

April 22, 2015

Via email to Jessica.Bean@waterboards.ca.gov

Felicia Marcus, Chair
State Water Resources Control Board
1001 I Street
Sacramento, CA 95814

Re: Draft Regulations Implementing 25% Conservation Standard

Dear Chair Marcus and Board Members:

California is in the midst of a multi-year drought; a drought that is straining current water supplies for most of California. In response, water agencies throughout California have implemented significant conservation measures that have resulted in tangible water savings. Water agencies throughout California understand the severe nature of the drought and the Governor's directive to achieve greater water savings through continued and improved conservation.

We have had the opportunity to review the draft emergency conservation regulations (Draft Regulations) circulated by the State Water Resources Control Board (SWRCB) and are concerned over the authority relied upon by the SWRCB for imposing mandatory conservation targets for various water agencies throughout California. The stated authority for imposing mandatory conservation targets contained in the Draft Regulations is the SWRCB's authority to prevent "waste and unreasonable use." The "tiers" of mandated conservation contained in the Draft Regulations are not based on any particular "unreasonable use" or "waste" of water but are instead simply tied to urban usage from a specific time period in 2013. The "tiers" do not recognize water right priorities, population density, climatic variation, or any other facts particular to water use. The Draft Regulations are intended to apply to water diverted and used from any source, whether from surface or groundwater supplies.

The SWRCB cannot exercise its "reasonable use" authority in the blanket manner as articulated in the Draft Regulations. The SWRCB's "reasonable use" authority is not a panacea. Instead, it is a doctrine by which the SWRCB carefully examines specific diversion and use of water and determines whether, based on facts before it, a particular use is unreasonable. The Draft Regulations do not look at any particular use or type of use and instead simply declare the regulations are necessary to prevent the "waste and unreasonable use of water."

The Draft Regulations also ignore the rule of priority. Because, in part, the Draft Regulations implement tiered conservation mandates tied to beneficial use during a portion of 2013, it is likely to result in senior water right holders being forced to cease beneficial use (“conserve”) while junior water right holders are entitled to continue to use water, perhaps at much greater quantities than senior water right holders. Imposing conservation mandates that result in water right holders diverting water without regard to priority “contravene[s] the rule of priority, which is one of the fundamental principles of California water law.” (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 943.)

Last, the Draft Regulations appear to attempt to impose some sort of “equitable” or “physical” solution to California’s ongoing drought. The California Supreme Court, however, has expressly rejected the imposition of a physical solution that ignores existing rights to water. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 (*Mojave*).

As the *Mojave* Court explained, “water right priority has long been the central principle in California water law. The corollary of this rule is that an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use.” (*Mojave* at p. 1243.) Even where courts impose equitable solutions, those solutions should be based primarily on water right priorities. (*Mojave* at pp. 1245-1246.) Where equitable solutions are sought, the primary consideration must be priority, with consideration also given to “physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former . . . all relevant factors.”¹ (*Mojave* at p. 1246.) The *Mojave* Court made clear that these factors are “merely illustrative,” not exhaustive and that they underscore the “nature of the problem of apportionment and the delicate adjustment of interests which must be made.” (*Mojave* at p. 1246.) These principles apply to both surface water and groundwater rights. Despite the concern expressed by many water agencies over consideration of these types of factors, the SWRCB’s Draft Regulations fail to address these relevant issues and fail to respect the rule of priority.

We recognize that California’s ongoing drought has reached crisis proportions, but we remain troubled by the SWRCB’s repeated readiness to abandon well-established legal principles in its drought responses. Notwithstanding the defects in the SWRCB’s

¹ To be consistent with *Mojave*, for example, the SWRCB should, at a minimum, incorporate a climate factor in determining conversation tiers. Information that would form the basis of a climate factor is readily available to the SWRCB from both the California Energy Commission and Pacific Gas & Electric. (See e.g. Comment Letter From Placer County Water Agency, dated April 13, 2015 at p. 3.)

Felicia Marcus, Chair
State Water Resources Control Board
Re: Draft Regulations Implementing 25% Conservation Standard
April 22, 2015
Page 3

Draft Regulations, we will continue to voluntarily implement conservation measures geared towards achieving the conservation goals set forth in the Governor's Executive Order B-29-15. Our willingness to continue to implement additional conservation measures to help California during this drought should not be construed as our acceptance of the SWRCB's assertion of authority under the "reasonable use" doctrine.

Sincerely,

PLACER COUNTY WATER AGENCY



By: _____
Einar Maisch
General Manager

SAN JUAN WATER DISTRICT



By: _____
Shauna Lorance
General Manager

CITY OF ROSEVILLE



By: _____
Richard Plecker
Environmental Utilities Director

SACRAMENTO COUNTY WATER AGENCY



By: _____
Michael L. Peterson
Director

CARMICHAEL WATER DISTRICT



By: _____
Steve Nugent
General Manager

EL DORADO IRRIGATION DISTRICT



By: _____
Jim Abercrombie
General Manager

CITY OF YUBA CITY



By: _____
Diana Langley
Director, Public Works

CITY OF FOLSOM

By:  _____
Marcus Yasutake
Environmental and
Water Resources Director