



San Diego County Water Authority

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January 28, 2016

Delivered by e-mail to: commentletters@waterboards.ca.gov

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OTHER REPRESENTATIVE

County of San Diego

The Honorable Felicia Marcus, Chair
and Members of the State Water Resources Control Board
c/o Jeanine Townsend, Clerk of the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

Subject: 2/2/16 BOARD MEETING (Conservation Extended Emergency Regulation)

Dear Chair Marcus and Members of the State Water Board:

I want to thank you again for the opportunity to participate in the State Water Resources Control Board (State Water Board) process to develop options for extension of the Emergency Regulation. We appreciate being part of the stakeholder workgroup that discussed potential modifications to the Emergency Regulation and being able to formally present a proposed drought-resilient supply credit at the December 7, 2015 Public Workshop. I also appreciate the time the State Water Board members have spent in meeting with agencies individually to discuss the Emergency Regulation. Through this process, we discussed the importance of equity and providing supply reliability benefit to communities that have invested in drought-resilient supplies. We also emphasized the importance of a balanced, sustainable approach to managing droughts that includes conservation and development of drought-resilient supplies.

The January 15, 2015 proposed Emergency Regulation begins to address the inequities associated with the original Emergency Regulation through modest credits and adjustments to address geographic climate differences, new growth, and investments made in new, local, drought-resilient potable water supplies. We do have concerns that the proposed Emergency Regulation still fails to fully recognize the supply investments and water management efforts of local communities. The following provides our detailed comments on the proposed Emergency Regulation:

Modifications to New Local Drought-Resilient Supply Credit

As we have mentioned in previous comment letters, over the last 20 years the Water Authority and other water agencies throughout the state have invested billions of dollars to develop drought-resilient water supplies to increase supply reliability locally, regionally and statewide. A variety of supply projects have been developed by agencies based on local water management efforts, local hydrology and available natural resources.

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These investments are consistent with Governor Brown's Water Action Plan calling for increased regional self-reliance. In addition, Governor Brown, in his January 21, 2016, State of the State address stated this about water supply reliability: "There is no magic bullet but a series of actions that must be taken." The Water Authority could not agree more. The Governor's address further lists a number of resource strategies, including, but not limited to, recycled water, desalination and storage. A key aspect of implementing the Governor's directive must be that urban water suppliers are provided appropriate credit for development of these diverse resource strategies.

As mentioned, we appreciate the State Water Board staff's efforts to recognize the investments in drought-resilient supplies by providing the modest supply credit in the proposed Emergency Regulation, but recommend the following specific modifications, understanding that we need to work within the current approach outlined in the original Emergency Regulation:

- 1. Remove the 8 percent maximum credit for the development of drought-resilient supplies.**
Allow urban water suppliers to receive full credit for the development of these supplies. We also continue to support a minimum conservation standard floor commensurate with the severity of the drought. This provides a balanced approach to managing droughts.
- 2. Allow credit for drought-resilient supplies developed prior to 2013.**
Supply investments made by communities prior to 2013 have better prepared California for this drought and future droughts, by helping to reduce, forestall, or in some cases eliminate shortage impacts. The Emergency Regulation needs to recognize water agencies for their early implementation of comprehensive water management. This goes to the very heart of Governor Brown's California Water Action Plan.

Evaluation of Emergency Regulation should be based on Measurable Objectives and Regional Perspective

State Water Board's draft Resolution, Item 5 directs staff to "monitor and evaluate available data on precipitation, snowpack, reservoir storage levels, and other factors and report back to the Board in March and April, 2016, if conditions warrant, bring a proposal for rescission or adjustment of this regulation to the Board no later than the second regularly-scheduled May 2016 Board meeting." This directive should be expanded to ensure that any action or non-action taken by the State Water Board in May is firmly based on specific measurable objectives to support the proposed position. In addition, the evaluation must be conducted from a regional perspective, to avoid a one-size-fits-all regulatory policy that doesn't take into account the actual supply and shortage condition present within a region or county. Continuing to ask Californians to sustain extraordinary, emergency water conservation efforts that are disproportionate to their actual need or immediate water supply conditions will undermine the credibility of the Administration and California's urban water suppliers. This may make it much harder to generate the required response should emergency conditions reemerge in the future.

Indeed, the curtailment of the Water Authority's beneficial use of lawful water supplies required by the Emergency Regulation without any specific analysis of the character of the Water Authority's use, the condition of the water source, and the degree of affect, if any, on other users and the environment are invalid for the reasons set forth in Attachment A to this letter.

