

To: SWRCB    **Re: “Comment Letter – “Mandatory Conservation Proposed Regulatory Framework”  
Revised Proposal, Saturday, April 18, 2015, Comment due date Wednesday, April 22, 2015**

*Joan C. Lavine*

Attorney at Law

123 North Hobart Blvd.

Los Angeles, California 90004, U.S.A.

Office Phone: (213)627-3241

E-mail: [JCLavine@aol.com](mailto:JCLavine@aol.com); [JoanLavine@gmail.com](mailto:JoanLavine@gmail.com)

April 22, 2015

Ms. Felicia Marcus, Chairperson, California State Water Resources Control Board, and  
Members, California State Water Resources Control Board

% Ms. Jeanine Townsend, Clerk of the State Water Resources Control Board  
State Water Resources Control Board, [Jeanine.Townsend@waterboards.ca.gov](mailto:Jeanine.Townsend@waterboards.ca.gov) or  
[jtowndsend@waterboards.ca.gov](mailto:jtowndsend@waterboards.ca.gov)

Mr. Tom Howard, Director of the California State Water Resources Control Board at  
[thoward@waterboards.ca.gov](mailto:thoward@waterboards.ca.gov)

% Jessica Bean, Engineering Geologist, California State Water Resources Control Board staff at  
[Jessica.Bean@waterboards.ca.gov](mailto:Jessica.Bean@waterboards.ca.gov)

1001 “I” Street, 24th Floor

Sacramento, CA 95814

Direct phone: (916) 341-6904; Fax phone: (916) 341-5620

Filed via email to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov), [Jessica.Bean@waterboards.ca.gov](mailto:Jessica.Bean@waterboards.ca.gov)

**ATTENTION: Ms. Jessica Bean, Engineering Geologist  
[Jessica.Bean@waterboards.ca.gov](mailto:Jessica.Bean@waterboards.ca.gov).**

**Re: “Comment Letter – “Mandatory Conservation Proposed Regulatory Framework”  
proposed by the California State Water Resources Control Board, notice delivered on  
Tuesday, April 18, 2015, by email at 8:54 a.m. PDT/April 19, 2015, 8:xx p.m. PDT ;  
Comment due date Monday, April 22, 2015 (updating Joan Lavine, Attorney, Comment  
Letter filed via email with the SWRCB on April 13, 2015, at about 1:20 p.m. PDT)**

TO CHAIRPERSON FELICIA MARCUS AND TO BOARD MEMBERS OF THE  
CALIFORNIA STATE WATER RESOURCES CONTROL BOARD:

TO MR. TOM HOWARD, DIRECTOR, CALIFORNIA STATE WATER RESOURCES  
CONTROL BOARD

TO CALIFORNIA STATE WATER RESOURCES CONTROL BOARD DESIGNATED  
STAFF ENGINEERING GEOLOGIST JESSICA BEAN:

Dear SWRCB Chairperson Marcus, SWRCB Board Members, and Ms. Bean:

I hereby respectfully submit my updated comments and objections to the California State  
Water Resources Control Board, to Chairperson of the SWRCB Felicia Marcus, and to the  
SWRCB Board Members, regarding the proposed **“Mandatory Conservation Proposed  
Regulatory Framework” revision proposed by the California State Water Resources**

Control Board, notice delivered on last Saturday morning, April 18, 2015, by email at 8:54 A.M. PDT; Comment due date Monday, April 22, 2015.

I hereby oppose and object to the above referenced revised proposed “Mandatory Conservation Proposed Regulatory Framework” proposed by the California State Water Resources Control Board, notice delivered on last Saturday morning, April 18, 2015, by email at 8:54 A.M. PDT (and another notice sent via email on Sunday evening April 19, 2015, at 8:36 p.m. PDT); Comment due date Monday, April 22, 2015 (no time of day specified).

The proposed regulations sent to me last Saturday morning, April 18, 2015, by email at 8:54 A.M. PDT; Comment due date Monday, April 22, 2015 continue to fail to focus on, address and seek to implement and resolve the water limitations currently present in California. Restricting use will not cure our water shortage. They fail to seek to obtain a broad coalition between the State of California, the local water users and suppliers and others such as the federal government to INCREASE water supplies. In, short fails to resolve the water drought water supply shortages.

I object that the pending revised regulations proposal exceeds the jurisdiction and authority of the California State Water Resources Control Board, and this SWRCB would act without jurisdiction were it to enact them.

