



# Association of California Water Agencies

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Public Comment  
Safe Drinking Water Plan  
Deadline: 12/15/14 by 12:00 noon



Sent via ELECTRONIC MAIL to [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

December 15, 2014

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

**Re: Association of California Water Agencies' Comments regarding the Draft Safe Drinking Water Plan for California**

Dear Ms. Townsend:

The Association of California Water Agencies (“ACWA”) appreciates the opportunity to comment on the State Water Resources Control Board’s (“State Board”) draft Safe Drinking Water Plan for California (“Draft Plan”). ACWA has a number of comments related to the Draft Plan which are set forth in detail below. ACWA encourages the State Board to carefully consider these comments and suggestions as it refines the Draft Plan before the June 2015 deadline for submittal of the final plan to the Legislature.

## **I. INTRODUCTION**

ACWA represents nearly 430 public water agencies that collectively supply approximately 90% of the water delivered for domestic, agricultural and industrial uses in California. Many of ACWA’s public agency members are entrusted with the responsibility of supplying the public with safe and reliable drinking water. Ensuring the safety of drinking water supplies by complying with all relevant state and federal laws and regulations is the highest priority of these agencies.

The purpose of the Safe Drinking Water Plan for California is to assess the overall quality of California’s drinking water, identify specific water quality problems and develop specific recommendations to improve the quality of drinking water, among other statutory requirements.<sup>1</sup> The release of the Draft Plan represents an important accomplishment for the State Board and the new Division of Drinking Water. We commend State Board staff for the effort, energy and thought that has been dedicated to the development of the Draft Plan. We acknowledge the Draft Plan as a valuable reference and resource for the drinking water community and agree with many of its recommendations. However, ACWA does have significant concerns with two of the specific recommendations included in the Draft Plan. As explained below in Sections II and III, ACWA opposes the Draft Plan’s recommendation for the enactment of legislation that would mandate the annexation of water systems and the recommendation for a “water usage fee” tax. We recommend that these provisions be removed from the Draft Plan and the Chapter 10 “Implementation Plan,” and be replaced with alternative language to address the concerns articulated in the Draft Plan. Additional comments are provided in Section IV.

**II. THE DRAFT PLAN’S RECOMMENDATION FOR THE ENACTMENT OF LEGISLATION THAT WOULD MANDATE THE ANNEXATION OF WATER SYSTEMS SHOULD BE REPLACED WITH A RECOMMENDATION FOR THE DEVELOPMENT OF A STRATEGY TO ADDRESS BARRIERS TO CONSOLIDATION.**

As detailed in the Draft Plan, among regulated water systems, problems related to consistent compliance with drinking water standards are concentrated among small systems serving less than 200 service connections.<sup>2</sup> These problems are particularly prevalent among small systems that serve disadvantaged communities. The Draft Plan includes a number of provisions aimed at addressing these compliance challenges through water system consolidation, including Recommendation 4-2 (“The State Water Board will continue to promote the consolidation of small water systems where ever feasible since consolidations with a larger water system is the best solution.”) and Recommendation 8-5 (“The State Water Board recommends enactment of legislation to mandate a requirement that a small public water system that is within the sphere of influence of a larger water system should be required to annex to the larger system.”).<sup>3</sup>

The challenges faced by small systems, and the potential benefits of and barriers to consolidation, have recently been examined in considerable detail. In 2012, the Brown Administration established the Governor’s Drinking Water Stakeholder Group (“DWSG”) to “develop recommendations to address communities’ challenges in dealing with nitrate contamination of drinking water supplies in the Tulare Lake Basin and Salinas Valley.”<sup>4</sup> As part of this effort, in a

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<sup>1</sup> Health & Safety Code § 116355.

<sup>2</sup> State Water Resources Control Board, DRAFT SAFE DRINKING WATER PLAN FOR CALIFORNIA (October 2014) (“Draft Plan”), at p. 15.

<sup>3</sup> *Id.*, at pp. 87, 154.

