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December 10, 2010

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ADMINISTRATIVE LAW

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Re: PROPOSED EMERGENCY RULEMAKING: TITLE 23. WATERS; DIVISION 2. DEPARTMENT OF WATER RESOURCES; CHAPTER 5.1 WATER CONSERVATION ACT OF 2009

These comments are submitted for the record of the Department of Water Resources and the Office of Administrative Law regarding a proposed emergency regulation to implement the provisions of the Water Conservation Act of 2009 (the Act) concerning the exclusion of industrial process water from the gross water use calculations of public water suppliers subject to the Act.

The proposed emergency regulation is inconsistent with the letter and intent of the Act. §596.1 correctly characterizes the linkage between "substantial percentage" and "disproportionate burden." Under §596.1(b), the option to exclude industrial process water is only available to water suppliers that have a "substantial percentage" of industrial water use within their customer base, and that such exclusion is for the purpose of avoiding a "disproportionate burden on another customer sector."

Unfortunately, §596.3 fails to effectively ensure that eligibility for the exclusion is limited to water suppliers that have a "substantial percentage" of industrial water use. Even water suppliers with very small percentages of industrial water use will be eligible for process water exclusion under the criteria in §596.3(b), (c), and (d). We believe that the letter and the intent of the Act can be more faithfully implemented with a construction similar to that proposed by DWR in previous iterations of this draft rule, where a given percentage of industrial water use was identified as high enough to be "substantial" and large enough that the avoidance of a disproportionate burden could be safely assumed. For water suppliers with industrial water use below this default threshold, but where industrial water use is significant enough to suggest the possibility of a disproportionate burden if process water is not excluded, additional criteria can be provided to qualify the water supplier for process water exclusion. We thought this general approach made sense when previously proposed by DWR, and we urge the Department and OAL to reconsider its use in the emergency rule.

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In addition to the changes in §596.3 discussed above, we believe that care must be taken to avoid the misapplication of the disadvantaged community criteria. The criteria referred to in §596.3(d) should apply to the entire population that is served by the water supplier, rather than any subset of the population. We believe that this is the Department's intent, but the present wording may contribute to misinterpretation, and we are suggesting a clarification.

Additionally, §596.4 is seriously deficient. The Act clearly limits the exclusion to process water, rather than all industrial water, and thus process water quantities must be validated to qualify for exclusion. Both paragraph (a), regarding the verification of process water generally, and paragraph (b), regarding the proration of process water when only a portion of an industrial water user's supply is provided by a public water supplier, specify that verification of quantities is to be accomplished "by means of metering, submetering, *or other means determined suitable and verifiable by the urban retail water supplier* . . . ." (Emphasis added) This catch-all phrase renders the rule for the quantification of process water volumes eligible for exclusion essentially unenforceable, as it leaves water suppliers with virtually open-ended discretion to employ estimation techniques of unknown and unspecified accuracy or veracity. We recommend that all "other means" of verification be subject to the review and approval of the Department prior to the incorporation of any resulting exclusion in an urban water use target reported in an Urban Water Management Plan. The burden should be on the proponent of novel estimation techniques to bring them to DWR's attention for concurrence before incorporation into a water use target, rather than expecting DWR staff to ferret out the use of such techniques after the fact.

Attached in strike-and-add format are suggested edits to the proposed emergency rule that would more closely comport with the Act. By limiting the exclusion of industrial process water from the gross water use calculations of public water suppliers to the extent intended by the Act, these revisions to the emergency rule will facilitate the adoption of urban water use targets that are, in the aggregate, closer to the statewide urban water use target of 20% specified in the Act.

Respectfully submitted,

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Attachment

California Code of Regulations
Title 23. Waters
Division 2. Department of Water Resources
Chapter 5.1. Industrial Process Water Exclusion in the Calculation of Gross Water Use

§596. Process Water

(a) The purpose of sections 596.1 through 596.6 is to implement the process water provisions of Part 2.55 of Division 6 of the Water Code. This regulation supplements other guidance provided by the Department of Water Resources for implementation of Part 2.55.

(b) The Department of Water Resources will review and assess the implementation of sections 596.1 though 596.6 and based upon the recommendations of the Commercial, Industrial and Institutional task force convened pursuant to section 10608.43 of the Water Code the Department may amend sections 596.1 through 596.6

Note: Authority cited: Section 10608.20(i) (1), Water Code. Reference: Sections 10608 through 10608.43 Water Code.

