



NEVADA IRRIGATION DISTRICT

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VIA ELECTRONIC MAIL

Ms. Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Commentletters@waterboards.ca.gov

RE: Comment Letter – Draft Article 22.5 Drought Emergency Water Conservation

Dear Chair Marcus and Board Members:

The Nevada Irrigation District (District) has provided comments on the proposed urban conservation emergency regulations at every opportunity. The District's comments encouraged flexibility in the regulatory scheme, particularly to avoid consequences of unnecessarily strident conservation mandates, such as increased wildfire risk and reduced hydroelectric power generation, and urged the State Water Resources Control Board (State Board) to avoid utilizing its waste and unreasonable use power in such a blunt and uncompromising manner. The State Board staff has completely ignored the District – and dozens of other commenters – on these subjects.

References to Waste and Unreasonable Use are Unnecessary and Inappropriate

While the District appreciates and supports paragraph 15 of the draft resolution adopting the emergency regulations, its inclusion should be unnecessary. Rather than having to ameliorate the various blunt references to waste and unreasonable use, it would be best to simply strike each reference as unnecessary and inappropriate. State Board staff is engaging in a deliberate strategy to strip away the heretofore on-the-ground, case-by-case examination of water uses and instead apply blanket conclusions of what constitutes unreasonableness or wastefulness in the use of water. In our industry, labeling a supplier as wasteful or unreasonable is equivalent to affixing a prominent Scarlet Letter that may have significant consequences to the supplier's water/property rights, its current and future financing, and its ability to continue providing a safe and reliable water supply to its customers in the future. Such a powerful "tool" – the vernacular used by

State Board staff – should be used sparingly and only after a close examination of the supplier’s specific use of water. The Federal Court of Claims¹ succinctly summarized the considerations and process required to declare a particular use of water wasteful or unreasonable and thus prohibited:

in determining whether a particular water use is reasonable, **the California Constitution requires a balancing and consideration of all interests.** Cal. Const. art. 10, § 2; *see also* Cal. Water Code § 100.5 (the reasonableness rule itself **requires a consideration of all circumstances**); *United States v. State Water Res. Control Bd.*, 182 Cal.App.3d at 129 [] (a “determination of reasonable use **depends upon the totality of the circumstances** presented”); *Environmental Def. Fund, Inc. v. East Bay Mun. Util. Dist.*, 26 Cal.3d 183, 194 [] (1980) (“**what is a reasonable use of water depends upon the circumstances of each case**, such an inquiry cannot be resolved in vacuo from statewide considerations of transcendent importance”) (quoting *Joslin*, 67 Cal.2d at 140 []).

No use of water can be determined to be wasteful or unreasonable as those terms are used in the relevant Constitutional articles, statutes, and regulations, without a case-by-case determination that considers and balances all relevant circumstances of each case.

Each one of the proposed emergency regulations contains an extraneous reference to the doctrine—one contains two such references—as if the mere recitation of the words conveyed some authority or protection upon the State Board. Proposed section 863(a)(6) declares, without elaboration, that each of the three proposed regulations that follow are “necessary to prevent waste and unreasonable use of water.” Proposed section 864(a) similarly indicates that each of the proposed end-user prohibitions are intended to “prevent the waste and unreasonable use of water.” Proposed section 865 contains two references to the doctrine: Section 865(c)(1) states that each urban water supplier must achieve the proposed conservation standards in order to “prevent the waste and unreasonable use of water.” And section 865(f)(1) states that smaller public water suppliers must also implement certain mandatory conservation measures to “prevent the waste and unreasonable use of water.” Finally, section 866 states that if a water supplier fails to meet its conservation standard under section 865(c), then, in order to “prevent the waste and unreasonable use of water,” the State Board may issue conservation orders directing the suppliers to implement specific additional conservation actions.

The only one of these four proposed regulations that comes close to describing wasteful or unreasonable uses of water is section 864, which prohibits certain *specific* uses of water.

¹ *Casitas Municipal Water District v. United States* (2011) 102 Fed.Cl. 443, 449 [parallel citations removed, bolding added], *aff’d* (2013) 708 F.3d 1340.

However, even that section fails to take into account “all of the circumstances” or engage in any sort of fact-based balancing. Indeed, it is impossible to consider all circumstances or to balance them in a general rulemaking such as this. A case-by-case balancing can only occur in a quasi-adjudicative proceeding, not in a quasi-legislative action.

The Emergency Regulations Digest, at unnumbered page 4, purports that the proposed regulations do not “declar[e] any particular use or practice a waste or unreasonable use of water.” While the language in these proposed regulations may not be as straightforward as that used in other recent drought-related emergency regulations,² the implication is clear and no other conclusion can be made from the repeated references to the doctrine, to *Light v. SWRCB*, and to Water Code section 275. Rather than slip a statement into the rulemaking record that purports to interpret the proposed regulatory language, the language and references themselves should be stricken from the proposed regulations.