Emergency Regulation should not be used as a Model for any Potential Future Statewide Conservation Regulation

The Emergency Regulation was initially adopted in response to unprecedented hydrologic conditions in 2015 and it's widely recognized that the State Water Board needed to take swift and

decisive action at the time. Although the proposed Emergency Regulation begins to recognize the importance of local water management efforts and the unique characteristics of local communities, this statewide, one-size-fits-all regulatory approach to managing droughts should not be used as a model for future long-term or emergency conservation regulations. Drought response actions, such as conservation mandates, should be determined at the local level, and the availability of drought-resilient supplies must be factored into the regulation on a regional or county basis.

In the State Water Board Draft Resolution, Item 19, staff is directed “to continue working with stakeholders on further refinement of emergency water conservation regulation should they need to be extended beyond October 2016.” In addition, draft Resolution, Item 20, directs staff “to engage the Department of Water Resources in developing a proposed framework for enhanced urban water conservation and efficiency.”

We look forward to continuing to work with the State Water Board, the Department of Water Resources and other stakeholders on a comprehensive drought response approach and potential long-term water use efficiency policy that fully values existing and future investments in drought-resilient and emergency supplies, along with long-term water use efficiency efforts in a manner that comports with California Constitution’s Article X, section 2 and pays due regard to the legislature’s prior acknowledgement of the primary responsibility of urban water purveyors in addressing shortage situations through approved urban water management plans.

Sincerely,

A handwritten signature in black ink, appearing to read "Maureen A. Stapleton". The signature is fluid and cursive, with a long horizontal stroke extending to the left.

Maureen A. Stapleton
General Manager

Enclosure

ATTACHMENT A

If the SWRCB proceeds to adopt the Emergency Regulations as proposed and on the existing record, the SWRCB will abuse its discretion will exceed its authority under the law because the Emergency Regulations are not consistent with well-settled legal principles, the SWRCB findings will not be supported by the evidence, and the conclusions relating to the Emergency Regulations are not supported by the findings. Initially, the Emergency Regulations are inconsistent with and are invalid under applicable law for the following reasons.

1. There is no substantial evidence in the record — cited or presented — that the Water Authority, its member agencies or its customers are using water unreasonably or wastefully. To the contrary, the Water Authority is a leader among urban water agencies in conservation and water supply contingency planning in all facets.
2. There is no substantial evidence in the record that the Water Authority's use of water in excess of the Emergency Regulations' proposed limitations is unreasonable, wasteful or harmful. The Water Authority's water use is reasonable and highly efficient, as judged by any applicable standard.
3. There is no substantial evidence in the record that the Water Authority's use of water from existing sources is unsustainable, wasteful, or unreasonable because its use will not injure any other water user or the environment. All evidence is that water is available to the Water Authority and that this water can be used safely and efficiently.
4. There is no factual nexus between the Water Authority's continuing use of water at levels higher than authorized through the Emergency Regulations and any adverse impact on the environment or other lawful water users.
5. The Water Authority's water users are within all contractual entitlements, state and federal allocations, and consistent with the Water Authority's state approved urban water management plan.
6. Because the evidence is fundamentally inconsistent with a finding of unreasonable use, the Emergency Regulations would deter from and violate the requirement for maximum beneficial use of water set forth in Article X, section 2 of the California Constitution and would violate the rules of legal priority to use water set forth in California case law.
7. The California legislature has declared that water shortage planning should be administered locally through urban water management plans and has set forth detailed requirements for addressing drought and other supply interruptions by investments in reliable water supplies.¹ The legislature has declared that these actions be compiled in coordination with other agencies and approved by the State Department of Water Resources.² The Water Authority has prepared an approved

¹ Wat. Code §§ 1750, 10753.7, 10753.8.

² Wat. Code § 10753.7(a)(2).

plan and is presently implementing it. The Emergency Regulations are inconsistent with the Water Authority's approved plan.

