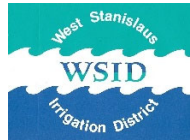




Westlands Water District



June 10, 2021

**VIA EMAIL**

Ms. Jeanine Townsend  
Clerk to the Board  
California State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
Email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Re: **6/15/2021 BOARD MEETING – ITEM #5 (Consideration of a proposed Resolution to adopt Emergency Regulations to address water shortages in the Russian River Watershed)**

Dear Ms. Townsend,

This letter is submitted on behalf of the San Luis & Delta-Mendota Water Authority (“Water Authority”) regarding Item #5, Consideration of a proposed Resolution to adopt Emergency Regulations to address water shortages in the Russian River Watershed, at the upcoming June 15, 2021 meeting of the State Water Resources Control Board (“State Water Board”).

The Water Authority has reviewed the draft State Water Board’s proposed “Resolution No. 2021-\_\_\_ to Adopt Drought-Related Emergency Regulation to Address Severe Water Shortages in the Russian River Watershed” and the draft emergency regulations that would that would add sections 877, 877.1, 877.2, 877.3, 877.4, 877.5, 877.6, 878, 878.1, 879, 879.1 and 879.2 to Title 23 of the California Code of Regulations (“Draft Emergency Regulations”). The Water Authority appreciates and supports the State Water Board’s objective of protecting releases of stored water to support beneficial uses, and recognizes the challenge in front of the State Water Board to appropriately balance all beneficial uses of water in one of the driest years in California’s history.

Given the challenges posed by this year's dry hydrologic conditions, the Water Authority continues to believe that a collaborative approach between the State Water Board and water users will yield the largest benefit to the greatest number of beneficial uses of water and urges the State Water Board to maximize the use of collaborative and voluntary approaches, in lieu of adopting binding regulations, particularly when such regulations are not required for the Board to ensure enforcement of water rights. We are concerned that the State Water Board staff is proposing that the State Water Board go *further* than it has before without doing *better* than it has before.

### **Going Further**

Section 879.2 of the Draft Emergency Regulations determines that “[d]iversion or use of water in the Upper Russian River Watershed in violation of this article constitutes a waste and unreasonable use of water and is subject to any and all enforcement proceedings authorized by law.” It is unclear why the State Water Board staff is proposing that the State Water Board go further than before in labeling otherwise beneficial uses of water as “waste,” in addition to being “unreasonable.”

The California Constitution requires “the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented”. (Cal. Const. Art. X, § 2). However, the determination of such is fact dependent, and the circumstances of each determination need to be carefully considered. (*Imperial Irrigation Dist. V. State Water Resources Control Board* (1990) 225 Cal. App. 3d 548). It is unclear why the State Water Board staff is proposing to declare all uses beyond the exemptions provided in the Draft Emergency Regulation are deemed both unreasonable **and** wasteful. There is an important distinction between an unreasonable and a wasteful use of water. And, during drought, there may be times in which an otherwise beneficial use of water becomes unreasonable but not wasteful. Take for example water used to irrigate a horticultural display at a botanical garden. During times when water is in surplus, irrigating such a display is both reasonable and beneficial. During extreme drought, it may no longer be reasonable to irrigate the display if say domestic uses are not being met. However, under that circumstances, the use of water for the horticultural display serves a beneficial use, and it would thus be inappropriate to identify such a use as a waste of water. Here, the State Water Board staff have provided insufficient evidence as to why uses beyond the exemptions listed in the Draft Regulation amount to waste.

Further, the State Water Board staff proposal stands in contrast to regulations the State Water Board issued during prior droughts. In 2008, for example, State Water Board regulations identified diversions in violation of water discharge management programs as unreasonable, but specifically did not declare a specific use of water for frost protection unreasonable, much less all such uses. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1489.) Nor did the 2008 regulations determine any otherwise beneficial use to constitute “waste.”

And in 2014-2015, emergency regulations and related curtailment orders limited diversions of water on Deer Creek to protect specific instream flow levels, and determined that allowing diversions to reduce the flows below the minimum amounts necessary for fish migrations and survivability would be unreasonable. (See *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, 1002.) But, the State Water Board's emergency regulations did not determine all diversions, regardless of flow levels, were unreasonable, and did not label any use as "waste."