<sup>4</sup> State Water Resources Control Board, *Governor’s Drinking Water Stakeholder Group*,

[http://www.waterboards.ca.gov/water\\_issues/programs/groundwater/drinkingwater\\_stakeholders.shtml](http://www.waterboards.ca.gov/water_issues/programs/groundwater/drinkingwater_stakeholders.shtml)

2013 report to the Governor’s Office the DWSG focused on, “exploring opportunities and actions to maximize solutions by creating efficiencies and building institutional capacity to address [operations and maintenance] and other sustainability and affordability challenges through shared solutions.”<sup>5</sup> The DWSG characterized “shared solutions” as ranging in options from “[i]nformal arrangements (e.g., sharing of equipment)” through “[f]ormal arrangements (e.g., sharing of technical, managerial and financial resources or joint management between neighboring or various systems, including isolated systems)” to “[m]ore complex arrangements that may lead to structural changes (e.g. physical sharing of water sources or treatment facilities and even full system[] consolidation).”<sup>6</sup> The DWSG emphasized that the definition of shared solutions was “broad and expansive, and not prescriptive or limited to full or physical consolidation of drinking water treatment and delivery systems.”<sup>7</sup> Finally, the DWSG acknowledged that, “the best solution for each community will differ among a variety of options that are not limited to ‘shared solutions’. For example, there will be areas where individualized and non-scalable solutions will be necessary.”<sup>8</sup> (Emphasis added.)

As recognized by the DWSG, the consolidation of a small water system with compliance problems with a larger system is a solution that can work in some situations. However, Recommendation 8-5 in the Draft Plan includes a recommendation for the “enactment of legislation to mandate a requirement that a small public water system that is within the sphere of influence of a large water system should be required to annex to the larger system.”<sup>9</sup> (Emphasis added.) A statewide consolidation mandate for all water systems is not the right solution to the problems facing some small water systems. Any mandate for consolidation is problematic, and Recommendation 8-5’s annexation mandate is too broad and would create new problems for water systems without addressing the barriers to consolidation for small water systems facing challenges.

***(a) The Proposed Mandate for Annexation Would Apply to Water Systems that are Well-Managed and Sustainable.***

By its terms, the recommendation would not mandate annexation solely for small systems facing compliance challenges, or for disadvantaged communities. Instead, the annexation mandate would apply to all small water systems within the sphere of influence of a larger water system. Many small water systems are well-managed and sustainable entities. The cost and effort required to annex these systems into nearby larger water systems would not result in any practical benefit. It is also not clear how Recommendation 8-5’s annexation mandate would apply in situations with multiple potential annexing agencies or in circumstances where the relevant Local Agency

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<sup>5</sup> Governor’s Drinking Water Stakeholder Group, REPORT ON NEW AND EXPANDED FUNDING SOURCES (August 13, 2013) (“2013 DWSG Report”), at p. 2.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.*, at p. 1.

<sup>9</sup> Draft Plan, at pp. 154, 170.

Formation Commission has not established spheres of influence that are conducive to the annexation of small water systems facing challenges.

***(b) The Proposed Mandate for Annexation Would Not Address the Legal, Financial and Technical Barriers to Consolidation for Small Water Systems with Contamination Problems, or Which Serve Disadvantaged Communities.***

Even if narrowed, the proposed mandate for annexation in Draft Plan Recommendation 8-5 would not address the existing legal, technical and financial barriers to consolidation, and would in fact compound the difficulties presented by those barriers, as it would have significant implications for water systems.

i. Legal Barriers to Consolidation

Liability is a major challenge and disincentive facing water districts with respect to consolidation. Water agencies need clear liability protection when annexing with an existing water system. Currently, there is no legal incentive for a water district that has been in compliance to annex one that is not—particularly if the annexing district and its customers will be assuming liability for a potentially expensive problem they did not create.

The Legislature has acknowledged this issue. Earlier this year, Governor Brown signed SB 1130, legislation which was specifically designed to allow public water agencies in Riverside County to provide necessary assistance to a small water system with failing infrastructure and contamination problems without being held liable for past administrative actions or operational deficiencies of the small system. ACWA supported SB 1130, and the legislation provides a model of a tailored approach that constructively deals head-on with a barrier to consolidation.

ii. Financial Barriers to Consolidation

Mandated annexation would also present significant financial challenges for water systems. Many water agencies are special districts, which are focused forms of local government with locally-elected Boards of Directors. Special districts are subject to Proposition 218, which, while providing water district customers with a powerful tool to hold special districts accountable in their rate-setting and revenue-raising functions, can present a barrier to processes like consolidation. Under Draft Plan Recommendation 8-5's annexation mandate, it is unclear what would happen if a rate increase needed to accomplish the annexation was rejected by the public under Proposition 218. A potential outcome is that the larger system would not be able to raise rates to support the physical solution required to comply with the annexation mandate.

