

**MINASIAN, MEITH,
SOARES, SEXTON &
COOPER, LLP**

ATTORNEYS AT LAW
A Partnership Including Professional Corporations

1681 Bird Street
Post Office Box 1679
Oroville, California 95965-1679

Writer's E-MAIL: pminasian@minasianlaw.com

PAUL R. MINASIAN, INC.
JEFFREY A. MEITH
M. ANTHONY SOARES
DUSTIN C. COOPER
EMILY E. LaMOE
ANDREW J. McCLURE
JACKSON A. MINASIAN

TELEPHONE:
(530) 533-2885

FACSIMILE:
(530) 533-0197

WILLIAM H. SPRUANCE,
Retired

MICHAEL V. SEXTON,
Retired



February 14, 2018

State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Proposed Adoption of Emergency Regulations Regarding Waste and Unreasonable use regarding car washing, offering sprinkler use, watering landscape after a rain and street and highway median irrigation except for tree maintenance after Members of the Board.

I. Introduction.

This office has, on behalf of all of our clients, previously submitted written comments pointing out the lack of legal authority for the proposed regulations and the direct violation of legal authority represented by these proposed regulations. We know that your staff has convinced you that you should “do something” and the Board Members “wish to do something” about water conservation. Put bluntly, you should not misuse and adulterate the power to determine that certain uses of water are unreasonable and wasteful after evidentiary hearings by attempting to engage in urban planning and edicts to local water purveyors without factual review and hearings. You can constructively ask the Legislature to make misuse of water or lack of water conservation practices an infraction and include those acts in the Penal Code. You can ask that the Legislature include in the Government Code requirements that building and planning codes and licenses for hotels and restaurants include certain water conservation practices. However, to attempt to become the Legislature is a misuse of the quasi-judicial power granted to your Board to declare waste and unreasonable use.

At end of this letter, we will add some of the other legal authority as to why these proposed amendments to regulations are improper under established legal principles so that no argument can be made that we have not exhausted our administrative remedies and provided a fair opportunity for the Board Members to retreat from these ill-

considered regulations relating to waste and unreasonable use as a means of purporting to conserve water.

However, the body of these comments will address the basic problem represented by these proposed changes: If the Board wishes to have a leadership role in addressing the ethics of water use in California, it should recommend to the Legislature and endorse the adoption of Criminal Code changes by the Legislature. This will actually deter violations and not involve the circuitous process of first labeling the water right holder and public agency supplying the water as wasteful, as this regulation proposed. In addition, if the Board wants to aid in changing the water use and conservation ethic of our citizens in this State, it can monetarily support public service announcements and education programs. Threats from State agencies to local water right holders that you will be found to have wasted water under your permits and licenses, if your water customers do not act in a certain way, will not work and undermines the authority of the Board. Particularly, threatening local public agencies who hold permits, licenses or water rights with waste and unreasonable use proceedings and the loss of those water rights because some of their customers may not abide by these water use ethics immediately is itself wasteful and increases the costs of local water agencies.

1. The SWRCB can change the ethic by a clever media program, instead of a poorly thought out emergency regulation.

If the SWRCB wants to “do something”, why not commission humorous or clever c.d. spots on these water conservation techniques that can be sent to television, radio and newspapers who already have regulations requiring devotion of effort and time to running public service notices. This is how litter laws and non-smoking ethics were fostered in our population. . . not through State boards threatening local cities and counties with loss of rights if the practices continued.

2. If post-harvest use of water for crops, timber stock piling and cutting into usable wood is “not commercial agricultural use”, what is it? Is post-harvest use wasteful or unreasonable by being included in this regulation?

In Section 963(a) in the latest amendment, your staff has added language, “. . . Commercial agricultural use. . . includes irrigation, frost protection and heat control, but does not include cleaning processing or other similar post-harvest activities”. Post-harvest use of water is critical. Use of water for preserving logs before they are cut into usable lumber or cooling saw blades is reasonable “commercial agricultural use”. If the SWRCB intends to drive the remaining logging industry out of California, no better tool can be imagined. If the grocery store produce manager who sprays vegetables to maintain their freshness and temperature or the citrus or melon packer who cleans mud

from the produce is not engaging in “commercial agricultural use” and this language is within the Wasteful and Unreasonable Water Use Practices sections, what is a water right holder or user of water within the timber industry or the agricultural industries to make of this? Are we wasting water?

