



Sent via email to: Clerk of the Board  
commentletters@waterboards.ca.gov

January 27, 2016

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814



**Directors**  
Edward J. "Ted" Costa  
Kenneth H. Miller  
Dan Rich  
Pamela Tobin  
Bob Walters  
**General Manager**  
Shauna Lorange

Re: 2/2/16 Board Meeting – Item 7 (Conservation Extended Emergency Regulation)

Dear Ms. Townsend:

San Juan Water District (SJWD) appreciates the opportunity to comment on the proposed regulatory framework as the State Water Board considers extending the Emergency Regulation for Statewide Urban Water Conservation. I have personally attended and testified at the State Water Board's public hearings and have followed this process closely. The SJWD Board of Directors has concerns with the adopting of mandatory conservation requirements during a rainy winter and at the same time causing our agency to strand investments in the millions of dollars that our customers have paid for over many years to provide a higher level of service during the dry conditions we have seen in the past few years. We also urge you to confirm, consistent with existing law and your previous rulemaking and the Governor's directives, that any water conserved as a result of the State Water Board's mandates is legally transferable.

### **Mandatory Conservation with Increased Water Supply**

SJWD respectfully requests that the SWRCB wait to adopt regulations for 2016 until after the water supply situation is clearer in late April or May. The state is losing credibility with the public by maintaining draconian reduction requirements during a rainy season that has resulted in a swift increase in reservoir storage and above-average snowpack. The proposed emergency regulations require SJWD customers to continue to achieve a 33% reduction in water usage this winter when there has been an above-average level of rain and snow. SJWD customers went above and beyond to meet the voluntary 20% reduction in 2014, met the 36% requirement in 2015, and are now being asked to continue at a very high level of conservation during a wet winter. The forecasters are projecting continued wet weather in February through April, and Folsom Lake is now within the flood curve for flood protection operations. Our customers do not understand the need for continuing conservation during this period of wet weather and have expressed a high level of frustration with the continuing conservation mandate. As a result of this "conservation fatigue," it will be extremely difficult for SJWD and other water agencies to achieve similarly high levels of water conservation during this period. This is particularly true when neither the Governor nor the State Water Board can or have attempted to make a compelling case for why conservation mandates must be extended at this time.

## Stranded Investments

Although the proposed regulatory framework does provide some flexibility related to climate differences throughout the state, it fails to recognize agencies that had been proactive and strategic prior to the current drought, thereby effectively dismissing the investments in resiliency made by ratepayers in some districts to prepare for droughts over years prior to 2013. SJWD customers have seen double digit rate increases to cover the costs of capital projects to provide a high level of water service during dry years through the use of a sustainable groundwater basin. These projects are now sitting idle as the mandated water use reductions do not allow our customers to receive the benefits of increased water reliability that they have been funding over the years. It will be difficult to convince ratepayers to continue to fund an active conjunctive use program and other conservation improvements in the future based on the inability to utilize the benefit the past couple of years.

## Decision on Transferability of Mandatory Conservation

SJWD understands that the United States Bureau of Reclamation will be sending in comments that include a request for the SWRCB to make a determination on whether or not water conserved under its conservation mandates is transferable. SJWD has an 1853 appropriative water right that has been in continuous use by the District and its predecessors since it was initiated and which SJWD's ratepayers have invested significant resources to use and protect. The District's ability to utilize that right has been limited as a result of mandatory conservation regulations even though the water to support that right has remained available. SJWD has suffered significant revenue losses and increased expenses as a result of complying with the State Water Board's conservation mandates and should be able to recoup some of its losses and stranded investments through the transfer of conserved water to the extent permitted by law. For the reasons discussed below, SJWD believes that it has the legal right to transfer any portion of its pre-1914 appropriative water right that it conserves regardless of whether conserved water results from voluntary or mandated conservation.