The issue of debt liability is also a significant area of uncertainty under Draft Plan Recommendation 8-5's annexation mandate. A mandate for annexation would likely require the

assumption of any debt and financial liabilities of the small annexed system by the larger annexing system without any consideration for the larger system’s willingness or ability to assume those liabilities.

iii. Technical Barriers to Consolidation

Draft Plan Recommendation 8-5’s annexation mandate does not incorporate any consideration of the technical feasibility of the annexation of small systems, which should be a threshold issue when considering the physical work that will be required to comply with the mandate. Other recommendations in the draft Plan, such as Recommendation 4-2’s statement of intention to “promote consolidation of small systems *where feasible*,” expressly incorporate the essential consideration of technical feasibility.<sup>10</sup> (Emphasis added.)

Additionally, under Draft Plan Recommendation 8-5’s annexation mandate it is unclear what the effect of annexation would be on a larger annexing system’s compliance status if the small system to be annexed is not in compliance with a regulatory standard.

***(c) The Draft Plan Should Recommend the Development of a Strategy to Address the Barriers to Consolidation.***

ACWA supports the development and implementation of adaptable approaches that can solve the specific problems of communities that lack access to safe drinking water. Voluntary consolidation is one tool that can be appropriate, and recent legislation demonstrates that a tailored approach that deals head-on with the barriers presented by consolidation can prove successful.

ACWA urges staff to delete the Draft Plan Recommendation 8-5’s mandate for annexation and replace it with a proposal to develop a strategy for addressing barriers to consolidation. Recommendation 8-5 notes that, “[t]he State Water Board will use the Transition Advisory Group as a forum to address barriers to consolidation, and receive recommendations.” As a member of the Transition Advisory Group, ACWA looks forward to working with the State Board and other stakeholders on the development of a strategy to address the barriers to consolidation.

Proposed alternative language for Recommendation 8-5, at Draft Plan pages 154, 170:

***The State Water Board recommends the development of a strategy to address the legal, financial and technical barriers to consolidation. The State Water Board and Board staff will use the Transition Advisory Group as a forum to obtain stakeholder input regarding how to address barriers to consolidation.***

<sup>10</sup> Draft Plan, at p. 87.

### **III. THE DRAFT PLAN SHOULD NOT ADVANCE A “WATER USAGE FEE” TAX AS A FUNDING SOURCE.**

Draft Plan Recommendation 4-3 recommends the development of a “stable, long-term funding source” to be provided for safe drinking water solutions for small disadvantaged communities, and identifies a “water use fee” as a potential funding source.<sup>11</sup> While ACWA recognizes the value in the development of stable funding sources to help fund solutions in small disadvantaged communities that do not have safe drinking water, ACWA urges the State Board to delete the water use fee from the Draft Plan.

The draft Plan notes that “it is beyond the scope of the report to assess whether this [statewide water use] fee is a fee or a tax under Proposition 26.” Proposition 26, enacted by California voters in 2010, added a new definition of the term “tax” to the California Constitution and provides that taxes must be approved by two-thirds vote of Legislature and that certain local fees be approved by two-thirds of voters. Under Proposition 26, a fee is a tax if it does not link payor charges and benefits. Accordingly, it is clear that the Draft Plan’s statewide “water use fee” is a tax under Proposition 26, because in areas where safe drinking water problems do not exist, the payor of the water usage fee does not benefit. A tax can be assessed under Proposition 26 without reference to how the benefits relate to the cost, but the enactment of such a tax requires a two-thirds vote of the Legislature. A statewide water usage tax would be, by definition, regressive, and as the State Board’s February 2013 report to the Legislature “Recommendations Addressing Nitrates in Groundwater” noted, “a water use fee may be viewed as a burden on low-income residents.”<sup>12</sup>

ACWA wants to work with the State Board and other stakeholders to identify funding solutions for small disadvantaged communities. In ACWA’s recent work on Proposition 1, that commitment was manifest; the bond recently approved by voters includes \$520,000,000 for projects that improve water quality, including drinking water projects, with the priority being disadvantaged communities. In working to get Proposition 1 on the ballot, the Administration, ACWA and other stakeholders worked together to find a solution that was broadly supported. A similar approach should be utilized as the State Board works to identify funding sources to help fund safe drinking water solutions in small disadvantaged communities.

