

**FROM THE DESKS OF
PROFESSORS SAX AND LESHY**

October 26, 2009

Honorable Darrell Steinberg
Senate President pro Tempore
California State Senate
State Capitol, Room 205
Sacramento, CA 95814

Honorable Karen Bass
Speaker of the Assembly
California State Assembly
State Capitol, Room 219
Sacramento, CA 95814

RE: Waste and Unreasonable Use in the Context of Proposed Water Conservation
Legislation

Dear President pro Tempore Steinberg and Speaker Bass:

We are appreciative that you and your colleagues in the Legislature are working on a package of bills that includes a new water conservation program for the state. However, we are very concerned about some proposed language that would be at odds with the Constitutional requirement that reasonable and beneficial use be the measure of all water use in California. The problem is with the proposed language that would prohibit water administrators and courts from considering examining whether the failure to meet the water conservation goals specified in section 10608.8(a)(2) is waste or unreasonable use. The Constitutional requirement of Art. X, Sec. 2, which is also set out in statutory form in sec. 100 of the Water Code is foundational to all of California water law, and cannot be immunized from consideration by courts or administrative agencies. Nor can determination of what meets constitutional standards be resolved outside the particular circumstances of a given situation. This basic legal point is of particular cogency in the setting of water conservation, which is of ever increasing importance to our State at this time

Moreover, any legislative effort to preclude consideration of the circumstances and specifics of an agency's performance in meeting or not meeting water use and conservation goals would establish a highly inappropriate precedent. Reasonableness of use is a standard that is susceptible to a wide range of evidentiary issues, including but not limited to cost, hydrologic conditions, and other intervening unexpected circumstances such as

prolonged drought. Properly, nothing in the bill before you suggests that the mere failure to meet the targets is per se evidence of waste. Similarly nothing should mandate that such failure is per se reasonable.

Thank you for your consideration of our views in this regard.

Sincerely,

A handwritten signature in cursive script, appearing to read "Joe Sax".

Joe Sax
James H. House and Hiram H. Hurd
Professor of Environmental Regulation Emeritus

A handwritten signature in cursive script, appearing to read "John Leshy".

John Leshy
Harry D. Sunderland Distinguished Professor
Hastings College Of The Law