



May 4, 2015

Via email to commentletters@waterboards.ca.gov

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



Directors
Edward J. "Ted" Costa
Kenneth H. Miller
Dan Rich
Pamela Tobin
Bob Walters
General Manager
Shauna Lorange

Re: Comment Letter of San Juan Water District -- April 28, 2015 Draft Urban Water Conservation Regulations and Related Rulemaking Materials

Dear Ms. Marcus:

San Juan Water District ("SJWD") appreciates the opportunity to comment on the State Water Resources Control Board's ("SWRCB") potential adoption of its April 28, 2015 draft of urban water conservation regulations. As explained below, SJWD continues to believe that the draft regulations have serious problems, problems that have only been highlighted by the rulemaking materials that the SWRCB released on April 29, 2015.

- 1. The SWRCB Has Underestimated the Costs of Implementing the Proposed Regulations by At Least Tens of Millions of Dollars and Has Overestimated Water Suppliers' Ability to Recoup Those Costs*

The Notice of Proposed Rulemaking and Emergency Regulations Digest that the SWRCB released on April 29, 2015 contains estimates of the costs that water suppliers will incur in order to implement those regulations. Those estimates underestimate the costs of implementing the proposed regulations by at least tens of millions of dollars because they do not include the increased costs that water suppliers will incur in staff time, advertising and other measures that will be necessary to achieve compliance with the regulations' conservation standards. This is particularly true for inland agencies such as SJWD that the SWRCB's proposed regulations target for higher levels of conservation because we are located in warmer climates. Instead, the SWRCB's estimate of costs focuses solely on the revenues that water suppliers will lose as a result of lower customer demand – that revenue loss will be significant – and fails to include the costs to comply with the SWRCB's proposed heightened reporting requirements.

The SWRCB's failure to even acknowledge the significant additional costs associated with the customer outreach, advertising, monitoring of customers' use and enforcement that will be necessary to achieve a 36% reduction in water use is a glaring omission in the SWRCB's analysis. As an example, SJWD estimates that it will need to expend a minimum of \$275,000 in additional costs to implement these activities in its relatively small retail service area. This

estimate assumes that SJWD will be able to achieve the required 36% savings through customer messaging and education alone. When similar amounts are multiplied across the 441 agencies that would be subject to the proposed regulations, it is clear that the SWRCB has underestimated the costs of implementing those regulations by at least tens of millions, if not hundreds of millions, of dollars.

The SWRCB's April 29, 2015 documents then compound this problem by overstating water suppliers' ability to recoup the additional costs that the proposed regulations would compel them to incur. Those documents appear to assume that water suppliers simply would be able to raise their rates to recoup whatever costs the proposed regulations would force them to incur. The SWRCB cannot wish away Proposition 218, which is a constitutional provision enacted by the People. The SWRCB's statement ignores the reality that public agencies must perform rate studies, issue notice that provide at least 45 days for customers to object to a proposed increase, and that a hearing must be held before a proposed rate increase can be developed. All of this requires the expenditure of additional resources. And there is no guarantee that an increase can be imposed because a majority of ratepayers can protest and thereby reject an increase.

In addition, the Fourth District Court of Appeal's April 20, 2015 decision in *Capistrano Taxpayers Association v. City of San Juan Capistrano* indicates that Proposition 218 does not allow public water suppliers to simply impose tiered water rates at a level that will drive their customers to achieve higher levels of conservation. Rather, Proposition 218 requires that tiered rates be tied to the costs of service. In light of the *San Juan Capistrano* decision, it is at best uncertain whether public water suppliers are simply free to pass on to their customers the costs of complying with state conservation mandates that not only are not tied to the costs of any particular water supply, but in fact mandate that those suppliers not use supplies that are available to them. In SJWD case, for example, the costs of its sources of water supply are relatively similar making it difficult to create legally valid rate tiers with sufficient cost differentials to encourage conservation.

The SWRCB's analysis of the costs associated with the proposed regulations contains numerous flaws and ignores crucial information of a constitutional dimension. As a result, it would be arbitrary and capricious for the SWRCB to adopt the proposed regulations based on that financial analysis.

2. *The SWRCB's Rationale for Its Proposed Conservation Tiers Is Arbitrary and Capricious Because It Relies on Warm-Weather Water Use to Justify Year-Round Regulations*

Page 2 of the SWRCB's April 28, 2015 fact sheet noticing its proposed emergency regulations ("Fact Sheet") states the following rationale for putting inland water suppliers into the higher conservation tiers:

Everyone must do more, but the greatest opportunities to meet the statewide 25% conservation standard exist in those areas with higher water use. Often, but not always, these water suppliers are located in areas where the majority of the water use is directed at outdoor irrigation due to lot size, climate and other factors. As temperatures are forecast to climb to above average for the summer months, it

will become even more important to take aggressive actions to reduce outdoor water use. The emergency regulation establishes tiers of required water reductions that emphasize the opportunities to reduce outdoor water use.

