



May 4, 2015

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24th Floor Sacramento, CA 95814

**RE: Fair Oaks Water District Comments**

Submitted via email to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Dear Ms. Townsend,

Thank you for the opportunity to submit further comments to the SWRCB as part of the Drought Emergency Regulatory Framework issued by the SWRCB. It is unclear from the SWRCB's notice whether the District's previous comments are incorporated into the public record for the proposed hearing on May 5 and 6, so the District has attached its previous comment letters to this letter to ensure that all documents are properly considered by the SWRCB.

In summary, the District reasserts its positions that the SWRCB's regulations are contrary to the Reasonable Use Doctrine and California's water rights priority system as explained by the California Supreme Court in *Barstow v. Mojave*.<sup>1</sup> The SWRCB's regulations are also contrary to the California's Regional Self Reliance mandates as adopted in 2009, codified in Water Code Section 85021, as well as Water Code Section 1011 that preserves conserved water for those who implement water conservation activities. And last, the SWRCB's regulations are unreasonable and arbitrary as they are applied to calculating the gallons per capita per day (GPCD) baseline conditions, assigning conservation tiers to the water purveyors, and determining the underlying methodology that is applied by the SWRCB to calculate GPCD conservation savings. All of these problems result in a set of unworkable regulatory actions that cause material harm to water purveyors that have planned and prepared for California droughts.

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<sup>1</sup> *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4<sup>th</sup> 1224.

As described in the attached documents, the District respectfully requests that the SWRCB issue regulations that better align with California's 165-year history of water rights laws and recognize the District's prudent planning to manage its water supplies. As shown by the Fair Oaks Water District's voluntary reduction of over 20% in 2014, the District is more than willing to work to conserve water for all of California, but again request that consideration be given to all planning, work and investment we have completed prior.

Sincerely,



Tom R. Gray  
General Manager  
Fair Oaks Water District

tgray@fowd.com

c: State Water Resources Control Board Members  
Board of Directors, Fair Oaks Water District  
John Woodling, Regional Water Authority

Attachments: FOWD letter dated April 22, 2015  
FOWD letter dated April 13, 2015



FAIR OAKS  
WATER DISTRICT

April 22, 2015

Ms. Jessica Bean  
State Water Resources Control Board  
Jessica.bean@waterboards.ca.gov

Dear Ms. Bean,

The Fair Oaks Water District disagrees with the SWRCB's proposed draft emergency regulations implementing the Governor's April 1, 2015 Executive Order (Proposed Regulations) issued on Saturday April 18, 2015. The Proposed Regulations violate state law as well as the State's regional self-reliance mandate, punishing those entities who rely upon local water sources by investing "*in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.*"<sup>1</sup>

**"No Good Deed Goes Unpunished"**<sup>2</sup>

The District has invested millions of ratepayer dollars to carefully plan and implement water management measures that have positioned the District to continue reasonable water service to its ratepayers during periods of drought or other water supply disruptions. In other words, the District has planned for its water supply reliability for 2015 and beyond through sound management and sound investments so that its ratepayers' needs are met.

The District also continues to help Californian's during the prolonged drought by voluntarily reducing its water use to assist those in need – achieving an average monthly savings since July 2014 of 20%. Yet the reduction mandates included in the Proposed Regulations disproportionately punish the District for its regional self-

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<sup>1</sup> Water Code Section 85021 (developed as part of the Sacramento-San Joaquin Delta Reform Act of 2009).

<sup>2</sup> Clare Boothe Luce (1956).

reliant planning by illegally taking the District's water without compensation for use by those who have not planned for drought in accordance with California law.<sup>3</sup>

The District's primary investment for drought protection has been its conjunctive use facilities and prudent management of regional groundwater with its regional partners. Our regional groundwater conditions have been managed expressly for drought mitigation – after years of extensive regional in-lieu and direct recharge. Yet these groundwater investments must now remain idle as SWRCB forces the District's ratepayers – that made the drought-savvy investments – to take extraordinary conservation measures to benefit other areas in the state. Why is the SWRCB forcing the District's ratepayers to forego our own locally-available resources to meet the needs of those that have failed to plan at significant cost and expense to the District?

### **Who Benefits from the 1.3 MAF Savings?**

The SWRCB states that the tiered reductions will save approximately 1.3 million acre-feet (MAF) over the next nine months, equating to a little more than 1.7 MAF annually. With one acre-foot able to meet the needs of between 1 and 5 homes for a year<sup>4</sup>, and using 3-people per home as an average, 1.7 MAF would be enough to serve 5 million to 25 million people. Who are the intended beneficiaries of the District's conserved water? The District does not need SWRCB protection or planning because it has responsibly managed its water assets for 2015 and beyond. But if the SWRCB is protecting others that have not planned for their future then the uncompensated reallocation of water resources based upon vague notions of waste and unreasonable use is simply illegal. All water conserved by the District belongs exclusively to the District under Water Code Section 1011 and cannot be reallocated to others without the consent of the District.

