

SOUTH FEATHER WATER & POWER AGENCY

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VIA ELECTRONIC MAIL

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Re: Comment Letter - Mandatory Conservation Proposed Regulatory Framework

Dear Chairman Marcus and Board Members:

South Feather Water & Power Agency appreciates the opportunity to provide comments on the State Water Resources Control Board's proposed emergency regulations concerning mandatory water conservation measures. The Agency previously submitted comments on April 13, 2015, to the SWRCB's draft regulatory framework. The SWRCB incorporated many of the Agency's comments and took a good first-step in the draft regulations by adding flexibility and in addressing the Agency's concerns. The Agency encourages the SWRCB to make the following additional changes to the draft regulations:

- 1. The Regulations Should Not Imply that Failure to Achieve the Mandated Conservation Standard is Per Se Waste and Unreasonable Use; South Feather Water & Power Agency Recommends Striking All References to Waste and Unreasonable Use in the Regulations**

For nearly 90 years, the Constitutional prohibition on waste and unreasonable use has been applied on a fact-specific and case-by-case basis after opportunity to be heard and the presentation of evidence in an adjudicatory or quasi-adjudicatory setting. (E.g., *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.* (1935) 3 Cal.2d 489 (applying water for the purpose of drowning gophers not reasonable); *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132 (use of water to transport sand and gravel down riverbed for later extraction not reasonable); *Imperial Irrigation Dist. v. SWRCB* (1990) 225 Cal.App.3d 548 (excessive canal spills, tail water, and seepage constituted waste of water.) Specific facts considered in such cases included, but were by no means limited to, the amounts of water needed for the users' beneficial uses, the relative importance of competing uses, the local scarcity of water resources, and local water use customs.

In contrast, the regulations engage in no such analysis and instead imply that failure to meet the applicable conservation tier will necessarily constitute waste and unreasonable use of water. What may be "wasteful"

or “unreasonable” will depend on the applicable facts involved and each water supplier ought to be able to present its case for why it believes its water practices are efficient and reasonable, notwithstanding a possible failure to adhere to the SWRCB’s conservation mandate. For example, a supplier in Tier 9 (36%) with wise water use requirements in place, relatively abundant stored surface water supplies, and operational projections that provide for adequate end of water year carryover storage should not be labeled as wasteful or unreasonable simply because it failed to achieve the mandated conservation level, despite its best efforts.

The Agency is deeply troubled with the SWRCB’s recent trend to declare water uses and/or practices wasteful and unreasonable without undertaking the requisite case-by-case factual analysis. This trend appeared to start with the emergency regulations on Mill, Deer, and Antelope Creeks where the SWRCB declared all diversions and uses (except for health and safety) automatically wasteful and unreasonable if such diversions interfered with the proscribed minimum instream flow or pulse flow regime. The current emergency urban conservation regulations are drafted in a similar manner where potential violators, despite best efforts, are branded as unreasonable water wasters.

The SWRCB can satisfy the Governor’s April 1st Executive Order and the requisite conservation targets without referencing or improperly expanding the waste and unreasonable use doctrine. The regulations need not specifically refer to waste and unreasonable use for the SWRCB to have that tool available to it in the event of enforcement. The Agency urges the SWRCB to strike all references to waste and unreasonable use.

2. The SWRCB Should Add Further Flexibility to the Emergency Regulatory Scheme

a. Section 865, subdivision (c)(2), Should Be Expanded To Include Suppliers With Adequate Surface Water Storage and Projected Adequate Carryover Storage Levels

The Agency and its ratepayers acquired and perfected senior water rights and have planned, financed, and constructed facilities to manage multiyear droughts, as we are currently experiencing. A one-sized-fits-all regulatory scheme would ignore these prior rights and efforts by the Agency and its ratepayers to ensure adequate water supplies notwithstanding multiyear droughts. Blunt, inflexible regulations that do not account for local water supply conditions would unjustly penalize ratepayers that have invested huge sums of money ensuring they have a safe, reliable water supply even in extended droughts. Further, in the Agency’s case, water conserved would remain in storage for 2016 and beyond and not benefit other areas of the State. The Agency recommends expanding Section 865, subdivision (c)(2), to address these realities:

Each urban water supplier whose source of supply does not include groundwater or water imported from outside the hydrologic region and that received average annual precipitation in 2014 or has adequate surface water storage for 2015 and projected

adequate carryover storage for the 2015/2016 water year may, notwithstanding its average July-September 2014 R-GPCD, submit for Executive Director approval a request to reduce its total water usage by 4 percent for each month as compared to the amount used in the same month in 2013. Any such request shall be accompanied by sufficient information showing that the supplier meets the criteria of this subsection. that the supplier's sources of supply do not include groundwater or water imported from outside the hydrologic region and that the supplier's service area received average annual precipitation in 2014.

b. The Emergency Regulations Should Acknowledge the Need for Limited Outdoor Watering To Minimize and Potentially Avoid Wildfires

The Agency's service area extends from the Sierra Mountains to the wooded Sierra foothills and requires special consideration when imposing drastic cuts in water use. Unlike those of many of the urban water suppliers identified in the proposed rulemaking package, the Agency's service area is characterized by large lots, dense forest, dry grasses, chaparral, wind and lightning storms and, potentially, wildfires. Unlike many of the other suppliers assigned to the highest conservation tier, the Agency's service area is not characterized by opulent or lush ornamental landscaping.

In the hot, dry summer months, the Agency's service area is subject to extreme wildfire risk. It is almost entirely within a "Very High Fire Hazard Severity Zone," as classified by Cal Fire pursuant to 14 C.C.R. section 1280, and the portions that are not classified as "Very High" are classified as "High Fire Hazard Severity Zones." (See, also, requirements imposed by Pub. Res. Code §§ 4290 et seq.) In order to protect human health and safety, the Agency's customers need to be able to keep their grasslands watered and their tall trees alive. The SWRCB has already acknowledged as much, but has not incorporated that concern into the draft regulations. (See *Fact Sheet for Draft Regulations Implementing 25% Conservation Standard* at p. 4 ["It will be very important as these provisions are implemented to ensure that existing trees remain healthy and do not present a public safety hazard."]) Allowances must be made in the proposed regulations to allow the Agency and its customers, and similarly situated suppliers, to mitigate the significant risks to human health and safety posed by dry grasslands and dying forests in areas with extreme fire danger and windstorms. The Agency recommends adding the following as a new subdivision to section 865:

Each urban water supplier whose source of supply does not include groundwater or water imported from outside the hydrologic region and whose service area includes areas classified by the California Department of Forestry and Fire Protection as a Very High Fire Hazard Safety Zone or High Fire Hazard Severity Zone may, notwithstanding its average July-September 2014 R-GPCD, submit for Executive Director approval a request to reduce its total water usage by 4 percent for each month as compared to the amount used in the same month in 2013. Any such

request shall be accompanied by sufficient information showing that the supplier meets the criteria of this subsection.

3. The Emergency Regulations Should Avoid Reductions on Hydroelectric Power Projects, Such as the Agency, That Individually or Cumulatively Put the Power Grid at Risk of Failure

The Agency owns and operates the South Feather Power Project (FERC Project No. 2088) that has a combined electric generation capacity of 120 megawatts. The Agency's hydroelectric project is incidental to its consumptive deliveries; that is, some of the water that is run through the Agency's powerhouses to generate electricity is then used by its customers for consumption. Placing the Agency in Tier 9 would require the Agency's consumptive demands to be reduced by 36% and, potentially, result in significant reductions in hydroelectric generation. Requiring 36% mandatory reductions when adequate supply exists creates an unnecessary reduction in power generation that could, along with water sale revenue, be financially catastrophic to the Agency. Additionally, such action could be cumulatively catastrophic to the power grid given other power agencies like South Feather Water and Power are categorized in Tier 9 (e.g., Placer County Water Agency, Nevada Irrigation District).

If the SWRCB adopts the revised language to Section 865(c)(2), quoted in 2.a. above, the Agency's concerns and the threat to the State's power grid can be alleviated.

Sincerely,
South Feather Water and Power Agency



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c: SFWPA Board of Directors