Despite focusing solely on outdoor water use as the primary basis for the proposed regulations' tiers that would impose much more significant burdens on inland water suppliers, the regulations themselves would apply for the entire 270-day duration of the regulations, which would extend until February 2016. In other words, the SWRCB has stated no justification at all for imposing much higher conservation burdens on inland water agencies during at least the three months from November 2015 to February 2016 when outdoor water use generally is low and an Agency like SJWD would be required to make its customers reduce their indoor water use by as much as 36%.

In addition, on page 5 of the Fact Sheet, the SWRCB states that, "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." Yet, the SWRCB has made no attempt to determine what amount of water might be required in each climate region to meet this tree health requirement. Further, there is nothing in the record to indicate why the SWRCB has preferred only trees and not all permanent plantings, which also require some watering for long-term sustainability. Finally, the SWRCB ignores water uses such as food gardens that might have economic and sustainability impacts.

For the above reasons, it would be arbitrary and capricious for the SWRCB to adopt regulations because the stated rationale for the proposed water use reductions does not even apply through the entire period that the regulations would apply, is contradictory, and lacks any individualized analysis of the impacts of the proposed regulations on the regulated water suppliers and communities that they serve. The only basis for finding any waste or unreasonable use stated in the SWRCB's record appears to be the Fact Sheet's statement that it is possible to get more use reductions through reductions in outdoor use in hotter areas. But the constitutional rule set forth in Article X, section 2 of the California Constitution does not allow the state to discriminate in such a manner, particularly on so slim and contradictory a record.

3. *The SWRCB's Statements that the Proposed Regulations Would Safeguard and Maintain Urban Water Supplies Do Not Reflect Actual Water Management Practices*

The SWRCB's Notice of Proposed Rulemaking and Emergency Regulations Digest state that the proposed regulations would "safeguard" and "maintain" urban water supplies. These statements simply do not reflect the reality of water management. While long-term conservation programs can effectively "safeguard" a water supplier's supplies by reducing overall demand so that those supplies can stretch farther, short-term conservation programs such as those that the proposed regulations would require water suppliers to implement generally do not save water supplies for later use. Water suppliers that depend on direct diversions of water obviously cannot recapture the water to which they have rights, but that would flow past them unused while the regulations are in effect. Water suppliers that depend on reservoir storage generally will not be able to hold the water in that storage while the regulations apply because most reservoirs are controlled by the Central Valley Project ("CVP") and the State Water Project, which will

Ms. Felicia Marcus

May 4, 2015

Page 4

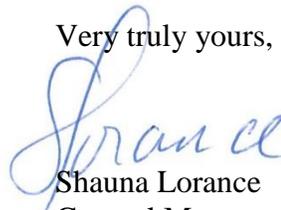
appropriate the water available for their own purposes when water suppliers are not able to take deliveries of it because of forced conservation. For example, the federal Bureau of Reclamation has not adopted rescheduling guidelines for the use of water stored in reservoirs upstream of the Delta because such rescheduling would constrain the CVP's operational flexibility. Only those rare water suppliers that have full control over their reservoir storage will be able to retain the conserved water.

This impact is a particular concern for SJWD and similar water suppliers that have secure contracts with the Bureau of Reclamation or the State. In spite of pre-existing legal arrangements that have been in place for decades, the proposed regulations demonstrate that the SWRCB is willing to prohibit SJWD from using its secure water supplies during this drought in spite of SJWD ratepayers' investment of tens or hundreds of millions of dollars over decades to guard against such risks. For an agency like SJWD that holds some of the oldest water rights in California, the SWRCB's application of the proposed regulations constitutes at least an uncompensated temporary taking of those rights because SJWD may not be able to use some portion of the surface water that would otherwise be available under its 1850s-era rights while the regulations apply and would transfer that water to the CVP and downstream water users for free.

Conclusion

In addition to the above comments on the final rule-making package, SJWD incorporates its prior comments concerning the SWRCB's previous drafts of its emergency urban water conservation regulations. SJWD believes that the revised draft regulations continue to have significant problems, as does the SWRCB's new analysis of those regulations' financial impacts.

Very truly yours,



Shauna Lorance
General Manager

cc (via e-mail): Board of Directors
Frances Spivy-Weber
Dorene D'Adamo
Tam Dudoc
Steven Moore
Thomas Howard
John Woodling