Any statewide water use tax would face broad opposition among California’s public water agencies. ACWA recommends that the State Board engage stakeholders in discussions to identify viable, stable, long-term funding sources.

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<sup>11</sup> *Id.*, at pp. 87, 168.

<sup>12</sup> State Water Resources Control Board, RECOMMENDATIONS ADDRESSING NITRATES IN GROUNDWATER (February 20, 2014), at.p. 24.

Proposed alternative language for Recommendation 4-3, at Draft Plan pages 87, 168:

***The State Water Board recommends that the State Water Board and Board staff engage stakeholders in discussions to identify viable, stable, long-term funding sources to ensure that all Californians, including those in DACs, have access to safe drinking water.***

**IV. INCONSISTENT OR UNCLEAR PROVISIONS IN THE DRAFT PLAN SHOULD BE REVISED OR DELETED.**

***(a) Recommendation 4-2***

Recommendation 4-2 (“The State Water Board will continue to promote the consolidation of small water systems where ever feasible since *consolidations with a larger water system is the best solution.*” (Emphasis added.)) is based on the false premise that the consolidation of water systems will always be the best solution. In their 2013 report to the Governor’s Office, the Governor’s Drinking Water Stakeholder Group acknowledged that, “*the best solution for each community will differ among a variety of options that are not limited to ‘shared solutions’.*”<sup>13</sup> (Emphasis added.) ACWA suggests the following alternative language for Recommendation 4-2:

Proposed alternative language for Recommendation 4-2, at Draft Plan pages 87, 170:

***The State Water Board will continue to promote consolidation of small water systems where consolidations are feasible and workable solutions based on the specific circumstances of the systems in question.***

***(b) Recommendation 8-6***

Recommendation 8-6 proposes that:

The State Water Board will annually assess alternatives for providing safe, affordable drinking water for small public water systems in DACs with drinking water and related water quality issues and recommend enactment of legislation to establish a framework of statutory authorities for regional or statewide organizations and local governmental agencies to develop, design, implement, operate, and manage these systems for small DACs.<sup>14</sup>

<sup>13</sup> 2013 DWSG Report, at p. 1.

<sup>14</sup> Draft Plan, at p. 155.

It is unclear to ACWA what the State Board is proposing in Recommendation 8-6. For example, clarity is needed on what types of “organizations” might see their authorities changed. Recommendation 8-6 should be revised to clarify the recommendation’s intent, or be deleted. A proposal to modify the authorities of regional or statewide organizations or local government agencies should be discussed with the potentially impacted entities before it is proposed.

**V. CONCLUSION**

ACWA commends the State Board for its focus on carrying out its drinking water duties and responsibilities in a manner that protects and benefits all Californians. ACWA is committed to working with the State Board, Division of Drinking Water staff and other stakeholders on addressing drinking water quality and reliability issues in small and disadvantaged communities.

ACWA appreciates the substantial efforts of State Board staff to produce the Draft Plan and organize stakeholder workshops that allowed drinking water community stakeholders with an opportunity to provide input into its continued development. ACWA and water agencies around the state stand ready to continue to work with State Board staff as they continue to refine the Draft Plan.

If you have any questions regarding this matter, please contact me at AdamW@ACWA.com or (916) 441-4545.

Sincerely,



Adam Walukiewicz  
Regulatory Advocate

cc: The Honorable Matt Rodriquez, Secretary, California Environmental Protection Agency  
The Honorable Felicia Marcus, Chair, State Water Resources Control Board  
The Honorable Dorene D’Adamo, Member, State Water Resources Control Board  
The Honorable Tam M. Doduc, Member, State Water Resources Control Board  
The Honorable Frances Spivy-Weber, Member, State Water Resources Control Board  
The Honorable Steven Moore, Member, State Water Resources Control Board  
Mr. Gordon Burns, Undersecretary, California Environmental Protection Agency  
Mr. Tom Howard, Executive Director, State Water Resources Control Board  
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Mr. Tim Quinn, Executive Director, Association of California Water Agencies  
Ms. Cindy Tuck, Deputy Executive Director, Association of California Water Agencies