1. These proposed SWRCB regulations establish policy in violation the restriction on the general scope of authority of all California administrative agencies. Kugler v. Yocum, 69 Cal.2d 371 (1968); Clean Air Constituency Et Al., Petitioners, v. California State Air Resources Board, 11 Cal. 3d 801, 816, 523 P.2d 617; 114 CR at 577, 586 (1974). Creation of policy cannot be delegated to a state administrative agency. A State of California state administrative agency therefore cannot establish policy by rulemaking or quasi-legislative action or activity.
2. These proposed SWRCB regulations and proceedings, hearings, and comment deadlines have not been adequately, reasonably or fairly noticed. A notice sent out on Saturday and Sunday, allowing only a five-day window of which two are Saturday and Sunday, and three are workdays, to respond to such a major overhaul of an essential component of everyone’s life, water, is not constitutionally, minimally adequate, reasonable or fair, in violation of the Due Process Clauses of the 5<sup>th</sup> and 14<sup>th</sup> Amendments, U.S. Constitution and Article I, Sections 1, 7, 11, 13, 19, California Constitution. Such notice violates federal law under Title 40 CFR, § 25.5, requiring much more time of at least 45 days. It results in a substantial denial to the general public of the right to have access to the rulemaking proceedings and to be able to participate. Mullane v. Central Hanover Bank, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

This is hardly an “emergency” necessitating an unreasonably short comment period in a quasi-legislative, rulemaking proceeding. The SWRCB has been addressing drought and water conservation issues over several years.

3. **I object that these proposed regulations violate the requirements and restrictions of the California Constitution, Article 13D, Section 6, particularly, in that the tiered pricing fails to be cost-based and use-based. Capistrano Taxpayers’ Assn. v. City of San Juan Capistrano, California Court of Appeal, Fourth District, Div. 3, Case No. G048969 (Superior Court. No. 30-2012-00594579). They, if enacted, would be void as in substantial conflict with same.**
4. I object that these regulatory proposals violate the California Constitution, Article 13B, Section 6, requirement that what a state mandates it must fund. These proposals lack funding provisions required, and would be void if enacted.
5. In various ways these proposed regulations are too vague to be complied with or enforced. For instance, one provision is to prohibit watering for 48 hours after “measurable rainfall” without identifying where the rainfall has occurred or how close to a user’s property it takes place. Section 654 (a)(5).
6. I object that these proposals conflict with the California State Water Action Plan enacted over a year ago.
7. I object that these proposals usurp and confiscate authority reserved to and in municipal authorities and agencies, and water rights owners, particularly as provided by the California Constitution and various legislative acts of the California State Legislature.

I recommend and urge that you vote AGAINST the adoption of these revised (as of April 17 or 18, 2015) proposed “Mandatory Conservation Proposed Regulatory Framework”. I recommend you vote “NO” and AGAINST the adoption of the proposal as a whole.

I recommend you re-direct your energies and attention, and that you focus on the development of consistent, stable expansion of water supplies. I suggest:

1. Emergency construction of an extensive network of desalination plants.
2. Importation of water supplies from areas with an overabundance of water, such as the U.S. Northwest areas and Canada, and the laying of waterlines off the California Coastline to do so. See the worthy proposal of William Shatner, news article published in the last one or two days in the Los Angeles Times.
3. Develop adequate storage for potable water with adequate means of collecting rainwater.
4. Develop recycling systems and adequate storage for recycled water.
5. Apply to the federal agencies supplying water for increased allowances and their transmission of water from water abundant areas.
6. Develop consumer-friendly, practical means of conserving water that consumers can implement and use individually and that can easily and quickly be put into use.

Authorize and encourage (by grants, credits, and funding) individual use of gray water, recycling systems, and individual water storage.

7. Consider seeding clouds. Consider collecting and directing rainfall over the Pacific Ocean to California.
8. Set clear use conservation targets for consumers that are achievable. Permit water use to that level without fines, fee increases or cost increases.
9. State clear, simple means of water use reduction. If improvements that save at least five or ten percent of a previous year’s usage are implemented, reward the consumer – pay for the improvement, give a tax credit, lower the water rate use.
10. Engage water experts in engineering and water rights expert attorneys, as well as marketing experts, to put together a can-do team to get California back to a safe level of water supplies.
11. This proposal fails to support our agricultural and commercial sectors.
12. This proposal fails to support individual water users.

I object that this revised proposal is overbroad, too vague, duplicative, arbitrary, capricious, cruel, unusual, harsh and punitive, uneven-handed, unenforceable and too costly. The proposed restrictions are overbroad, too vague, arbitrary, unreasonable, exceed statutory and constitutional limits of Board’s authority, and are unenforceable. They interfere with and constitute regulatory revocation and “taking” of vested property rights involved with issued permits and licenses.

I object that the revised proposal lacks provisions for grandfathering in issued permits and licenses.

I object that the revised proposal lacks procedures and criteria for exemptions.

I object that the revised proposal fails to comply with federal Clean Water Act regulatory requirements for adequate written, mailed notice to interested parties under Title 40 CFR, § 25.5, and Due Process of Law reasonable notice and reasonable opportunity to be heard requirements of the 5<sup>th</sup> and 14<sup>th</sup> Amendments, U.S Constitution.