8. Similarly, the Emergency Regulations inhibit the Water Authority from fulfilling its statutory mandate to satisfy water demands within its jurisdiction as required by the Water Code Appendix at section 45-5-11.
9. The Emergency Regulations disincentivize water purveyors, like the Water Authority, from investing in projects and programs to provide reliable supplies during drought if it is understood that during a drought, the SWRCB may eliminate a significant portion of the benefit that its members would receive in exchange for the investment made in drought-resilient supplies.
10. The Emergency Regulations fail to address the responsibility of agricultural users to conserve water, thereby treating the Water Authority unequally and unfairly in relation to other water users.
11. The Emergency Regulations fail to consider the economic impact on the Water Authority, its member agencies, and its customers in the form of: (i) stranded fixed capital investments; (ii) lost revenue attributable to lost sales and opportunities; and (iii) increased costs and associated higher water rates where fixed costs must be recovered in relation to reduced total water sales.
12. The Emergency Regulations re-distribute water from lawfully acquired sustainable supplies that are available to the Water Authority and could be applied to beneficial uses, including domestic water use, which is statutorily specified at section 106 of the Water Code as the highest valued use, in favor of other types of uses that are declared inferior by the Water Code.
13. The deprivation of water resulting from the Emergency Regulations interferes with fundamental vested water rights of the Water Authority derived from valid lawful agreements and substantial investments in water transfers, water storage, desalination and conservation programs.
14. The interference with the Water Authority's vested rights serves to unlawfully deprive the Water Authority of its water and redistributes the supplies to others, without consideration or compensation, in violation of the federal and state Constitutions as takings of property.
15. The Emergency Regulations physically and by regulation unconstitutionally "take" the Water Authority's sustainable water supplies by restricting the Water Authority's use of lawfully-acquired water supplies through the application of a restriction adopted in derivation of the California Constitution's overarching policy in favor of maximum beneficial use of available water supplies.

Evidence summarizing the water Authorities reasonable and beneficial uses, substantial investments, reliable supplies, historical customer demands and use are included in the zip file below. Further specific legal deficiencies concerning the Emergency Regulations are set forth below.

I. The Emergency Regulations Violate Article X, Section 2 of the California Constitution

Article X, section 2 of the state's Constitution provides, in part:

[T]he general welfare requires that 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, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

California's courts have explained that this constitutional provision “declares the state's policy to achieve maximum beneficial use of water and prevention of waste, unreasonable use and unreasonable method of use.”³ Although Article X, section 2 of the California Constitution empowers the SWRCB’s regulatory authority, it also *limits* it. In regulating water use, the SWRCB may not enact regulations that would compromise Article X, section 2’s overarching state policy in favor of maximum beneficial use of water or other foundational legal principles, including the requirement to base reasonable use restrictions on the circumstances of each case,⁴ and the common law’s longstanding system of legal priorities to use water.⁵

To comport with the state policy set forth in Article X, section 2, before restricting a use of water under the premise of unreasonable use, the SWRCB must assess the relative benefits and harms relating to the use, the source from which the water is taken, and the impacts, if any, to other users, the environment, or other public interests. Without performing such a specific analysis, the SWRCB cannot reasonably determine whether the restrictions will promote or impinge the maximum beneficial use of the limited resource for a specific agency such as the Water Authority.

The Emergency Regulations, if adopted, would not stem from a circumstance-specific assessment of the harms and benefits in relation to individual sources and uses of water by the Water Authority. Rather, the Emergency Regulations would apply a blanket regulatory reduction based on the premise that across-the-board water conservation is necessary in a drought. Such blunt water use restrictions cannot reflect the level of specific analysis required to comport with Article X, section 2.

The Emergency Regulations would apply to the Water Authority’s members, which, through the Water Authority, have invested hundreds of millions of dollars in drought-resistant

³ *Erickson v. Queen Valley Ranch Co.* (1971) 22 Cal.App.3d 578, 584-85; see also *Central & West Basin Municipal Water Dist. v. Water Replenishment Dist. of So. Cal.* (2012) 211 Cal.App.4th 943, 950.

⁴ *Gin Chow v. City of Santa Barbara* (1933) 217 Cal. 673; 702; *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 138, 140.

⁵ *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937; *In re Waters of Soquel Creek Stream System* (1978) 79 Cal.App.3d 682, 689; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1486.

sources of water and are already conserving water to the maximum extent feasible. Under the proposed regulations, the Water Authority's member agencies could seek a credit for drought-resilient supplies developed after 2013, but the amount of the credit would not be based on an assessment of the Water Authority's water sources and the scope of harm, if any, to other users or the public interest arising from the use of such supplies. Rather, the credit would provide modest relief for certain categorical factors, including the development of post-2013 drought-resilient supplies. Such a broad-brush credit system cannot reflect the source-specific analysis necessary to determine which level of restriction, if any, is appropriate to comport with the constitutional requirement to put the state's water to the fullest beneficial use possible.

In summary, the proposed Emergency Regulations lack the appropriate factual nexus to support a reasonable cost-benefit analysis. They would also frustrate the legislature's directive to urban water suppliers to prepare and implement urban water management plans.⁶ As a result, if adopted, the Emergency Regulations would be unconstitutional.

