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**Via Email and U.S. Mail**

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State Water Resources Control Board  
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Email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

***Re: Comment Letter – Prohibiting Wasteful Water Use Practices***

Dear Ms. Townsend:

The San Joaquin Tributaries Authority (“SJTA”) reviewed the State Water Resources Control Board’s (“State Water Board” or “SWB”) proposed rulemaking to establish California Code of Regulations, title 23, division 3, chapter 3.5 on Conservation and the Prevention of Waste (hereinafter the “Proposed Regulations”). The Proposed Regulations prohibit certain uses of water in the name of conservation by determining that specific uses of water are wasteful and unreasonable. The unreasonable use doctrine is the wrong tool to promote water conservation. The misplaced reliance on unreasonable use results in several fundamental problems for the Proposed Regulations. These problems include, but are not limited to, the Proposed Regulations are outside the authority of the State Water Board, the Proposed Regulations cannot be used to achieve conservation, the Proposed Regulations mischaracterize conserved water, and the Proposed Regulations fail to achieve their intended purpose. For these reasons the SJTA requests the State Water Board revise the Proposed Regulations to align with the legal authority, jurisdiction, and policy of the State.

**I. The Proposed Regulations Are Outside State Water Board Authority**

a. Waste and Unreasonable Use is Not a Regulatory Tool.

Whether a specific use of water is unreasonable or amounts to waste cannot be determined in the abstract. (SWB Decision 1600, at 8.3.) In order to establish a use of water as unreasonable, the law requires an examination of the facts concerning such water usage and an evaluation of such facts in view of regional circumstances. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.) California courts have never defined a category of water use as per se

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unreasonable because the determination of reasonableness of any particular use depends largely on the circumstances. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 368 [“[a]s to what is waste water depends on the circumstances of each case and the time when waste is required to be prevented.”].)

The Courts and the State Water Board decisions support that unreasonable use must be determined by the individual attributes of a specific water use. (*Environmental Defense Fund, supra*, 26 Cal.3d at 194 [“What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes.”]; *Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548, 570 quoting *Tulare Dist. v. Lindsay-Strathmore* (1935) 3 Cal.3d 489, 567 [“What is a beneficial use, of course, depends upon the facts and circumstances of each case. What may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need.”]; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140[“A reasonable use of water depends on the circumstances of each case...”]; SWRCB Water Right Decision, D-1600, 8.3 at 22 [“The ‘reasonableness’ of the diversion and use of water...cannot be determined in the abstract or by some inflexible standard.”].)

Contrary to the legal requirements discussed above, the Proposed Regulations attempt to regulate water by determining certain categories of water use are unreasonable, independent of the specific facts related to the use. The State Water Board cannot determine a use of water is unreasonable *in vacuo* of the factual circumstances. The Reasonable Use Doctrine was not envisioned nor intended to be used in a regulatory context and State Water Board’s attempt to do so is unlawful.

b. The State Water Board Fails to Provide the Fact Specific Analysis Required by the Reasonable Use Doctrine.

The analysis provided in the Notice of Proposed Regulatory Action (“NOP”) and the Negative Declaration are not sufficiently specific to support the determination of unreasonable water use. The Proposed Regulations appear to assume that the elimination of categories of “wasteful” water uses will result in savings/conservation for source-watershed stream flows. (State Water Board, NOP at 6.) This assumption is not supported by facts. For example, the NOP states, “[t]he State Water Board estimates that the proposed regulation would result in annual statewide savings of 12,489 AF.” (State Water Board, NOP at 10 [emphasis added].) Because, the term “savings” is never defined, it is not clear whether “savings” constitute water dedicated to in-stream uses, water that remains in storage, or is water reallocated to other consumptive uses. Without the disclosure of this information, the State Water Board has not considered the circumstances and all the necessary factors necessary prior to determining a water use is wasteful or unreasonable.

Even assuming the Proposed Regulations “conserve” some quantity of water, the NOP and Negative Declaration fail to evaluate what happens to the “conserved” water. For example, during above normal or wet water years, reservoirs may bypass water for flood protection that will never be put to beneficial use, but will instead flow out of the system. Under this fact pattern, it is difficult to

support the Proposed Regulations' determination that using the water in a manner prohibited by the Proposed Regulation is an unreasonable use of water – especially when the water would otherwise be unused and flow to the ocean, achieving no beneficial use. The NOP and the Negative Declaration analyze the identified uses *in vacuo* of any specific circumstances. The abstract conclusions cannot support the conclusion of unreasonable use.

c. Water Code Section 1058 Does Not Provide Authority for the Proposed Regulations.