Striking all references to the waste and unreasonable use of water would have no effect on the regulations’ validity or enforceability. This is clearly understood by the regulations’ drafters, as each reference to waste and unreasonable use (aside from one) is accompanied by a reference to a more appropriate basis for regulatory authority: the promotion of water conservation.³ The State Board is authorized to promulgate emergency regulations to promote water conservation in exactly the same manner that it is authorized to do so to prevent the waste and unreasonable use of water.⁴ Inexplicably, the only reference to waste and unreasonable use in the proposed regulations that was not accompanied by a reference to the promotion of water conservation is the subdivision setting out each water supplier’s water conservation target.⁵ **According to the plain regulatory language, the water conservation targets imposed on suppliers are not intended to promote water conservation, but instead are only intended to prevent the unreasonable and wasteful use of water—even though no particular uses of water were identified.** Each of the proposed regulations is intended to and would promote the conservation of water. None of the proposed regulations would serve to prevent wasteful or unreasonable uses of water, at least not in the manner intended and required by California law.

The District is concerned with the State Board staff’s attempt to expand the definition of waste and unreasonable use to include any use of water, or general class of uses of water, that the State Board deems *undesirable*. Both last year and this year, every use of water (except “health and safety”) on three Sacramento River tributaries was explicitly deemed waste and unreasonable use

² E.g., 23 C.C.R. section 877 (“The [State Board] has determined that it is a waste and unreasonable use under Article X, section 2 of the California Constitution to . . .”).

³ See proposed sections 863(a)(6), 864(a), 865(f)(1), 866(a)(1) (each referring to promoting water conservation).

⁴ See Water Code section 1058.5(a)(1); Governor’s Executive Order dated April 25, 2014, at 17.

⁵ Proposed section 865(c)(1).

if all of the uses collectively caused streamflows to fall below certain thresholds, without any balancing or consideration of the circumstances, or even any consideration of how the water would have been used were it diverted.⁶ In this case, the State Board preferred environmental instream uses of water and classified everything that interfered with this preference as wasteful and unreasonable.

With little in the way of specific guidance in statutory, Constitutional, or common law, the State Board is incrementally increasing the reach of the doctrine to the point we find ourselves now: Uses of water are being declared to be wasteful and unreasonable by regulation, without a balancing, without any consideration of context or circumstance, and without any knowledge of what the alleged wasteful or unreasonable use is in the first place. The State Board is expanding the definition of waste and unreasonable use to include any use or class of uses that the State Board wishes to limit and dispensing with the due process protections of case-by-case determinations and a balancing of interests. This is alarming because a water right is a property right, and the State Board is of the opinion that it need not pay just compensation for taking a water right so long as it first declares the holder's exercise of the right to be wasteful and/or unreasonable.

The State Board, as an unelected body that is not directly answerable to the public, cannot grant itself plenary authority to, by regulation, take private property for public use without just compensation. These proposed emergency regulations constitute another leap the State Board is taking in that direction, while using the drought as a cover for this grab of extra-Constitutional authority. The District urges the State Board to strike all references to waste and unreasonable use in the regulations.

The State Board Should Not Ignore Public Comments

The State Board has received hundreds of comments, but has only made a couple of limited, commonsense changes to the regulatory approach. In many respects the current draft regulations are more inflexible than when the framework was originally outlined. Many, if not most,

⁶ See 23 C.C.R. section 877. For instance, the State Board issued Order No. WR 2015-0017-DWR to all diverters on Antelope Creek, in Tehama County, on April 3, 2015, requiring them to bypass the first 35 cubic feet per second (cfs) to promote fish migration. Any diversion that would cause the flows to dip below 35 cfs was deemed by the regulations to constitute a waste and unreasonable use of water. (23 C.C.R. section 877 and subd. 877(c)(3).) In the month since the restrictions have been in place, fewer than 35 cfs was flowing in the creek on three out of the four measurement dates. Under the regulation, any use of Antelope Creek water for agriculture when the order was in effect was deemed to be wasteful and unreasonable per se, even if the water was necessary to keep cattle or trees alive, and notwithstanding that section 106 of the Water Code declares irrigation to be a higher use of water than fishery protection.

comments on the proposed regulations have repeated common themes. One, the State Board ought to consider additional factors in ranking water suppliers for assignment to the conservation standards. Basing their comments on the State Board's own admonishments against using residential gallons per capita per day (R-GPCD) figures as a metric for comparing different water suppliers,⁷ commenters called on the State Board to consider geography, climate, population density and growth, past conservation success, water in storage, water sources, and other factors in ranking the suppliers. This call to consider these additional factors transcended traditional divisions: north and south, coastal and inland, water exporters and headwater/area of origin users alike all called on the State Board to consider these additional factors. The State Board ignored this rare unanimity and refused to consider the very factors that the Board itself warned the public must be considered before using R-GPCD to make comparisons among California water suppliers. To rank suppliers in this way, using only 3 months' data from a single metric, while ignoring all other variables, is arbitrary and capricious and the conservation standard assignments are therefore not supported by substantial evidence.