§596. 1. Applicability

(a) Sections 596.1 through 596.6 describe criteria and methods whereby an urban retail water supplier may deduct process water use when calculating their gross water use in developing their urban water use targets.

(b) An urban retail water supplier that has a substantial percentage of industrial water use in its service area is eligible to exclude the process water use of existing industrial water customers from the calculation of its gross water use to avoid a disproportionate burden on another customer sector.

Note: Authority cited: Section 10608.20(i) (1), Water Code. Reference: Sections 10608.24 (e) and 10608.26 (d) (1) Water Code.

§596.2. Definitions

The terms used in this regulation are defined in this section.

(a) "commercial water user" means a water user that provides or distributes a product or service. Examples include commercial businesses and retail stores, office buildings, restaurants, hotels and motels, laundries, food stores, and car washes.

(b) "disadvantaged community" means a community with an annual median household income that is less than 80 percent of the statewide annual median household income.

(c) "distribution system" means a water conveyance system that delivers water to a residential, commercial, or industrial customer, and for public uses such as fire safety where the source of water is either raw or potable water.

(d) "drought emergency" means a water shortage emergency condition that exists when there would be insufficient water for human consumption, sanitation and fire protection, as set forth in California Water Code Section 350-359 and Government Code Section 8550-8551.

(e) "gross water use" means the total volume of water, whether treated or untreated, entering the distribution system of an urban retail water supplier, excluding all of the following:

(1) Recycled water that is delivered within the service area of an urban retail water supplier or its urban wholesale water supplier
(2) The net volume of water that the urban retail water supplier places into long-term storage
(3) The volume of water the urban retail water supplier conveys for use by another urban water supplier
(4) The volume of water delivered for agricultural use, except as otherwise provided in subdivision (f) of Section 10608.24 of the Water Code.

(f) "incidental water use" means water that is used by industry for purposes not related to producing a product or product content or research and development. This includes incidental cooling, air conditioning, heating, landscape irrigation, sanitation, bathrooms, cleaning, food preparation, kitchens, or other water uses not related to the manufacturing of a product or research and development.

(g) "industrial water user" means a manufacturer or processor of materials as defined by the North American Industry Classification System (NAICS) code sectors 31 to 33, inclusive, or an entity that is a water user primarily engaged in research and development. An industrial water user is primarily involved in product manufacturing and processing activities and research and development of products, such as those related to chemicals, food, beverage bottling, paper and allied products, steel, electronics and computers, metal finishing, petroleum refining, and transportation equipment. Data centers dedicated to research and development are considered an industrial water user.

(h) "institutional water user" means a water user dedicated to public service. This type of user includes, among other users, higher education institutions, schools, courts, churches, hospitals, government facilities, and nonprofit research institutions.

(i) "local agency" means any municipality, such as a city or county government or public water agency.

(j) "non-industrial water use" means gross water use minus industrial water use.

(k) "process water" means water used by industrial water users for producing a product or product content, or water used for research and development. Process water includes, but is not limited to; the continuous manufacturing processes, water used for testing, cleaning and maintaining equipment. Water used to cool machinery or buildings used in the manufacturing process or necessary to maintain product quality or chemical characteristics for product manufacturing or control rooms, data centers, laboratories, clean rooms and other industrial facility units that are integral to the manufacturing or research and development process shall be considered process water. Water used in the manufacturing process that is necessary for complying with local, State and federal health and safety laws, and is not incidental water, shall

be considered process water. Process water does not include incidental, commercial or institutional water uses.

(*l*) "recycled water" means water that is used to offset potable demand, including recycled water supplied for direct use and indirect potable reuse that meets the following requirements, where applicable:

(1) For groundwater recharge, including recharge through spreading basins, water supplies that are all of the following:

(A) Metered.

(B) Developed through planned investment by the urban water supplier or a wastewater treatment agency.

(C) Treated to a minimum tertiary level.

(D) Delivered within the service area of an urban retail water supplier or its urban wholesale water supplier that helps an urban retail water supplier meet its urban water use target.

(2) For reservoir augmentation, water supplies that meet the criteria of paragraph (1) and are conveyed through a distribution system constructed specifically for recycled water.

(m) "urban retail water supplier" means a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes.

