



April 22, 2015

Submitted via email: commentletters@waterboards.ca.gov

**Construction
Industry
Coalition
On Water Quality**

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

Subject: Proposed Text of Emergency Regulation - Article 22.5. Drought
Emergency Water Conservation

Coalition Members

Dear Ms. Townsend,

On behalf of the more than 3,000 member companies of the Construction Industry Coalition on Water Quality (CICWQ), we would like to thank the California State Water Resources Control Board (State Board) for this opportunity to comment on the proposed Text of Emergency Regulation - Article 22.5. Drought Emergency Water Conservation.

The Construction Industry has been a leader in environmental compliance in the State of California. In particular we have worked closely with local regulators to craft rules that achieve measurable results in lowering dust emissions (PM-10) throughout southern California and to reduce sediment transfer to local rivers and streams. The single most effective way to do this is with regular watering of active grading surfaces and storage piles and the use of wheel-washers for haul vehicles exiting to public streets.

The nature of construction is temporary and transitory. In many cases construction is taking place where there are no public utilities (water or electricity) and those services need to be brought to the site. Currently in California, construction activity is operating at about 70% of its normal level of activity. Our generation of emissions and our use of water is at an all-time low.

In reviewing the Proposed Text of Emergency Regulation we are concerned about the possibility that local agencies will look to construction watering activities as one way to reduce potable water usage. In many cases this would cause construction activity to be in violation of both air quality and water quality regulations that mandate water for dust control and track out mitigation.

To address this potential conflict, we propose that Sec 864. (a) be modified to include "or locally adopted air and water quality regulations" as follows "(a) To prevent the waste and unreasonable use of water and to promote water conservation, each of the following actions is prohibited, except where necessary to address an immediate health and safety need or to comply with a term or condition in a permit issued by a state or federal agency or locally adopted air and water quality regulations:"

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Building Industry Association
of Southern California



Engineering Contractors'
Association



Southern California
Contractors
Association



We believe that this change will assure that the regulatory compliance requirements will remain with the existing authorities and not be distributed to hundreds of new jurisdictions that will complicate compliance and add further confusion to the already complex construction regulations.

While our comments above address some of the specific issues in the Emergency Regulations affecting our industry, we also wish to express a more overarching concern regarding the vulnerability of the Emergency Regulations to legal challenges. A legal review of the draft Emergency Drought Regulations suggests that Article 22.5, section 865 is invalid on its face and will be unconstitutional as applied. If adopted, the regulation will require a reduction in water use by an urban distributor of water (urban water supplier) without regard to any of the criteria traditionally applied to consideration of waste and unreasonable use. Section 865 would impose a uniform reduction on the distribution of water by public and private urban water supplier, region by region. The hasty deadlines imposed by the regulations ignore that drastic action by suppliers will be required, and that developing suitable and rational policies to achieve the required water savings will take time, particularly regarding the need to educate customers about the new conservation measures.

As such, the proposed regulation appears to be invalid for the following reasons:

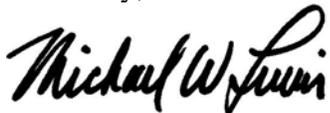
- It does not consider whether the water withdrawn and distributed by urban water suppliers pursuant to previously adopted urban water management plans is from sustainable sources or the safe yield of a groundwater basin.
- The regulation does not account for whether the urban water supplier has previously implemented tiered rates (lawfully supported by a cost of service study) or penalty systems designed to require efficient use under existing drought management plans and local ordinances that take into account the unique demographic, hydrologic and geographic factors within each supplier's service area.
- It does not consider whether the water being distributed has been acquired by lawful "self-help" measures previously approved by the State in some capacity or lawfully permitted by local agencies; e.g., water transfers, diversions to storage, water augmentation plans or desalination.
- There is no consideration of whether a required reduction in groundwater use will reduce the quantity of water previously available by causing recharge to be rejected in managed groundwater basins (i.e., reducing temporary surplus).
- The regulation fails to account for whether the relative efficiencies within the urban supplier's service area comport with or exceed industry standards.

- There is no apparent reconciliation of the reductions imposed by the regulation with the SWRCB's own water duty standards.
- There is no consideration of the relative system losses for the urban supplier. Those with substantial system losses (unaccounted for water) are treated the same as those with virtually none (e.g., new systems or suppliers that have invested in fixing infrastructure).
- The regulation makes no attempt to reconcile its terms with the priority for domestic use as set forth in California Water Code section 106.
- The regulation does not consider whether the action will harm water supply projects under development in a manner inconsistent with Water Code section 106.5.
- Water rights validly acquired in accordance with applicable law and exercised under efficient methods without harm to senior or paramount rights and without unreasonable harm to the environment are property rights that are subject to protection against regulatory takings by government.

For all these reasons, our legal analysis finds that section 865 should be reconsidered and restructured to comport with the law. An emergency condition and the difficulty of responding thereto, while challenging, are not likely to be accepted by the courts as legitimate reasons for the abject failure embodied in section 865.

CICWQ's membership is at the forefront of water quality regulation, providing to water quality regulators practical ideas that are implementable and that have as their goal clean water outcomes. If you have any questions or want to discuss the recommendations in our letter, please feel free to contact me at (626) 858-4611, or by cell phone at (951) 206-4420, or at mike@lewisandco.net.

Sincerely,

A handwritten signature in black ink that reads "Michael W. Lewis". The signature is written in a cursive, flowing style.

Michael W. Lewis
Senior Vice-President