We fully understand that some regions of the state face significant groundwater declines and other regions are solely dependent on surface water resources that are significantly depleted. But the District has planned for these circumstances in its local region based upon the availability of local resources – the District is regionally self-reliant. The perceived “equity” in taking water from those who have planned for drought conditions to help those that have not is not only illegal under California Water Law, it is the most inequitable solution available.<sup>5</sup>

### **The Regulations are Unworkable**

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<sup>3</sup> The California Supreme Court has been very clear on the doctrine of prior appropriation as the primary component in California Water Rights law. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4<sup>th</sup> 1224.

<sup>4</sup> The range is dependent on the factors noted by the SWRCB on their urban water use reporting website:  
[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/conservation\\_reporting\\_info.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/conservation_reporting_info.shtml)

<sup>5</sup> *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4<sup>th</sup> 1224

The Emergency Regulations state: "Each urban supplier...shall reduce its total water usage by [some identified percentage] compared to the amount used in the same month in 2013." Our District's reduction target is 36%. Though we understand the attraction of mathematical simplicity used by the SWRCB to develop these targets, the methodology ignores the complexity of water management and use in this region and is contrary to SWRCB's own policy for addressing conservation savings.<sup>6</sup>

The current Emergency Regulations state: "*These three months reflect the amount of water used for summer outdoor irrigation, which provides the greatest opportunity for conservation savings.*"<sup>7</sup> From this premise, a 36% reduction is imposed on our ratepayers for all months – whether or not outdoor irrigation is actually occurring. The solution posed is completely unworkable and grossly inequitable during the winter months for District ratepayers.

SWRCB's proposed regulations mandate that the District's ratepayers reduce their *indoor use* by over 30% during the winter months – a rate far more punitive than the rates imposed on other purveyors who live in cooler climates and more dense communities (where those locations 2014 summer baseline R-GPCD value reflects indoor use). Our ratepayers cannot be expected to reduce indoor use by over 30% when others with the same indoor use have significantly lower mandates, most of which rely almost exclusively on imported water supplies.

Solution: The reduction targets must be adjusted so that indoor conservation objectives are more equitable and achievable. At a minimum, the Proposed Regulations should be modified to reflect a second period of average R-GPCD when landscape irrigation is minimal or even non-existent. We suggest this period would be the average of use during November 2014 through February 2015.

As an example, the District's July-September 2014 R-GPCD averaged 274. In contrast, the November-February average R-GPCD was 91.

Under this framework, a November-February required reduction target would be 16%, as represented by the proposed Section 865(c)(5). This target has a much greater equity and opportunity for success than applying the summertime target of 36% to our significantly lower winter-month R-GPCD.

### **Summary**

The SWRCB's self-declared "equitable, achievable, and enforceable" emergency regulations are truly just the opposite – the proposed regulations reward those who

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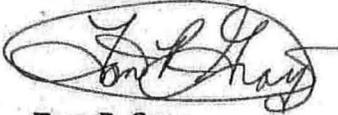
<sup>6</sup> The SWRCB lists several factors as part of a "Important Note" that clearly states: "*It is not appropriate to use Residential Gallons Per Capita Day (R-GPCD) water use data for comparisons across water suppliers, unless all relevant factors are accounted for.*" ([http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/conservation\\_reporting\\_info.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/conservation_reporting_info.shtml))

<sup>7</sup> April 18, 2015 Fact Sheet, p. 2.

failed to plan for drought by punishing those that did plan. SWRCB is punishing the District's ratepayers for their foresight and drought-planning investments and actions. Moreover, the proposed regulations ignore accepted principles of California Water Law and ignore the state's policy of "regional self-reliance" by placing the drought mitigation burden on the District - a District that has prepared for these exact drought circumstances with local resources and local planning.

The mandated target of 36% for the responsible Fair Oaks Water District ratepayers is illegal and inequitable.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tom R. Gray", enclosed within an oval-shaped scribble.

