



February 22, 2015

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
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Sacramento, CA 95814
E-mail: commentletters@waterboards.ca.gov

VIA E-MAIL

Re: Comment Letter – General Order for Recycled Water Use

Dear Board Members of the State Water Resources Control Board:

On behalf of the Wishtoyo Foundation (“Wishtoyo”) and its Water Initiative, we object to the State Water Resources Control Board’s (“SWRCB’s” or “State Board’s”) adoption of State Water Resources Control Order WQ 2016-00XX-DDW Draft Water Reclamation Requirements for Recycled Water Use dated 1/21/2016 (“General Order for Recycled Water Use” or “General Order”).

Introduction

Throughout California, rivers, streams, and groundwater supplies are severely impaired by withdrawals of water for consumptive uses, many of which are unreasonable, wasteful, and or not sustainable for their respective regions. California is now experiencing one of the most severe droughts in history. The drought has exasperated the strain on flow deprived streams and over-drafted groundwater basins, but is not the cause of these long standing problems that impair and threaten the well being of the state’s residents and wildlife.

California’s laws safeguard the state’s limited water resources for a multitude of oft competing beneficial uses. The relevant laws protect groundwater basins and surface water supplies needed for current and future water uses alongside the river and stream flows needed to sustain in-stream public trust resources. These laws work conjunctively, so that the water resources of the state can be planned, managed, and maximized to serve the greatest possible number of beneficial uses, including the protection of fish, wildlife, and other in-stream resources. They require that the state ensure that all water be used

reasonably, and not wasted, and require the protection of in-stream flow dependent wildlife and human public trust protected uses when feasible. The state's strict adherence to these laws and the non-discretionary duties they impose, are critical to preserve the natural resources vital to the survival and well being of the state's current and future generations.

Despite the degraded and endangered condition of rivers, streams, and groundwater aquifers throughout the state, almost all of which have been further strained by drought, the State Board continues to routinely approve and supervise distribution, management, and uses of new water supplies, such as recycled water, without analyzing whether or ensuring that the new water will be, or is being, managed and used reasonably and not wastefully. Furthermore, the State Board continues to routinely approve and supervise distribution, management, and uses of new water supplies, such as recycled water, without analyzing whether or ensuring that the new water will be, or is being, managed and used in a manner that protects and restores in-stream flow dependent public trust resources of rivers and streams and or groundwater aquifers harmed by water withdrawals for consumptive uses. As a result, the State Board's approvals and authorization of new water uses continues to allow the state's water resources to be managed and used in a non-integrated, unreasonable, and wasteful way, depriving the public of in-stream flow dependent public trust resources and sustainable water supplies.

The State Board has a non-discretionary affirmative duty and the legal authority under Article X Section 2 of the California Constitution, Sections 100 and 275 of the California Water Code, and the California Public Trust Doctrine to ensure the reasonable beneficial use of, and to prevent waste of, all of California's water resources, and, when feasible, to protect the state's in-stream flow dependent public trust resources. Wishtoyo Foundation thus requests that the State Board adhere to Article X Section 2 of the California Constitution, Sections 100 and 275 of the California Water Code, and the California Public Trust Doctrine by promulgating and adopting a General Order for Recycled Water Use that stops perpetuating decades of unreasonable, wasteful, non-integrated, and irresponsible water uses, management, and planning that results in ongoing and continuous harms to rivers, streams, water supplies, and groundwater basins in Ventura County, Los Angeles County, and throughout the state.

To meet this legally mandated request, the General Order for Recycled Water Use must ensure that recycled water the General Order authorizes for use is used and managed reasonably in a manner that protects the state's scarce water supplies, groundwater basins, and the in-stream flow dependent public trust resources of the state's river and streams. To accomplish this, the General Order must contain procedures and requirements that prevent unreasonable use of new and recycled water, and that protect the state's flow impaired in-stream flow dependent public trust resources and over-drafted groundwater basins.