3. If the SWRCB does not intend to threaten water right holders with loss of their water rights because their citizen users do not follow your desired practices, please state that in the regulations because the text does not include that assurance.

If these named practices are to be an infraction and fineable, the SWRCB should ask the Legislature to add them to the Penal Code. The systems and societies of Australia and Israel that you all state you admire would be embarrassed for you in attempting this sort of “tokenism” . . . only law enforcement can ask for access to hotel rooms to make sure the signs are up or video tape the waitpersons behavior in restaurants offering water. Even if the SWRCB summons a waitress or motel owner to testify to their practices, no infraction can be levied on an involuntary witness by the SWRCB. Water Code § 1106. If the SWRCB Board Members are adopting regulations that are only aimed at customers and not at revoking or reducing granted permits and licenses of public water purveyors, state that in the regulations.

II. Additional Legal Reasons as to why these Regulations and latest amendments should not be adopted.

1. Water Code § 1058.5 exempts the Board from Office of Administrative Law approval and authorizes declaration of violation of regulations as an infraction and as finable, but only if the regulation is an emergency regulation in effect for 270 days and adopted during a Governor’s Declaration of Drought emergency period. Is the SWRCB really going to try to renew this regulation every 270 days, even if there is no Governor declared drought to “lead the way” in eliminating turf use in California and to avoid Office of Administrative Law jurisdiction? The Office of Administrative Law procedure requires the economic studies of the costs imposed on local water purveyors by the threat of proceedings to revoke their permits or licenses and will inevitably ask: “Would it not be cheaper to put these provisions in the Penal Code and mandate the turf provisions in the Government Code regarding a general plan and building requirements?”

2. The cited newly added language regarding excluding post-harvest water use from Commercial Agricultural use has huge potential economic effects and environmental effects. The SWRCB is devising some new program here, but it is not described. (Does every post-harvest agricultural user have to apply for an industrial use permit or authority?) As an example, the timber industry is what the State government is depending upon to remove dead and dying timber and reduce fire damage and erosion

into the waters of the State and to counter global warming effects. Are the timber operators to stop use for post-harvest use of water? What is your “program” or “project”?

3. CEQA requires at least a Substitute Environmental Impact Report be prepared explaining what the plan for post-harvest use of water is and its effects or CEQA will be violated. Under the example, we have no idea what the produce manager in a grocery store or a melon or citrus packer, and their respective water agencies supplying water under an irrigation and domestic permit or license, would do to authorize the use of post-harvest water for agricultural products. It is a legal requirement that regulations be fathomable and understandable and this last minute addition is not.

III. Conclusion.

In addition to the many statutory and court principles that require that waste and unreasonable use be determined by fact finding hearings, under Due Process rules these regulations are improper and if the Board wishes to “do something” it should:

1. Use the money for clever and thoughtful public service media announcements in easily usable forms, which water industry members and the SWRCB can circulate to local media and encourage be run. In addition, what if the SWRCB spent just a little bit of the money its staff currently spends on studies and outside consultants on paying to run those ads in major urban use areas where the greatest savings of water can be achieved?

2. The SWRCB can and should be a leader. However, your staff is picking the wrong tool for you to use. You are to act as a judge in regard to reasonable and beneficial use and you need facts, evidence and parties in front of you. If you want to sponsor and push for statewide approaches to conservation, work with the Legislature and DWR, in regard to urban water plans already required by the Legislature, to include those provisions.

Very truly yours,

MINASIAN, MEITH,
SOARES, SEXTON & COOPER, LLP

By:


PAUL R. MINASIAN

PRM:lmj

cc: San Joaquin River Exchange Contractors Water Authority