Tom R. Gray  
General Manager  
Fair Oaks Water District

tgray@fowd.com

c: State Water Resources Control Board Members  
FOWD Board of Directors  
John Woodling, Regional Water Authority



April 13, 2015

Ms. Jessica Bean  
State Water Resources Control Board  
Jessica.bean@waterboards.ca.gov

Dear Ms. Bean,

Fair Oaks Water District appreciates the opportunity to comment on the SWRCB's Proposed Regulatory Framework for Mandatory Conservation Measures (Proposed Framework). The purposes of this letter are to identify the key facts in the Proposed Framework that affect the District, address the problems proposed by the identified facts, and propose solutions that can meet Governor Brown's objectives in the April 1, 2015 Executive Order.

### **The Big Picture**

California is experiencing an epic drought that puts communities, farms and fish in real danger. In addition, it is becoming more apparent that droughts, like this one, are the new norm. Given this fact, the District, through its own policies and foresight, has invested and plans to continue to invest millions of dollars for infrastructure upgrades to improve water reliability and mitigate drought calamities. The District recognizes the impending peril of California's water situation and will continue to do its part to assist those in need just as it may find itself asking for assistance from other Californians in another perilous time for another reason.

The District has fully embraced the State's statutory mandate for "Regional Self-Reliance" and responsibly planned for and paid for its citizens' drought mitigation and long-term conservation programs. But now the District is being told to *do more* and *pay more* to benefit those Californians that reside outside of its region who have not embraced Regional Self-Reliance and have failed to plan. And the *do more* and *pay more* order looks to be in place for the foreseeable future creating a fundamental injustice to the District's ratepayers.

***Do More.***

Fair Oaks Water District is being asked to disproportionately carry California's drought burden. The District is being asked to reduce its residential per capita water use by 35% and its commercial-institutional usage by a similar percentage so that California can meet a 25% statewide water conservation objective. This mandate for the District to "do more" is fundamentally wrong, especially when taking into account the District's prior actions and investment.

Over the past decade the District planned, developed and paid for alternative water supply for use in time of water shortage or drought; while meeting state targets for water conservation. The District developed this water supply in harmony with the Sacramento region's culture and environment and in accordance with planning documents submitted to the State. The District has managed its surface and groundwater resources to endure critically dry years. In other words, the District has planned for its water future using local supplies and engineering - all with an understanding that droughts in California are inevitable and that reliable water supplies form the basis of a sound economy. And, despite this current epic drought crisis, the District's good water planning would allow it to serve its residents adequate water supplies to meet their fundamental needs and beyond. The proposed Framework could actually force the District to forego utilization of the reliability and drought mitigation assets in which it has invested.

But the State of California seeks to levy punishment on the District for good planning (calling it *waste*) by telling the District's 40,000 residents that they must disproportionately carry the water supply burden for all of California by reducing their usage by 35%. And, in particular, the District's residents must carry that burden on behalf of those areas in the State that rely on imported sources of water that greatly exceed their naturally-occurring local resource limits. The District's residents should not be forced to perpetually "do more" and disproportionately bear the burden of inadequate water supply planning in other areas of California.

***Pay More.***

The District is also being asked to "pay more" and disproportionately bear California's drought costs despite our investments to-date in reliable water supplies and long-term conjunctive use water supply facilities planning. The State of California is telling the District's residents that, although our ratepayers have paid to acquire the District's reliable water assets that protect our service area from drought, the District should share those water assets with other Californians at our ratepayer's sole expense. In other words, the District should *give its water supply away for free* even though the District's ratepayers made all of the investments to secure the reliable supplies and pay for the delivery infrastructure.

The State is also mandating that, even though the District's financial coffers rely upon the bimonthly fees paid by the District's residents for their metered water consumption, the District should sacrifice those fees – and solely bear the economic burden of the loss of those fees – so that areas without water can be served. In short, the State is telling the District's ratepayers to assume the economic burden for the inadequate water supply planning in other areas in the State that are beyond the District's control!

In addition, by forcing reductions in commercial demand, the State is directly impacting the District's business economy. Indeed, under the SWRCB Proposed Framework, the District's excellent long-term water planning and sound investments in supplies, conservation, and infrastructure do not satisfy the State's "equitable conservation standards." The Proposed Framework mandates that the District disproportionately carry the financial burden of this drought in order to benefit all of California.

The District's ratepayers should not be forced to perpetually "do more" and "pay more" to rectify the inadequate water supply planning of other areas in California. The disproportional assignment of drought-related burdens and costs to the District's ratepayers who have planned well for their futures is, in its purest form, unjust and inequitable.

## **The Details**

The District has spent a considerable amount of time assessing the details provided in the Proposed Framework. The District's comments are divided into the following categories: (1) Tiered Residential Per-Capital Use Targets; (2) Commercial, Industrial and Institutional water use reduction; (3) The Newly Constructed Home and Building Irrigation Mandate; (4) Compliance Assessment; (5) Enforcement; and (6) California Water Law.