To the detriment of the state's over-drafted groundwater basins and in-stream flow dependent public trust protected resources, the Draft General Order would allow recycled water in Los Angeles and Ventura Counties, including recycled water produced

in the Oxnard Plain, to be provided to end users without considering and mandating reasonable use of recycled water in accordance with the reasonableness requirements of the California Constitution and Water Code, and without considering and mandating the protection of the state's public trust protected resources of rivers and streams, including the Santa Clara River. This violates the California Public Trust Doctrine, the California Constitution, and the California Water Code. While authorizing the provision of recycled water in this manner may otherwise be reasonable and permissible in regions with ample groundwater supplies that recharge at the rate of extraction and rivers that contain sufficient year round in-stream flows notwithstanding diversions, this practice is not reasonable or legal in the water starved Los Angeles and Ventura regions, the arid and water resources scarce Oxnard Plain and Santa Clara River watershed, and many other regions throughout the state. Using the Santa Clara River watershed and the Oxnard Plain contained within as an example, to be legally valid, the General Order must ensure that the provision of recycled water by General Order enrollees in the Oxnard Plain region to agricultural, municipal, and other water users protects the over-drafted Oxnard Plain groundwater basins and the Santa Clara River's in-stream flow dependent public trust resources, including a multitude of federally and state listed endangered species, that have been, and continue to be severely degraded by withdrawals of Santa Clara River flows and groundwater for unreasonable consumptive use in the Oxnard Plain. (See "Wishtoyo Foundation, Ventura Coastkeeper, Center for Biological Diversity, and CAUSE March 25, 2015 Amended Public Trust, Unreasonable Use, Unreasonable Method of Diversion, and Fish and Game Code Section 5937 Complaint against United Water Conservation District, Fox Canyon Groundwater Management Agency, and the State Water Resources Control Board" filed with the State Water Resources Control Board and on file with the State Water Resources Control Board Division of Water Rights that Wishtoyo hereby incorporates by reference.)

The General Order for Recycled Water Use Must Adhere to Article X Section 2 of the California Constitution, Water Code Sections 100 and 275, and the California Public Trust Doctrine

As provided above, all water, including new and recycled water, must be used reasonably and not wastefully, and when feasible, must be managed and or used to protect the state's in-stream flow dependent public trust resources and groundwater supplies. The Draft General Order for Recycled Water Use fails to require and ensure the reasonable use of recycled water and management and or use of recycled water to protect in-stream flow dependent public trust resources when feasible. Instead, the General Order allows the perpetuation and continuation of decades of unsustainable and non-integrated water management, and unreasonable and wasteful use of water, that threatens current and future water supplies, in-stream flow dependent public trust resources, and groundwater basins throughout the state. The Draft General Order for Recycled Water Use thus runs contrary to legislative mandates and California law.

Specifically, the General Order fails to adhere to Article X Section 2 of the California Constitution, Sections 100 and 275 of the Water Code, and the California Public Trust Doctrine because it fails to require and ensure reasonable use of recycled

water, or, if feasible, the use or management of recycled water in a manner that protects in-stream flow dependent public trust resources. In addition, it runs afoul of Article X Section 2 of the California Constitution, Sections 100 and 275 of the Water Code, and the California Public Trust Doctrine because it fails to provide a mechanism for the State Board to analyze or determine whether the recycled water will be used reasonably, and whether it is feasible to use or manage the recycled water in a manner that protects in-stream flow dependent public trust resources.

Article X Section 2 of the California Constitution, and sections 100 and 275 California Water Code

The State Water Board is charged with the ongoing and continuing duty to protect and manage all of California's water supplies – including recycled and new water, rivers, and streams in a manner consistent with the reasonable use provisions of Article X Section 2 of the California Constitution, and sections 100 and 275 California Water Code. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d at 367, 372; *Anderson Farms Company* (Oct. 20, 1977) California State Water Resources Control Board Decision No. 1474, at 2; (*Wright v. Goleta Water Dist.* (1985) 174 Cal.App.3d 74, 87.) Article X, Section 2 of the California Constitution and Section 100 of the California Water Code impose an affirmative duty on the State Board, in its approvals, actions, and oversight of the state's water resources, to ensure the reasonable use of water, to prevent its misuse, and to include the imposition of increased costs of water in the interest of conservation. (*Id.*; *Brydon v. E. Bay Mun. Util. Dist.* (1994) 24 Cal.App.4th 178, 202; *In the Matter of the Alleged Waste and Unreasonable Use of Water by Imperial Irr. Dist.* (June 21, 1984). State Water Resource Control Board, Decision No. 1600 at *9.) Water Code Section 275 explicitly requires that the State Board take all necessary action in executive, legislative, and judicial forums to prevent unreasonable use and violations of the California Constitution and California Water Code. Water Code Section 275 does not relieve the State Board of its affirmative duty and legal requirements under Article X, Section 2 of the California Constitution and Section 100 of the California Water Code to ensure the reasonable use and management of water in its approvals, authorizations, decisions, and supervisory oversights. Thus, in all of the State Boards actions and approvals it must ensure that the management and use of California's water, including recycled and new water, is reasonable, does not contribute to water waste, and protects the beneficial in-stream flow dependent wildlife and recreational uses of the State's rivers and streams, including those of the Santa Clara River. (*Id.*; Cal. Water Code §1243; *United States v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 103-04.)