Note: Authority cited: Section 10608.20(i) (1), Water Code. Reference: Sections 10608.12 (d, f, g, h, i, l, m, p), and 10608.20 (h) (1) Water Code.

§596.3. Criteria for Excluding Industrial Process Water Use from Gross Water Use Calculation

When calculating its gross water use, an urban retail water supplier may exclude up to 100 percent of process water use from its gross water use if ~~any one of the following criteria is met in its service area~~:

(a) Total industrial water use is equal to or greater than ~~12~~ 15 percent of gross water use, or

(b) Total industrial water use is equal to or greater than 6 percent of gross water use, and any one of the following criteria is met in its service area:

(~~b~~1) Total industrial water use is equal to or greater than 15 gallons per capita per day, or

(~~c~~2) Non-industrial water use is equal to or less than 120 gallons per capita per day if the water supplier has self-certified the sufficiency of its water conservation program with the Department of Water Resources under the provisions of section 10631.5 of the Water Code, or

(~~d~~3) The population as a whole within the ~~suppliers'~~ supplier's service area meets the criteria for a disadvantaged community.

Note: Authority cited: Section 10608.20(i) (1), Water Code. Reference: Sections 10608.20 (e) 10608.20 (h) (1) (A), 10608.24 (e), and 10608.26(d) Water Code.

§596.4. Quantification and Verification of Total industrial Process and Industrial Incidental Water.

The volumes of these water uses shall be for the same period as urban water suppliers calculate their baseline daily per capita water use and reported in their Urban Water Management Plans.

(a) The volume of process water use shall be verified and separated from incidental water use.

(1) To establish a baseline for determining process water use, urban retail water suppliers shall calculate the process water use over a minimum continuous ten year period ending no earlier than December 31, 2004, and no later than December 31, 2010.
(2) Verification of process water volumes can be accomplished by metering, sub-metering, or such other means as are determined suitable and verifiable by the urban retail water supplier and ~~reported in their Urban Water Management Plans and reviewed~~ by the Department of Water Resources prior to the incorporation of any process water exclusion in an urban water use target (including an interim urban water use target) reported in the water supplier's Urban Water Management Plan . ~~.~~

(b) In cases where the urban retail water supplier provides only a portion of an industrial water user's water supply, the urban retail water supplier shall prorate the volume of process water use excluded from gross water use by considering the average share of the industrial water use that it supplied during the previous five years. The verification of the proportion of industrial water use supplied shall be accomplished through metering, sub-metering or such other means as are determined suitable and verifiable by the urban water supplier and by the Department of Water Resources, such as audits, historic manufacturing output, or suppliers' billing records and ~~as~~ such other means of verification shall be presented to the Department prior to the incorporation of any process water exclusion in an urban water use target (including an interim urban water use target) reported in the water supplier's ~~reported in their~~ Urban Water Management Plans.

Example. If over the previous five years, an urban water supplier delivered only 60 percent of the average annual water used by an industrial water user, the urban supplier can only use that 60 percent of industrial water in determining if it is eligible to exclude process water from its gross water use; and if it is eligible, it can exclude only 60 percent of the volume of process water used by such industrial water user.

Note: Authority cited: Section 10608.20(i) (1), Water Code. Reference: Sections 10608.20(h) (1)(A), 10608.24 (e), and 10608.26(d) Water Code.

§596.5. Existing Industrial Customers

When implementing this regulation, urban retail water suppliers shall meet the following provisions:

(a) Any ordinance or resolution adopted by an urban retail water supplier after November 10, 2009 shall not require industrial water customers existing as of November 10, 2009 to undertake changes in product formulation, operations, or equipment that would reduce process water use.

(b) An urban retail water supplier may encourage existing industrial customers to utilize water efficiency technologies, methodologies, or practices through the use of financial and technical assistance.

(c) This section shall not limit an ordinance or resolution adopted pursuant to a declaration of drought emergency by an urban retail water supplier.

Note: Authority cited: Section 10608.20(i) (1), Water Code. Reference: Sections 10608.26 Water Code.

§596.6 New and Retrofitted Industries

Local agencies and water suppliers shall encourage newly-established and retrofitted industries to adopt industry-specific water conservation practices and technologies where such technologies exist.

Note: Authority cited: Section 10608.20(i) (1), Water Code. Reference: Sections 10608.20 (h) (1) Water Code.