### ***1. The Tiered Residential Per-Capita Use Targets Should be Changed to Reflect Local Factors that Affect R-GPCD, Historical Conservation Performance, and the Statutory Mandate of Regional Self Reliance.***

**Fact:** The SWRCB is targeting a reduction in statewide urban potable water demand of about 1.3 million acre-feet. The Proposed Framework allocates this total savings based upon calculated September 2014 R-GPCD, resulting in GPCD reduction targets between 10% and 35% statewide.

**Problems:** The proposed tiered R-GPCD is fundamentally flawed because it fails to reflect local factors that affect R-GPCD. The SWRCB, on the SWRCB website, has expressly identified the inappropriateness of using this data to calculate and compare water conservation effectiveness:

It is not appropriate to use Residential Gallons Per Capita Day (R-GPCD) water use data for comparisons across water suppliers, unless all relevant factors are accounted for. Factors that can affect per capita water include: Rainfall, temperature and evaporation rates... population growth... population density... socio-economic measures such as lot size and income... and water prices.<sup>1</sup>

It is confounding why the SWRCB would use the methodology it expressly deems as inappropriate to address the mandates of its water conservation decree. Treating dissimilar water supply conditions and circumstances as "the same" everywhere in the State is a recipe for failing policy and arbitrary action.

*Solution:* SWRCB should develop a methodology that takes its own identified factors into account when assessing R-GPCD. Climate, meteorology, hydrology, population statistics, environmental conditions and obligations, distance from source water, conveyance and transportation losses, regional self-reliance on local water supplies, return flows (via creeks, streams, permitted wastewater discharges, etc.), and past conservation performance are just some of the items that need to be considered in making the R-GPCD calculation a useful planning and conservation tool. These factors need not be exact, but could be applied to refine tiered per capita use targets to better reflect the conditions that exist in various regions in this State.

## ***2. The Commercial, Industrial and Institutional Water Use Reductions should be Incorporated into the Overall Per Capita Water Use Target for the Water Purveyors.***

*Fact:* The Governor's Order directs the SWRCB to address Commercial, Industrial and Institutional (CII) water conservation in similar percentages to those identified for Residential uses. The Governor's Order states that the SWRCB "impose restrictions to require that [CII] properties... implement water efficiency measures to reduce potable water usage in an amount consistent with the reduction targets mandated in Directive 2."

*Problems:* As described above, CII uses have significant bearing on the economic viability of the District. Punishing a District that has planned for and secured water supplies to keep their CII uses whole in times of shortage should be abandoned. The Governor's Order and subsequent press releases indicate his emphasis on the economic importance of California's agricultural economy to the local residents and the State of California as a whole. Similarly, the District's commercial economy is just as important to the District's economic well-being and requires the same protections that the Governor has decreed for agriculture.

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<sup>1</sup>[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/drought/conservation\\_reporting\\_info.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/conservation_reporting_info.shtml).

*Solution:* Let the District determine how it will meet its required GPCD reduction rather than SWRCB mandating particular requirements for particular classes of water users. The SWRCB should be more concerned about achieving the 1.3 million acre-foot reduction target, not *how* a water purveyor goes about doing it. The SWRCB should allow the District to determine what is in the District's best interest to meet conservation targets and how the District may be able to accommodate those interests with the resources that are at its disposal. Simply mandating that CII users must conserve some portion of water precludes creative solutions that might allow for economic productivity to continue while resource conservation goals are achieved.

***3. The Mandate for New Home Landscape Irrigation should be Clarified as Prospective Rather Than Retrospective so that Existing and Approved Land Use Plans can Progress.***

*Fact:* The Governor's Order directs the SWRCB to "prohibit irrigation with potable water outside of newly constructed homes and buildings that is not delivered by drip or microspray systems."

*Problems:* Incorporating resource conservation ethics into the landscape plans of new homes and new developments is an important long-term conservation protocol for the State of California. It is not, however, a logical drought mitigation measure and should be addressed prospectively rather than retrospectively. Requiring approved land use plans and home building plans to be completely reconfigured based on the Governor's Order is impractical and unworkable for the District.

*Solution:* The existing Model Water Efficient Landscape Ordinance (MWELO) obligations dictate the irrigation parameters for newly constructed homes. Retrofitting "newly constructed homes and buildings" would require a significant amount of resources that would result in minimal water conservation savings in the current drought cycle. Time is better spent adjusting the MWELO for future land use plans that are undergoing the land use and water supply planning processes before homes and buildings are approved or constructed.