Further, the Draft Emergency Regulations include a significant delegation of authority to the Deputy Director which appears to go further than any prior such delegations. For example, Section 877.2 of the Draft Emergency Regulations provides a list of what the Deputy Director may rely upon when determining the extent to which water is available under a diverter's priority of right or when rescinding curtailment orders, and relegates available, "additional pertinent and reliable information" to being considered only to the extent "staff resources permit." And Section 877.3 would empower the Deputy Director to decide whether uses otherwise exempt from curtailment under the Draft Emergency Regulations should be allowed to continue. (See also Draft Emergency Regulations, §§ 877.5, 878, 878.1, 879 [additional delegations of authority].) The State Water Board should carefully consider the implications of such delegation of authority before any such regulations are adopted.

### **Need To Do Better**

The Water Authority is keenly interested in ensuring the State Water Board afford adequate due process when making decisions that impact California water rights. While the Water Authority does not hold or represent those who hold Russian River water rights, it recognizes the need to ensure due process even in extreme conditions when time is of the essence.

During previous droughts, the State Water Board was put on notice by water right holders and California courts that it would be prudent, at a minimum, to provide water right holders with more process when considering actions that could impair the ability of the water rights holders to appropriate water. In 2018, the trial court in the *California Water Curtailment Cases*, JCCP No. 4838, advised: "In a future drought, the Board is called to fashion a curtailment process that gives users some meaningful opportunity to challenge the underlying findings *before* they are ordered to curtail their water use and *before* fines for noncompliance begin to accrue against them." (California Water Curtailment Cases, JCCP No. 4838, Final Statement of Decision, Phase I Trial, p. 38.) As that Court explained, "[p]ublishing its methodology and holding a public hearing where water users and outside experts could challenge it would both reduce the risk of erroneously depriving water users of their rights and assist the Board in pursuing effective enforcement measures." (*Id.*, p. 37.) Basing emergency regulations and curtailment orders off of an untested methodology creates "high risk of error." (*Id.*)

And, in other circumstances, the State Water Board *has* provided public hearings and additional process before imposing terms and conditions on water rights. For example, the State Water Board adopted a curtailment methodology to protect water quality following a public hearing through Term 91. (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 95.)

Here, little “process” has been afforded in the development of the Draft Emergency Regulations. A public workshop is scheduled for this evening, June 10, but the workshop does not provide adequate process for water right holders and interested parties to test the methodology to evaluate water availability that the State Water Board staff has proposed. And undoubtedly, questions will remain after the relatively short workshop has concluded.<sup>1</sup>

More is required here. The Water Authority strongly supports action to protect beneficial uses of water, but the State Water Board staff’s proposal, if adopted by the State Water Board, will instill mistrust and uncertainty in a water system that functions best when there is the ability to work collaboratively, in coordination, and with certainty and predictability, especially during drought conditions. Staff’s proposal does not provide adequate facts, consideration of those facts, nor due process to water rights holders to merit the adoption of the proposed regulations.

We urge the State Water Board to reject staff’s proposal.


Thank you for your time and serious consideration to these comments. If you have any questions or if I can be of any assistance on this matter, please do not hesitate to contact me.

Regards,



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Federico Barajas, Executive Director  
San Luis Delta Mendota Water Authority



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Rick Gilmore, General Manager  
Byron Bethany Irrigation District

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<sup>1</sup> For example, why do the draft regulations label diversion or use of water in the Upper Russian River Watershed in violation of the article “waste and unreasonable use of water” but “trespass” in the Lower Russian River Watershed? When and why were alternative quasi-adjudicatory or quasi-regulatory paths rejected? How is the type of water in the system, whether native, abandoned, foreign, or stored, affect the determination that diversions are waste and unreasonable or trespass, and does the priority or type of water right held by the diverter affect this determination?



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Chris White, General Manager  
San Joaquin River Exchange Contractors  
Water Authority



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Shelley Cartwright  
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Westlands Water District



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David Weisenberger, General Manager  
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CC:

E. Joaquin Esquivel, Chair, State Water Resources Control Board  
Dorene D'Adamo, Vice Chair, State Water Resources Control Board  
Tam Dudoc, Member, State Water Resources Control Board  
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