Water Code section 1011, subdivision (a) provides in relevant part:

When any person entitled to the use of water under an appropriative right fails to use all or any part of the water because of water conservation efforts, any cessation or reduction in the use of the appropriated water shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use. No forfeiture of the appropriative right to the water conserved shall occur upon the lapse of the forfeiture period applicable to water appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriated prior to December 19, 1914.

. . .

For purposes of this section, the term "water conservation" shall mean the use of less water to accomplish the same purpose or purposes of use allowed under the existing appropriative right.

(Emphasis added.)

Water Code section 1011(b), in turn, provides:

Water, or the right to the use of water, the use of which has ceased or been reduced as the result of water conservation efforts as described in subdivision (a), may be sold, leased, exchanged, or otherwise transferred pursuant to any provision of law relating to the transfer of water or water rights, including, but not limited to, provisions of law governing any change in point of diversion, place of use, and purpose of use due to the transfer.

(Emphasis added.)

Recital 15 of the SWRCB's resolution approving the 2015 emergency water conservation regulations provides in relevant part:

In support of water conservation, the legislature has, through Water Code section 1011, deemed reductions in water use due to conservation as equivalent to reasonable beneficial use of that water. Accordingly, this regulation is in furtherance of article X, section 2 during this drought emergency. This temporary emergency regulation is not to be used in any future administrative or judicial proceedings as evidence or finding of waste and unreasonable use of any individual water user or water supplier subject to this regulation, and are not to affect or otherwise limit any rights to water conserved under applicable law, including without limitation, water conserved consistent with Water Code section 1011.

(Emphasis added.)

In February 2009 the SJWD's Board of Directors adopted a resolution under Water Code section 1011 establishing San Juan's intent to retain control over all water conserved under any water right or entitlement, including San Juan's 1853 pre-1914 appropriative water right. San Juan has been proposing to transfer water conserved by its customers under that water right consistent with the SJWD board's 2009 resolution and the 15th recital of fact in the SWRCB's resolution adopting the 2015 emergency water conservation regulations. While DWR and Reclamation have refused to recognize SJWD's right to transfer conserved water under Water Code section 1011, there is no legal basis for those agencies' objection to the transfer of water conserved by SJWD's customers because it is water legally available for transfer under state law without regard to the means by which it was conserved.

When SJWD proposed a transfer of water conserved under its pre-1914 water right in 2015, DWR and Reclamation argued that the State Water Board's 2015 emergency water conservation regulations limit San Juan to transferring only that increment of water that is conserved over and above the 36 percent mandatory conservation requirement imposed on San Juan. That argument is contrary to Water Code section 1011 and the State Water Board's own pronouncement. As a result, any claim by DWR or Reclamation that SJWD or any similarly situated water right holder may not transfer water supplies conserved by their customers that are otherwise transferrable under state law constitutes an illegal taking of those water supplies without just compensation.

In summary, SJWD urges the SWRCB to delay adopting any new emergency water conservation regulations past the end of the existing order until 2016 water supply conditions are fully known. In addition, if conditions as of late April or May warrant a renewal of conservation mandates, the State Water Board should modify its proposed regulations to provide credit to agencies that have made long-term investments to provide a higher water reliability to their customers and avoid stranding those investments and discouraging customers from continuing their conservation efforts. Finally, the State Water Board should make it clear, consistent with state law and its own policies and all legal requirements governing water transfers, that conserved water (including the amount required to be conserved) is transferrable to agencies that have a shortage of supply. This clarification will ensure that water agencies' investments in conservation and supply reliability are fully realized and ensure that water conserved is fully utilized in areas of need. As directed by Governor Brown in paragraph 4 of his January 17, 2014 drought emergency proclamation, "The Department of Water Resources and the State Water Resources Control Board (Water Board) will expedite the processing of water transfers, as called for in Executive Order B-21-13. Voluntary water transfers from one water right holder to another enables water to flow where it is needed most." (Emphasis added.)

Very truly yours,

A handwritten signature in black ink, appearing to read "Pam Tobin". The signature is fluid and cursive, with a large initial "P" and "T".

Pam Tobin  
San Juan Water District  
Board President