The second most commonly requested revision was to remove the unnecessary references to "waste and unreasonable use" found throughout all of the proposed regulations. As described above, there is no need for the references to the doctrine, and the State Board has not followed the requisite procedures for determining whether a use of water is wasteful or unreasonable. With the interested parties arguing vehemently against use of the waste and unreasonable use doctrine in the regulations, and with no discernible need to invoke it for any identified reason, one can only conclude that the State Board is ignoring the public comments in order to further its own agenda to impermissibly expand the doctrine.

A third commonly heard comment was the need to account for commercial agricultural interests served urban water suppliers. Although the State Board made a minor concession by allowing suppliers that serve at least 20% of their *potable* production to commercial agricultural interests to discount the agricultural water when calculating conservation,⁸ that provision seems to have been crafted to serve a few combined agricultural/domestic suppliers, while excluding all other combined suppliers. The proposed exception applies the entirely arbitrary threshold of 20%, and it only applies to situations where the urban supplier provides *potable* water for agriculture. Given that the (flawed) metric is supposed to measure residential water use, there is not justifiable reason to impose the arbitrary and capricious cutoff of 20% of production. Suppliers that provide only 19% or 18%, or even 5%, of their water to agricultural users must be able to

⁷ See <https://drinc.ca.gov/dnn/Applications/UrbanWaterR-GPCD.aspx> ("It is not appropriate to use R-GPCD water use data for comparisons across water suppliers unless all relevant factors are accounted for.")

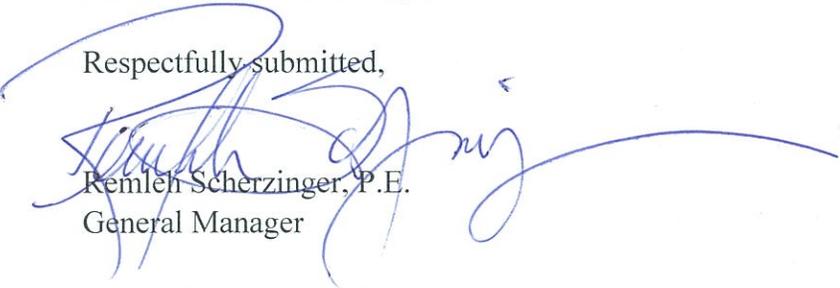
⁸ Proposed section 865(e).

exclude those amounts when they are being compared against purely residential use in cities. No justification was given for the arbitrary cut-off.

Finally, some suppliers, the District included, produce potable water for human consumption and also raw water for agricultural use, all from common sources (i.e., reservoirs). Although the first version of the draft regulations would have permitted the District to achieve its required conservation target by reducing deliveries of a combination of treated and raw water (thus saving water in upper reservoirs), the current revision would hamstring the District by requiring it to make all of its savings solely by reducing use of treated water, even though the treated and raw water all comes from the same place. From the perspective of the District's water storage situation, saving a quantity of raw water has the same effect as saving the same quantity of treated water. There is no reason to discern between various uses of the water once it leaves the District's storage facilities—water saved is water saved. By reducing flexibility in this latest revision, the State Board is making it more difficult for those suppliers such as the District that produce and serve both raw agricultural water and treated domestic water.

When hundreds of supplies and interested commenters repeat the same comments, the State Board ought to listen. Strike all references to waste and unreasonable use. Allow flexibility in achieving the mandated water savings through treated water reductions, raw water reductions, or both. Incorporate adjustments to R-GPCD to account for the diversity amongst California's water suppliers. Don't demand such onerous conservation mandates that, in the District's case, may unnecessarily expose its customers to greater risk of catastrophic wildfires or individually or cumulatively pose a risk to the power grid due to the loss of hydroelectric generation. These changes would adhere to the letter and intent of Governor Brown's April 1 Executive Order, while at the same time allowing suppliers the flexibility to manage supplies for a possible continuation of the drought into 2016.

Respectfully submitted,



Remleh Scherzinger, P.E.
General Manager

cc: Senator Jim Nielsen
Senator Ted Gains
Assembly Member Beth Gains
Assembly Member Brian Dahle
MCWRA – John Kingsbury
ACWA – Tim Quinn
NCWA – David Guy