The Boards' requirement to enforce Article X, section 2's limitations and prohibitions to prevent waste or unreasonable use apply to the use and management of all water, including recycled water and other sources of new water, by all water users, including use by local water management agencies. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d at 367, 372; *Imperial Irrigation Dist. v. St. Wat. Res. Control Bd.* (1986) 186 Cal. App. 3d 1160, 1163; *see also Miller & Lux v. San Joaquin Light & Power Corp.* (1937) 8 Cal.2d 427, 435.); *see also Mono Lakes Basin Water Right Decision*, (Sept. 28, 1994) California State Water Resources Board Decision 1631 at 11[holding: “[a]ll ... use of

water in California [is] subject to the mandate of Article X, Section 2 of the California Constitution to maximize the beneficial use of water and to prevent [] waste or unreasonable use.”) Thus, as part of its enforcement authority, the State Board must require water management agencies to impose conservation and efficiency measures on end-users. (*Imperial Irr. Dist. v. State Water Res. Control Bd.* (1990) 225 Cal.App.3d 548, 561-62; *People ex rel. State Water Res. Control Bd. v. Forni* (1976) 54 Cal. App. 3d 743, 750.) Where there are impending water shortages that are reasonably certain to exist, the reasonableness provision of the California Constitution requires that water providers impose measures intended to increase water conservation, and to initiate steps immediately which will assist in alleviating the shortage. (*Brydon v. E. Bay Mun. Util. Dist.* (1994) 24 Cal.App.4th 178, 202); *In the Matter of the Alleged Waste and Unreasonable Use of Water by Imperial Irr. Dist.* at *13 (June 21, 1984).)

In determining the reasonableness of the cost to implement water conservation measures, the State Board considers the value of the water that would be conserved, the cost of implementing the conservation measure, and the resources available for financing the measures. (*In the Matter of Waste and Unreasonable Use of Water By Imperial Irrigation District* (Sept. 7 1988) California State Water Board Order WR 88-20 at 4, 17, 29-31, 36.) The mere fact that water conservation measures may require the water user to incur additional expenses does not justify the continued unreasonable use of water. (*People ex rel. State Water Res. Control Bd. v. Forni* (1986) 54 Cal.App.3d 743, 751-52.) The reasonable use doctrine therefore requires water users to “endure some inconvenience or to incur reasonable expenses” in order to put water to maximum beneficial use. (*Id.*)

The use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water. (Cal. Water Code §1243.) In its determination of reasonable use, the State Board is required to consider the amounts of water required for recreation and preservation and enhancement of fish and wildlife resources, and the amounts of water needed to remain in the source for the protection of beneficial uses. (*Id.*; *United States v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 103-04) (holding that the State Water Board had the authority to modify existing permits for diversion and to curtail use of water to protect environmental resources and recreational uses under Article X, Section 2 of the California Constitution, and that “[n]onconsumptive or in-stream uses too, are expressly included within the category of beneficial uses to be protected in the public interest.”) A particular beneficial water use may be determined to be unreasonable based on its impact on fish, wildlife or other in-stream beneficial uses. (*Fishery Prot. and Water Right Issues of Lagunitas Creek*, (Oct. 26, 1995) California State Water Board Order No. WR 95-17 at 14.) Thus, ensuring that the waters of the state be put to the greatest possible beneficial use to protect fish, wildlife, and other in-stream beneficial uses can require that conservation measures be implemented or that water is used in-stream despite the additional cost. (*Id.*; *Brydon v. E. Bay Mun. Util. Dist.* (1994) 24 Cal.App.4th 178, 202; *People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal.App.3d 743, 755-56 (1976) (holding that riparian water right holders’ use of low winter flows to avoid frost damage, which resulted in temporary water shortages was unreasonable when they could construct reservoirs to hold

the required water despite the fact that this would require them to invest in construction costs.)