The State Water Board states that its authority for the Proposed Regulation comes from Water Code section 1058. (Proposed Regulation, § 963.) The State Water Board's reliance on Water Code section 1058 for the authority to implement the Proposed Regulations is misplaced. Water Code section 1058 states, “[t]he board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under this code.” (Water Code, § 1058.) Section 1058 grants the Board general authority to make rules, it does not provide the Board with authority to determine categories of water use are unreasonable. The misuse of section 1058 violates the several other provisions of the Water Code.

First, the Water Code makes it abundantly clear, water conservation measures are to be adopted and enforced on a local level via local ordinance, rather than pursuant to abstract statewide regulation by the State Water Board. The Water Code delegates the responsibility to establish rules for the distribution and use of water to local suppliers. (*See* Water Code, § 22257 [“[e]ach district shall establish rules for the distribution and use of water”; *see also* Water Code, § 375 [“any public entity that supplies water at retail or wholesale...by ordinance or resolution... [may] adopt and enforce a water conservation program to reduce the quantity of water by those persons for the purpose of conserving the water supplies of the public entity.”]; Water Code, § 10608.4[a]-[b] [“[i]t is the intent of the Legislature... [to] [r]equire all water suppliers to increase the efficiency of use of this essential resource... [and] [e]stablish a framework to meet the state targets for urban water conservation...called for by the Governor.”].) Thus, the Proposed Regulations conflict with the Water Code's specific directive designating authority to regulate conservation to local water suppliers.

Second, the Water Code only extends authority to the SWB to adopt conservation regulations during specified drought emergency conditions. (Water Code, § 1058.5.) This authority is conditioned on the SWB determining emergency regulations are need to “prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion...to promote water recycling or water conservation...” and the emergency regulation is in “response to conditions which exist, or are threatened” in a drought. (Water Code, § 1058.5[a][1]-[2].) Under this section, the SWB is allowed to determine a water use is unreasonable only after it has examined and evaluated the ascertainable facts in light of regional circumstances. In addition, the emergency regulations are limited in duration, expiring after the emergency situation has passed. (Water Code, § 1058.5[c].) Had section 1058 provided the State Water Board with the authority to determine categories of water use unreasonable, the requirements and limitations of section 1058.5 would be superfluous.

d. The Proposed Regulation of End Users is Outside of the Board's Jurisdiction.

The Proposed Regulations attempt to regulate/prohibit an end user's consumption of delivered water. For example, the Proposed Regulations state, "[t]he use of water is prohibited...for any of the following actions...use of a hose that dispenses water to wash a motor vehicle...application of potable water directly to driveways and sidewalks" (Proposed Regulations, § 963[b][1][B]-[C].) The California Constitution, the Water Code, and case law expressly limit the State Water Board's jurisdictional reach to the regulation of a water right holder. Article X, section 2 of the California Constitution focuses entirely on the "right" to divert water:

"[t]he *right* to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such *right* does not and shall not extend to the waste or unreasonable use or unreasonable method of diversion of water." (Cal. Const., art. X, § 2 [emphasis supplied].)

Numerous courts have held the SWB lacks the jurisdiction to regulate outside the realm of a water right license or permit. (See *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1242 [The constitutional amendment therefore declares the basic principles defining *water rights*]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82 [Article X section 2 applies to *all water rights* enjoyed or asserted in the state, whether the same be grounded on the riparian right or the appropriative right] *California Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, 429 citing to Water Code § 275 ["The SWRCB does have authority to prevent unreasonable and wasteful uses of water, regardless of the basis *under which the right is held.*"] (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1482 ["the Board is charged with acting to prevent unreasonable and wasteful uses of water, *regardless of the claim of right* under which the water is diverted."].)

Article X section 2 does not support the SWB's broad expansion of its jurisdiction under the Reasonable Use Doctrine. The legislative intent behind article X section 2 was to limit the amount of water being put by a riparian right holder to a reasonable beneficial use, rather than the full flow of the stream. (*Pleasant Valley Canal Co. v. Borrer* (1998) 61 Cal.App.4th 742.)