I object that this proceeding does not comply with the rulemaking requirements of the applicable APA provisions. SWRCB v. OAL, 12 Cal.App.4<sup>th</sup> 697, 16 cr2d 25 (1993, 1<sup>st</sup> dist.). Adoption of this proposal by the SWRCB is a form of a rulemaking proceeding. It does not comply with minimum standards of either procedural or substantive Due Process of Law. Mullane v. Central Hanover Bank, 339 U.S. 306; 70 S. Ct. 652; 94 L. Ed. 865; 1950 U.S. LEXIS 2070 (1950); 5<sup>th</sup> and 14<sup>th</sup> Amendments, U.S. Constitution; California Constitution, Article I, Sections 7, 11, 13 and 19, Article 13B, Section 6.

Fundamental administrative law and constitutional law place limits on the authority of an administrative agency, as well as the California State Legislature, county, municipal and other

government rulemaking entities with (quasi)-legislative authority, by limiting the legislative enactments only to those assertions of legislative authority that are necessary. So where a governmental entity can curb or prevent an evil or activity by regulation, it exceeds its jurisdiction by entirely prohibiting it. San Diego TB Assn. v. East San Diego, 186 Cal. 252; 200 P. 393 (1921); Jones v. City of Los Angeles, 211 Cal. 304, 295 P.14 (1930); 13 Cal. Jur. 3d Constitutional Law § 141.

In California, administrative agency water regulations purporting to establish different and more punitive regulatory action and punishment, particularly by use of regulatory prohibitions, are likely to be confiscatory regulatory takings and regulatory confiscations.

This proposal would conflict with local ordinances, regulations, and laws which have been enacted to avoid adverse environmental hazards, harms and problems.

It lacks a provision for compliance with the State Constitution, Article 13B, Section 6, funding requirements required by the State for its mandates, and for complying with these proposed regulatory mandates. It conflicts with and has the potential to conflict with already-enacted local land use and environmental laws implemented to protect the environment in violation of California Constitution, Art. 13B, Section 6, and Article 1, Section 19.

I object to the scheduling of comment deadlines and proceedings noticed via email on Saturday morning, April 18, 2015, and due the following Wednesday, April 22, 2015, as same is fundamentally unfair. This has the practical effort of deterring, discouraging, limiting and preventing public participation by scheduling so that this Board’s activities and proceedings conflict with other legal obligations. This scheduling of the comment period deadline sabotages public participation, and thus violates the requirement that this agency facilitate, encourage and promote public participation, as required by Title 40 CFR, Sec. 25.5.

It is harsh, punitive, cruel, and seeks to prohibit rather than regulate.

It seeks to shift the burden for failure of state officials, including the SWRCB, to establish means of maintaining adequate water supplies from the governor and the SWRCB over a long period of time. Seeks to punish water users, particularly individual residential water users, for state officials’ inabilities and failures to maintain and manage our water supplies.

Instead of developing water supplies, it impairs, disrupts and destroys ways of accessing water supplies and permitting the use of owned water rights.

Seeks to vacate the California water rights laws established and in effect for many years, specifically and generally.

Appears to attempt to override federal, state and local laws and regulations for ownership, use, development and regulation of water and water rights.

Instead of proposing a supportive team approach to assist individual water users who are the victims of this water crisis, the California State government seeks to lay the “blame” on the consumers and end uses, and to punish them with impossible-to-comply-with demands.

To the extent that it seeks to prohibit water users from using water rights and water

supplies they own and have contracted for and purchased, it is confiscatory. It interferes with the Contract Clause of the U.S. Constitution.

To the extent that it has the effect of revoking permitted, in-use water, it is confiscatory.

If the State of California officials and/or the federal government fail to provide the wherewithal, means, funding and system and fail to actually put into effect the transport of adequate water supplies from areas with water supplies for sale, then private and municipal government consortiums should be licensed and green-lighted to do so. The Pacific Ocean appears to this commenter to be a splendid and FREE “highway” for laying waterlines. These supplies obtained through these means should be entirely exempted from any restrictions.

If the State of California officials and/or the federal government fails to provide the wherewithal, means, funding and system and to put into effect a system of desalination, both through plants and individual desalination systems, to obtain adequate water supplies, then private and municipal government consortiums should be licensed and green-lighted to do so. The Pacific Ocean appears to this commenter to be a splendid and FREE water resource. These supplies obtained through these means should be entirely exempted from any restrictions.

Alternative means of protecting endangered species, rather than cutting off water supplies to farmers and residential users, must be implemented. We humans are in the process of becoming “endangered” ourselves.

The proposed drought water policy lacks sufficient specificity to provide water user with specific ways they can reduce and control water usage and become more efficient and more thrifty.

Consider, instead, a positive approach that will be supported by California’s constituents, rather than this harsh, heavy-handed, uneven-handed, cruel and over-controlling, exorbitantly costly, ultimately grossly unpopular and unenforceable approach.

Bring in a team of experts with the correct skill sets: water supply engineering experts, attorneys trained in legislative drafting and democratic implementation, by fair and even-handed means, and marketing experts for a positive, supportive campaign.

Thank you for considering my legal analysis, whether or not you agree with me.

Respectfully submitted,

JOAN C. LAVINE  
Attorney at Law, California State Bar No. 049169  
Property Owner in Los Angeles County, California