When evaluating whether a particular use of water is reasonable, local custom may be considered as one factor in determining the reasonableness of water use, but is not determinative in determining whether a particular use is unreasonable or wasteful. (California Water Code § 100.5; *In the Matter of Alleged Waste and Unreasonable Use of Water by Imperial Irrigation District* (June 22, 1984) California State Water Board Decision No. 1600 at 28.) Further, “[w]hat is a [reasonable] beneficial use at one time may, because of changed conditions, become a waste of water at a later time,” such when an area experiences great water scarcity and need. (*Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal. 2d 489, 567; *Envtl. Def. Fund, Inc. v. East Bay Mun. Util. Dist.* (1977) 20 Cal.3d 327, 332.)

The reasonable water use provisions and waste prohibitions of Article X, §2 of the California Constitution and the Water Code require that the General Order contain provisions that ensure that recycled water delivered to end users is used reasonably and not wastefully. However, in violation of Article X Section 2 of the California Constitution, Water Code Section 100 and Water Code Section 275, the State Board fails to ensure that the General Order mandate that recycled water be used reasonably for uses that are sustainable for the regions in which the recycled water is generated and by users that implement best available municipal and agricultural efficiency and conservation practices. For example, the General Order allows end users to grow water intensive crops that may not be sustainable for the region in which they are grown, and allows use by municipal and agricultural end users that have not implemented best available water efficiency and conservation practices. In the case where enrollment in the General Order would authorize recycled water to be delivered to municipal and agricultural end users that have not implemented best available water efficiency and conservation practices, the allowance of recycled water use in this manner would be unreasonable and thus should not be authorized by the General Order if agricultural or municipal end users adoption of best available water efficiency and conservation practices would result in more or enough recycled or total regional water being available for growing crops that are sustainable for a region’s limited water resources, for domestic and municipal water supply, to leave water in streams sufficient to support in-stream flow dependent public trust resources, or to leave water in or recharge over-drafted groundwater basins.

Likewise, and as another example as to why the General Order violates Article X Section 2 of the Constitution, and Sections 100 and 275 of the California Water Code for authorizing unreasonable use of the state’s scare water resources, in the case where enrollment in the General Order would authorize recycled water to be delivered to golf courses that have not implemented best available water efficiency and conservation practices, the allowance of recycled water use in this manner would be unreasonable and thus should not be authorized by the General Order if golf course adoption of best available water efficiency and conservation practices would result in more or enough recycled or total regional water being available for other golf courses implementing best available water efficiency or conservation measures, for growing crops that are

sustainable for a region's limited water resources and that make use of best available water efficiency and conservation measures, for domestic and municipal water supply, to leave water in streams sufficient to support in-stream flow dependent public trust resources, or to leave water in or recharge over-drafted groundwater basins.

The California Public Trust Doctrine

The Public Trust Doctrine establishes that the waters and wildlife of the state belong to the people, and that the state acts as a trustee to manage and protect these resources and their associated public uses for its peoples' benefit. (*Audubon*, 33 Cal. 3d at 437, 441-449.) The Public Trust Doctrine imposes on the State Board an affirmative duty to take the public trust into account in the allocation of water resources, including recycled and new water, to conduct ongoing supervision of water use, and to protect public trust uses "whenever feasible" in water rights matters, regulatory decisions, and from actions by private entities, government agencies, and individuals (*Nat'l Audubon Soc'y v. Superior Court*, (1983) 33 Cal.3d 419, 446.) The State Board is thus required to consider the impact of its operations, management practices, authorizations, approvals, and supervisory duties on in-stream flow dependent public trust resources, and to require the implementation of feasible measures to protect these resources. (*Id.*)

The State Board has a continuing duty to protect public trust resources associated with navigable and tidal waterways whenever feasible, and the authority to reconsider terms and conditions of past orders, decisions, or water allocations to protect public trust resources and to prevent waste, unreasonable use, unreasonable method of use, and unreasonable method of diversion of water. (*Imperial Irr. Dist. v. State Water Res. Control Bd.* (1990) 225 Cal. App. 3d 548, 555.) Thus, the State Board has a duty to manage and protect the public trust uses of the state's navigable waters from surface water diversions through various physical solutions, including leaving water in-stream when new water, including recycled water, is available or is made available. (*Audubon*, 33 Cal. 3d at 437, 441-449.) Because the State Board has an ongoing and continuous duty to protect the trust uses of navigable waters, the State Board is tasked with considering the impact of their previous, current, and future actions and approvals on in-stream flow dependent public trust resources, and to ensure its orders and actions protect public trust resources. (*Audubon*, 33 Cal. 3d at 437, 440-441.)