A. The Emergency Regulations Violate the Rule of Priority

The Emergency Regulations also violate well-settled rules of water rights priority. In general, water management must "preserve water right priorities to the extent those priorities do not lead to unreasonable use."⁷ As the court held in *Light v. SWRCB*, as between particular rights holders, every effort must be made to respected and enforce the rule of priority.⁸ The Emergency Regulations do not establish conservation limits on the basis of water right priorities, but rather apply across-the-board limitations without any consideration of priorities.

II. The Emergency Regulations Violate the Constitutional Prohibition Against Uncompensated Takings

The Emergency Regulations amount to an unconstitutional regulatory taking under the tri-part *Penn Central* test and a physical taking under *Tulare Lake Basin Water Storage Dist. v. United States*.⁹

A. The Emergency Regulations Amount to an Unconstitutional Regulatory Taking

The Emergency Regulations would effectuate a regulatory taking of the Water Authority's water rights for the following reasons. First, the Emergency Regulations would impose a significant economic impact on the Water Authority's business as a water wholesaler.¹⁰ By

⁶ Wat. Code § 10753.

⁷ *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243.

⁸ *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1489.

⁹ U.S. Const., 5th Amend.; Cal. Const., art I, §19. As explained above, conservation limits are not a permissible application of the reasonable use doctrine embodied in article X, section 2 of the California Constitution. *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104; *Tulare Lake Basin Water Storage Dist. v. United States* (2001) 49 Fed. Cl. 313.

¹⁰ *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124-29.

reducing the amount of potable water the Water Authority's member agencies can produce and sell to their customers, the Emergency Regulations would also reduce the Water Authority's ability to sell the quantities of water anticipated under its wholesale contracts with these retailers. The resulting economic losses would be directly attributable to the mandated percentage reductions on potable water production placed on the Water Authority's member agencies.

Second, the Emergency Regulations unconstitutionally would interfere with the Water Authority's reasonable, investment-backed expectations founded in its reasonable expectation that it would be able to recover the costs incurred for investments in drought-resistant water supplies.¹¹ The Water Authority's multi-year—and multi-billion dollar—investment in developing alternative sources of water to ensure it could continue to meet its mandate to supply water to local urban water suppliers was made without notice that use of that water could subsequently be curtailed to support state-wide water conservation targets.

Third, the character of the Emergency Regulations would be unreasonable and akin to an unconstitutional physical invasion of the Water Authority's rights.¹² It is a well-established principle that a water right is a usufructuary right and the advantage of a water right is solely derived from the ability to use the right to obtain water supplies.¹³ By imposing a blanket restriction on the *use* of water, the Emergency Regulations would be “extinguish[ing] a fundamental attribute of ownership,” since the ability to *use* water is a water right's fundamental attribute.¹⁴ The Emergency Regulations, therefore, would unconstitutionally impinge on the essence of the property interest at stake.

For these reasons, as currently drafted, the Emergency Regulations would amount to an unconstitutional regulatory taking requiring just compensation under both the state and federal Constitutions.

A. The Emergency Regulations Amount to an Unconstitutional Physical Taking

The Emergency Regulations would also constitute an unconstitutional physical taking. As stated by the Federal Court of Claims in *Tulare Lake Basin Water Storage District v. United States*, “[i]n the context of water rights, a mere *restriction on use* – the hallmark of a regulatory action – completely eviscerates the right itself since plaintiffs' sole entitlement is to the use of the water.”¹⁵ The Emergency Regulations would: (i) limit the Water Authority's ability to put potable water developed through its desalination facility to beneficial use; and (ii) limit and redistribute legally-obtained Colorado River water that otherwise would have gone to the

¹¹ *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124-29.

¹² *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, 124-29; *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 539.

¹³ *Tulare Lake Basin Water Storage Dist. v. United States* (2001) 49 Fed. Cl. 313, 319.

¹⁴ *Tulare Lake Basin Water Storage Dist.*, 49 Fed. Cl. at 319; *State v. Superior Court of Riverside Cty.* (2000) 78 Cal. App. 4th 1019, 1032 (noting that right holders have only usufructuary rights and do not own the corpus of the water); Cal. Water Code § 102.

¹⁵ *Tulare Lake Basin Water Storage Dist. v. United States* (2001) 49 Fed. Cl. 313, 319.

Water Authority to other users, including agricultural users that are not subject to the Emergency Regulations. The Emergency Regulations' evisceration of the Water Authority's right to use its legally-developed water supplies, therefore, would constitute a physical taking requiring just compensation under both the state and federal Constitutions.

