutrient standards in water quality control plans that are too conservative to allow for assimilation of high quality recycled water.

We thank you again for the opportunity to comment on this important initiative. If you have any questions regarding the comments provided herein, or if we may otherwise be of assistance, please feel free to contact my representative on this matter, Major Jeremy Jungreis, USMCR, my Legislative and Regulatory Affairs Officer for California regulatory issues. Major Jungreis may be reached at (760) 725-2631 or at jeremy.jungreis@usmc.mil.

Sincerely,



Patrick L. Christman
Director, Office of Govtl and External Affairs
Marine Corps Installations West (MCIWEST)
Marine Corps Office of the Regional Environmental
Coordinator—Western Region

³ As but one of many examples, Marine Corps Air Station (MCAS) Miramar in 2007 decreased its annual potable\drinking water consumption by more than 29,000,000 gallons. Two additional conservation projects are currently under construction that will save the MCAS more than 40,000,000 more gallons of drinking water.