When groundwater is so connected to the navigable water that its extraction adversely affects public trust uses, the State Board also has a duty to consider the effect of the groundwater extractions upon interests protected by the public trust, and so far as feasible, to avoid or minimize any harm to those interests. (Order After Hearing on Cross Motions for Judgment on the Pleadings at 2, *Env'tl. Law Found. v. State Water Res. Control Board* (Jul. 15, 2014) No. 34-2010-80000583; *Nat'l Audubon Soc'y*, 33 Cal. 3d 419, 426; *Fishery Prot. and Water Right Issues of Lagunitas Creek* (Oct. 26, 1995) California State Water Board Order No. WR 95-17 at 28-29.) Thus, the State Board has a duty to manage and protect the public trust uses of the state's navigable waters from groundwater extractions through various physical solutions, including order water to be

left in the ground when new water, including recycled water, is available or is made available. (*Audubon*, 33 Cal. 3d at 437, 441-449.)

To adhere to its affirmative duties under the public trust doctrine, the General Order must require that the State Board analyze and determine whether it is feasible to use or manage an enrollees' recycled water in a manner that protects flow deprived in-stream flow dependent public trust resources, and if feasible to require that the delivery and use of the enrollee' recycled water be managed in a manner that protects flow deprived in-stream flow dependent public trust resources. For instance, in a scenario where enrollment in the General Order would authorize delivery of recycled water to a.) end users (including water agencies or districts) that already receive water from streams with flow impaired public trust resources or to b.) end users (including water agencies or districts) that already extract groundwater that impacts flow impaired public trust resources, for the State Board to adhere to the public trust doctrine, the General Order must:

- 1.) Require an analysis as to whether it is feasible for the delivery of recycled water to such end users for reasonable water use could offset the need for such end users to receive/divert water from flow deprived streams or to extract groundwater from basins where extractions impact in-stream flow dependent public trust resources;
- 2.) Require that such end users of recycled water reduce the amount of water received from over extracted groundwater basins and flow deprived streams by the amount of recycled water received if it is feasible for the delivery of recycled water to such end users for reasonable water use could offset the need for such end users to receive/ divert water from flow deprived streams or to extract groundwater from basins where extractions impact in-stream flow dependent public trust resources;

For instance, the public trust doctrine requires that for all recycled water delivered to end users in the Oxnard Plain, that such end users of recycled water reduce an equivalent amount of water such end users are already extracting from the over-drafted groundwater basins and the flow deprived Santa Clara River that lacks sufficient flows needed to sustain and protect the River's in-stream flow dependent protected public trust resources because of diversions of Santa Clara River flow for direct delivery to end users in the Oxnard Plain and to recharge the Oxnard Plain's over-drafted groundwater basins. (*See* "Wishtoyo Foundation, Ventura Coastkeeper, Center for Biological Diversity, and CAUSE March 25, 2015 Amended Public Trust, Unreasonable Use, Unreasonable Method of Diversion, and Fish and Game Code Section 5937 Complaint against United Water Conservation District, Fox Canyon Groundwater Management Agency, and the State Water Resources Control Board" filed with the State Water Resources Control Board and on file with the State Water Resources Control Board Division of Water Rights that Wishtoyo herein incorporates by reference.)

About Wishtoyo Foundation

Founded in 1997, Wishtoyo is a 501(c)(3) nonprofit grassroots organization with over 700 members consisting of Ventura County's diverse residents and Chumash Native Americans. Wishtoyo's mission is to preserve and protect Chumash culture, the culture of all of Ventura County's diverse communities, and the environment that our current and future generations depend upon.

Thank you for considering our comments.

Sincerely,



Jason Weiner, M.E.M.
Water Initiative Director, General Counsel
Wishtoyo Foundation