III. The Emergency Regulations Violate the Constitutional Prohibition Against Impairing the Obligation of Contracts

The Emergency Regulations would also violate both the Contracts Clause set forth in the state and federal Constitutions under the three-part test articulated by courts.¹⁶ First, the Emergency Regulations would substantially impair the Quantification Settlement Agreement and related contracts ("QSA Contracts") to which the Water Authority is a party. By way of background, in 2003, the Water Authority entered into the QSA Contracts with, among other parties, the Imperial Irrigation District, to fund conservation measures within the Irrigation District's water system. In exchange, the Water Authority receives a set portion of the water conserved through these improvements to provide to local water retailers. By restricting the amount of water urban water suppliers can sell, however, the Emergency Regulations would prevent the Water Authority from taking full advantage of the QSA Agreements and impair the Water Authority's ability to sell the quantities of water anticipated under its wholesale contracts with retailers.

Second, even if the drought response represents a "significant and legitimate public purpose," as required by the second element of the tri-part test, the Emergency Regulations would only apply to one subset of water users—urban water suppliers—while exempting agricultural water use (and users) from any reductions. According to the U.S. Supreme Court, the requirement for a legitimate public purpose was established in order to "guarantee that the State is exercising its police power, rather than providing a benefit to special interests."¹⁷ The Emergency Regulations' exclusive application to urban water suppliers, however, suggests that the regulations benefit "special interests" rather than the public as a whole.¹⁸

The Emergency Regulations would also fail under the third element of the test because they are not "based upon reasonable conditions" and are not appropriate to the *purpose* purportedly justifying their adoption.¹⁹ As noted above, the Emergency Regulations would not be supported by a factual nexus between the Water Authority's continuing use of water at levels higher than authorized through the Emergency Regulations and any adverse impact on the environment or other lawful water users. Moreover, because the Emergency Regulations would only apply to some water users (i.e., urban water suppliers), and not others (i.e., agricultural water users), there is no way to control overall water consumption across the state. Although one segment of water users may be conserving water, another unregulated segment may be using water in amounts that counteract any conservation efforts. Finally, the SWRCB has multiple viable alternative means to inhibit unreasonable water use in times of drought. It

¹⁶ U.S. Const., art. I, §10; Cal. Const. art. I, § 9.

¹⁷ *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 412.

¹⁸ See *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 412.

¹⁹ See *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.* (1983) 459 U.S. 400, 412.

can prohibit unreasonable end uses of water, as it has done in Section 864 of the drought regulation; it can prohibit wasteful uses under specific circumstances where the use, source, and affected interests compel a determination of unreasonable use; and it can reduce diversions from overdrafted sources through curtailment of water uses consistent with applicable water right priorities, as it has done in many locations during the drought. Based on these facts, the adjustment of the rights and responsibilities of contracting parties does not justify the legislation's adoption.

Attachment A

San Diego County Water Authority 2010 Urban Water Management Plan

<http://www.sdcwa.org/sites/default/files/files/water-management/2010UWMPfinal.pdf>

San Diego County Water Authority 2010 Urban Water Management Plan Appendices A-I

http://www.sdcwa.org/sites/default/files/files/water-management/2010UWMP_appendicesA_I.pdf

Final 2013 Regional Water Facilities Optimization and Master Plan Update Chapters

http://www.sdcwa.org/sites/default/files/files/master-plan-docs/04_2013_Master_Plan_Final.pdf

Final 2013 Regional Water Facilities Optimization and Master Plan Update Appendices

http://www.sdcwa.org/sites/default/files/files/master-plan-docs/05_2013_Master_Plan_Appendices.pdf

San Diego County Water Authority General Manager's Adopted Multi-Year Budget Fiscal Years 2016 & 2017

<http://www.sdcwa.org/sites/default/files/files/finance-investor/Budget/Budget1617%20with%20links.pdf>

Carlsbad Seawater Desalination Project Water Purchase Agreement between The San Diego County Water Authority and Poseidon Resources (Channelside) LP

<http://www.sdcwa.org/sites/default/files/files/waterpurchaseagreement.pdf>

Colorado River Water Delivery Agreement

http://www.sdcwa.org/sites/default/files/files/QSA_colorado-river-water.pdf

The Last 5 annual reports:

<http://www.sdcwa.org/annualreport/2014/>

<http://www.sdcwa.org/annualreport/2013/>

<http://www.sdcwa.org/annualreport/2012/>

http://www.sdcwa.org/sites/default/files/files/publications/annual_2011.pdf

http://www.sdcwa.org/sites/default/files/files/publications/annual_2010.pdf

Zip-file of all attachments

http://www.sdcwa.org/20160128reportdelivery/sdcwa_report.zip

Previous correspondence on Emergency Regulations

January 6, 2016

December 1, 2015

May 4, 2015

April 22, 2015

April 13, 2015

March 12, 2015

July 14, 2014

June 5, 2014

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