The State Water Board's historic use of the Reasonable Use Doctrine recognizes the tool is limited to jurisdiction over water right holders. The State Water Board and the courts have previously applied the Reasonable Use Doctrine in the following limited circumstances:

- 1) Excessive use of water by riparians in light of new, competing appropriations for municipal water supply (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal. 2d 132.);

- 2) Wasteful conveyance losses to supply senior appropriative rights (*Imperial Irrigation Dist. v. State Water Resources Control Bd.* (1990) 225 Cal.App.3d 548; *See also* SWB D-1600.);
- 3) Simultaneous, aggregate diversions by riparians and appropriators that created shortages of water needed to protect wine grapes; (*Light v. State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463; *See also* *People ex rel. State Water Resources Control Bd. v. Forni* (1976) 54 Cal.App.3d 744.);
- 4) Maintenance of unexercised riparian rights at full priority in an over-appropriated watershed (*In re Waters of Long Valley Creek Stream Sys.* (1979) 25 Cal.3d 339.);
- 5) Inefficient conveyance and production of excessive runoff by pre-1914 appropriators (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351.);
- 6) An upstream point of diversion that threatened recreational and other in-stream uses downriver (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183.); and
- 7) The storage and diversion of water that jeopardizes compliance with water quality standards and other in situ beneficial uses (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82.).

As illustrated by the above examples, the SWB's jurisdiction is limited to water right holders, not end users.

Additionally, the Water Code limits the State Water Board to regulation of water right holders. Section 100 states, “[t]he *right* to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such *right* does not and shall not extend to the waste or unreasonable use...of water.” (Water Code, § 100 [emphasis supplied].) Therefore, Water Code section 100 ties the unreasonable use back to the water right holder. The SWB's jurisdiction to eliminate unreasonable use is limited to the water right holder. Water Code section 1825 limits the State Water Board's enforcement authority to the terms and conditions of permits licenses, certifications, and registrations to appropriate water, to State and Regional Board orders and decisions, and to prevent the unlawful diversion of water. (Water Code, § 1825.) These sections read in conjunction with Water Code sections 375-377, 22257, and 10608.4, which designate the authority to regulate conservation to local suppliers, demonstrate the Water Code's intent that the SWB exercise authority over water right holders, while local public entities have the authority to establish and enforce local rules on end users.

## II. The State Water Board Confuses the Unreasonable Use Doctrine with Other Authorities

### a. Distinction Between Conservation and Unreasonable Use.

The State Water Board confuses the concepts of waste and unreasonable use of water and water conservation. There are significant legal differences between these two concepts. The NOP states, “[e]ach of the specific prohibitions on water uses and other end user requirements are necessary to promote water conservation to maintain adequate supplies...” (NOP, Nov. 1, 2017, at 5.) The SWB attempts to achieve this conservation through declaring certain types of water use unreasonable. This is unlawful. Water Conservation is a saving of water, over which the water right holder maintains the water right. (Water Code, § 1011.) Unreasonable use is a fact determination that results in the termination of the right to divert water. (*Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 144-145.) The two legal principles are distinct in process and result and cannot be mixed. The State Water Board must revise the Proposed Regulations so unreasonable use is not used to achieve conservation.

### b. Distinction Between Priority and Unreasonable Use.

The State Water Board refers to water right priority in the Proposed Regulations stating “...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...*” (Proposed Regulations, § 963 [emphasis supplied].) The rule of priority is not applicable to a waste or unreasonable use determination. If a water right holder is engaged in waste or an unreasonable use of water, the right to divert water is extinguished and does not exist. (*Joslin, supra*, 67 Cal.2d at 144-145.) If no water right exists, the discussion of priority is not applicable. For this reason, there is no consideration of priority if a use is unreasonable. The Proposed Regulations must be revised to remove the reference to priority, as the rule of priority has no place in the determination of whether a use of water is unreasonable.

