

Feb. 12, 2018

VIA EMAIL TO: commentletters@waterboards.ca.gov

Offices of John S. Mills
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The Honorable Felicia Marcus, Chair
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, Ca. 95814

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

Dear Chair Marcus:

I previously submitted comments to the Board on behalf of the El Dorado County Water Agency (ECWA) and the Calaveras County Water District (CCWD) on 12/18/17 regarding this matter, therefore I will not repeat the facts of vested interest or agency water rights, nor the comments relating the proper application of the Waste and Unreasonable Use provisions of the Constitution and due process.

ECWA's member agencies include: a) the South Tahoe Public Utilities District; b) the County of El Dorado; c) the Georgetown Divide Public Utilities District and; d) the El Dorado Irrigation District.

As a precursor to addressing specific regulation details I wish to point out that the Board has no authority to adopt the regulation irrespective of one or more Executive Orders issued by the Governor¹.

The attached edited version of the draft regulations reflects our recommendations of those areas to be deleted as shown in strikeout format. New text is represented as underlined and bold text.

¹ 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.)

We wish to thank the Board and it's staff for providing the opportunity to submit written comments on this initiative. If there are any questions, we would be happy to answer them at your convenience.

Sincerely,

John S. Mills

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Suggested Edits
California Code of Regulations
Title 23. Waters
Division 3. State Water Resources Control Board

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Article 2. ~~Wasteful and Unreasonable~~ Water Uses

§ 963 ~~Wasteful and Unreasonable~~ Water Use Practices

~~The State Water Resources Control Board (State Board) has determined 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, given the need for the water to support more critical uses.~~

(a)

(3) “Turf” has the same meaning as in the Ca. Code of Regulations, Title 23, Division 2, Chapter 2.7, Section 491

(b)(1)(D) The use of potable water in an ornamental fountain, or other decorative water feature, except where (D)i the water is part of a recirculating system, or (D)(ii) the fountain is, or becomes, registered on the National Register of Historic Places.

(2) Notwithstanding subdivision (b)(1) the use of water is not prohibited by this article under any of the following circumstances:

- (A) To the extent necessary to address an ~~immediate~~ health and safety need. This may include but is not limited to, street sweeping and ~~the pressure~~ washing of public and private sidewalks or paved walking paths, the application of water to maintain wildfire fuel breaks or buffers in areas designated as very high or high fire hazard severity on CAL FIRE, Fire Hazard Severity Zone Maps, or to maintain areas of defensible space as may be required by local or state fire protection agencies, and the use of potable water in a fountain or water feature when required by law to be potable.
- (B) To the extent necessary to comply with a term or condition in a permit issued by a state or federal agency, or by a local agency as a mitigation measure under the California Environmental Quality Act.

- (C) When the water is used for ~~commercial~~ agricultural use¹ ~~meeting the definition of Government Code section 51201, subdivision (b).~~
- (E) To conduct dust abatement for residential, commercial, or industrial activities, or certain recreational activities².
- (F) For any purpose as may be needed during any local, state or federally declared emergency.

¹ Agriculture is a beneficial use of water even if it does not result in profit. (*Nelson v. Anderson-Cottonwood Irr. Dist.*, 51 Cal. App. 92, 96, 196 P. 292.) Domestic use, irrigation of pasture, irrigation of a garden and fruit trees and watering of livestock, are all beneficial uses of water. (See cases collected in Rogers & Nichols, *op. cit.*, pp. 262-63.) Watering of barnyard animals not kept for profit is a beneficial domestic use. (*Deetz v. Carter*, 232 Cal. App. 2d 851, 856, 43 Cal.)

² Christopher Wolfe, Brenda Buck, Aubrey Miller, James Lockey, Christopher Weis, David Weissman, Alexander Jones, Patrick Ryan. **Exposure to naturally occurring mineral fibers due to off-road vehicle use: A review.** *International Journal of Hygiene and Environmental Health*, 2017; DOI: [10.1016/j.ijheh.2017.07.003](https://doi.org/10.1016/j.ijheh.2017.07.003)