
State Water Resources Control Board

August 25, 2015

Joseph Carlini, Public Works Director
City of Tulare
411 East Kern Avenue
Tulare, CA 93274

Dear Mr. Carlini:

The State Water Resources Control Board (Board) received your June 16, 2015 agricultural water use exclusion certification to deduct commercial agricultural water from the City of Tulare's (City) total water production pursuant to the Board's May 5, 2015 Drought Emergency Water Conservation regulation (Regulation). The seven water users that you identify as your "Commercial Agricultural sector" do not appear to qualify for deduction of their water use from the City's total potable water production pursuant to California Code of Regulations, title 23, section 865, subdivision (e) (Section 865(e)). These water users do not qualify because they are not using water for agricultural use as defined in Government Code section 51201, subdivision (b). As explained in detail below, the Regulation does not authorize an urban water supplier to deduct water used for processing or packaging agricultural products from its total potable water production. Therefore, the City's June 16, 2015 certification cannot be accepted.

Section 865(e), provides, in relevant part that "[e]ach urban water supplier that provides potable water for commercial agricultural use meeting the definition of Government Code section 51201, subdivision (b), may subtract the amount of water provided for commercial agricultural use from its potable water production total" if certain conditions are met. Section 51201, subdivision (b) of the Government Code defines agricultural use as the "use of land, including but not limited to greenhouses, for the purpose of producing an agricultural commodity for commercial purposes." An agricultural commodity is "any and all plant and animal products produced in this state for commercial purposes, including, but not limited to, plant products used for producing biofuels." (Gov. Code § 51201, subd. (a).) Thus, the Regulation allows an urban water supplier to deduct potable water used for the purpose of producing plant and animal products from land for commercial purposes from its production total if all the conditions of Section 865(e) are met.

Packaging or processing agricultural commodities in food processing facilities does not constitute the use of land to produce plant and animal products. Packaging or processing agricultural commodities in food processing facilities typically uses industrial machinery and human labor to convert raw plant or animal products into finished goods. Cooking, pickling, or rinsing plant products; cooling machinery; diluting juice concentrate; producing ice; and supporting the metabolic processes of microorganisms that convert raw milk into other dairy products, for example, do not constitute commercial agricultural use of water under the Regulation. These activities are more properly classified as commercial, institutional, and industrial uses of potable water or industrial process water, and are therefore subject to the water conservation standards identified in the Regulation.

In adopting the Regulation, the Board considered and rejected proposals to deduct industrial process water from total potable water production, including proposals to deduct water used by food processing facilities. Written and spoken comments from the Agricultural Council of California, the Tulare County Economic Development Corporation, the City of Tulare, and Saputo Cheese, Inc. correctly recognized that food processing water was not eligible for deduction from total potable water production under the staff proposal or the language of the Regulation that was ultimately adopted by the Board. This conclusion is consistent with the language and structure of Government Code section 51201, which Section 865(e) cross-references. While it is not necessary to decide whether the definition of “agricultural commodity” in Government Code section 51201, subdivision (a) includes processed agricultural products, reference to “use of land ... for the purpose of producing an agricultural commodity” is consistent with the general purposes of the statute. Not deducting industrial process water from total potable water production is also consistent with the plain meaning of the word “agriculture,” i.e. “[t]he science or art of cultivating soil, harvesting crops, and raising livestock.” (Black’s Law Dict. (9th ed. 2009) p. 80, col. 2; accord American Heritage Dict. (2nd college ed. 1985) p. 88, col. 2.) Finally, Section 865(e) applies to “water provided for commercial agricultural use.” When read with “use of land” in the Government Code’s definition of commercial agricultural use, this indicates that only water applied to land used to produce agricultural commodities qualifies. Commercial, industrial, and institutional uses of water are not commercial agricultural use within the meaning of Section 865(e).

Based on the City’s June 16, 2015 certification, it appears that the City mistakenly reported water that does not meet the Regulation’s requirements in its June 2015 monthly conservation report. Water supplied to the seven water users identified as the “Commercial Agricultural sector” in the City’s June 16, 2015 certification will not be subtracted from the City’s total potable water production. If the City identifies different water customers who meet the requirements of section 865, subdivision (e), the City may submit a new certification. Should you have any further questions, you may contact me at (916) 445-5960.

Sincerely,

Eric Oppenheimer
Director, Office of Research, Planning and Performance

Cc: Don Dorman