### c. Distinction Between Public Trust and Unreasonable Use.

The State Water Board also mixes the legal concepts of waste and unreasonable use of water with the Board’s charge to protect the public trust. Through its public trust authority, the State Water Board may weigh and balance reasonable uses of water to limit previously issued water rights to the extent feasible and necessary to protect public trust uses of water. (Water Code § 1253; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) However, by definition, the water uses weighed and balanced in a public trust proceeding are reasonable uses of water. As the “specific intended use must be evaluated and found to be reasonable, beneficial and in the public interest before a permit can issue” (State Water Board, Decision 1422, at 80; *Central Delta Water Agency v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 245, 262 [“There is nothing in the public interest provisions of section 1253 that conflicts with the requirements of the Water Code.”]) The public trust authority to weigh and balance beneficial uses presupposes that the uses of water are reasonable.

Therefore, the public trust tool is a more refined or precise tool compared to the tool of reasonable use, which only allows the State Water Board to determine if the specific use of water is valid or undeserving of a right. (Water Code §§ 275, 1253.)

### **III. The Proposed Regulations Incorrectly Assume Conserved Water Will Become Unappropriated Water**

The Proposed Regulations incorrectly assume that water conserved by the Proposed Regulations will remain in-stream as unappropriated water. For example, the NOP states, “water conservation can directly protect watersheds by reducing consumption and dedicating those saving to in-stream flows.” (NOP at 6.) Moreover, the NOP identifies water conservation for source watershed stream flows as a benefit of the Proposed Regulations. (*Ibid.*)

This assumption is not supported and contrary to law. A party who saves water by improving efficiency or other conservation method is entitled to the benefit of that improvement. (*Pomona Land & Water Co. v. San Antonio Water Co.* (1908) 152 Cal. 618, 623-625.) This common law rule was codified in Water Code section 1011, which provides that water saved through conservation efforts is considered water beneficially used and the water right holder maintains the right to the conserved water. Water Code section 1011 states, “any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction of use.” (Water Code, § 1011[a].) It goes on to state, “[n]o forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to [appropriated] water...” (*Ibid.*) “Conservation” is defined as the use of less water to accomplish the same purpose or purposes of use allowed under the existing appropriative right. (Water Code, § 1011.) Thus, the assumption that water “conserved” under the Proposed Regulations becomes unappropriated water is not supported and unlawful.

### **IV. The Proposed Regulations Do Not Achieve Their Intended Purpose**

During the November 21, 2017, public workshop for the Proposed Regulations, State Water Board Staff presented that the purpose of the Proposed Regulations is to achieve the Governor’s Executive Orders (B-37-16 and B-40-17) and SB X7-7. The Executive Orders are directed at achieving four objectives: 1) using water more wisely; 2) eliminating water waste; 3) strengthening local drought resilience; and 4) improving agricultural water use efficiency and drought planning. (State Water Board, NOP at 9.) SB X7-7 mandates the state achieve a 20 percent reduction in urban per capita use by 2020. (*Id.*, at 12.)

Contrary to its stated goals, the SWB acknowledges the water savings from these Proposed Regulations will be “relatively minor” and the prohibitions are unlikely to achieve even modest progress in accomplishing the objectives and conservation goal. For example, throughout the NOP and

the Negative Declaration, the SWB describes “the potential overall water saving from the proposed regulations are likely to be relatively minor,” and the prohibitions “would not by [themselves] necessarily achieve a significant level or amount of [the identified] benefits.” (NOP, at 5.) The State Water Board estimates the annual water savings from the Proposed Regulations will be approximately 12,489 acre-feet. This very marginal quantity of water savings will not achieve SB X7-7’s conservation goals.

Further, the limitations in the Proposed Regulations are already largely enforced as local ordinances, which means the Proposed Regulations do not further increase conservation awareness or effectuate change. The admitted lack of water savings and highly symbolic nature of the Proposed Regulations reflect the State Water Board’s desire to institute regulations as a symbol of conservation, rather than actual water conservation. This type of symbolic regulation is harmful and unlawful. In order to be valid, the Proposed Regulations must be necessary to effectuate a demonstrated need.

### **Conclusion**

The SJTA supports water conservation. However, the Proposed Regulations are outside the SWB’s jurisdiction and unlawfully rely on the Reasonable Use Doctrine. For these reasons, the SJTA requests the SWB revise the Proposed Regulations to be consistent with established law and the policies of water conservation.

Very truly yours,

O’LAUGHLIN & PARIS LLP



Tim O’Laughlin

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cc: SJTA