***4. The Compliance Assessment Should Reflect Actual Compliance Achieved through Historical Actions and Progress Rather Than an Arbitrary Baseline Assessment.***

*Fact:* The Proposed Framework defines the reporting months for which comparisons between 2013 R-GPCD and 2015-16 projected R-GPCD will be made to assess compliance. The proposal states that monthly values for June 2015 through February 2016 will be compared "to the same period(s) in 2013."

*Problem:* The period identified for comparison would encroach upon a period of extreme drought peril in California. California is in its fourth consecutive year of drought. Yet the SWRCB wishes to compare the District's tiered R-GPCD and CII

conservation mandate to historical periods where the District was already experiencing and mitigating drought impacts. Moreover, the Governor declared a state of Emergency on January 17, 2014 and the SWRCB is now considering the extremely dry conditions that developed in late 2013 and early 2014 as the basis for the District's compliance assessment. This timeline adversely affects those agencies that responded to the drought in its earliest stages.

*Solution:* We suggest that the comparison period be established as March 2012 through February 2013. Such an assessment reflects conditions that existed in the drought's infancy where water users were beginning to understand the implications of reduced precipitation and runoff. Furthermore, the comparison period should incorporate meteorological and climatological variances. For instance, along the lower American River, November and December 2012 had significant rainfall events, providing over 12 inches of rain which significantly affects irrigation and water demands. Comparing similar meteorological situations is critical to assessing compliance in meeting R-GPCD and CII conservation criteria. Absent these considerations, comparisons may inadvertently indicate a purveyor shifting from "in compliance" to "out of compliance" and then back to "in compliance" as weather factors affect the baseline and comparison months.

***5. The Enforcement Actions Should Clarify What Enforcement Actions Equate with Specific Regulatory Violations and What Procedures will be used in Implementing Enforcement Actions.***

*Fact:* The Proposed Framework identifies "informal" and "formal" enforcement actions that might be levied upon urban water purveyors that violate SWRCB mandated actions. The enforcement actions threaten fines of "up to \$10,000 per day for each day of non-compliance." These extraordinary measures and heavy fines may be justified by the perilous water conditions in the State of California, but clarity in how these enforcement actions are triggered and implemented is extremely important to the District.

*Problems:* Enforcement of regulatory actions is a critical component of effective governance. But enforcement of regulatory actions is unjust where the regulations are unclear and the types of enforcement actions levied for regulatory infractions is not clearly articulated and thus potentially inconsistently applied. The Proposed Framework simply lists informal and formal enforcement but does not link those enforcement tools to the types of regulatory violations that may be in effect. For instance, the District simply cannot be responsible for leaky pipes upon a resident's property with a potential fine to the District amounting to \$10,000 per day. The Proposed Framework fails to describe how the regulatory enforcement will apply to the obligations of the District and therefore the District is unable to provide meaningful comment on the listed enforcement actions.

*Solutions:* The Proposed Framework should clarify which enforcement actions relate to specific regulations and violations. Simply stating that it is possible for the SWRCB to bring formal enforcement actions against the District of up to \$10,000 per day for "compliance" that the District may or may not be able to control is too vague to warrant meaningful comment. Clarification of such extraordinary enforcement penalties is needed.

**6. *The Proposed Framework Should Clarify How It Implicates the Fundamental Components of California Water Rights Law***

*Fact:* California Water Rights law is based upon 150 years of well-established principles for allocating water supplies in times of shortage. The water rights priority doctrine was upheld in the most recent California Supreme Court case dealing with water in California, *Barstow v. Mojave*, where the court reiterated the water rights priority system as the "central principle in California water law." The court contemplated and addressed the California Constitutional prohibition on waste and unreasonable use but returned to the doctrine of priority in rendering its final decision.

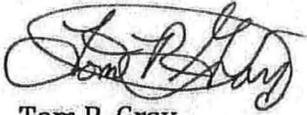
*Problems:* The Proposed Framework seeks to "equitably" reapportion water based upon notions of fairness that are counter to the water rights priority system and counter to the *Barstow v. Mojave* decision. Changing the water rights priority system based upon malleable concepts of equity through water conservation mandates, renders the priority doctrine meaningless and will create vast uncertainty in water and land use planning throughout California.

*Solution:* Reassert the legal principles in California's water rights priority system so that there is no misunderstanding among water purveyors and users in the State that failure to adequately plan for drought with local supplies and local investments may lead to cessation in water supply availability and an undue burden on local ratepayers and customers.

**Summary**

Once again, we appreciate the opportunity to comment on the SWRCB's Proposed Framework. The District is hopeful that SWRCB staff, management and Board Members will deeply reflect upon the underlying inequities of the Proposed Framework that affect the District as well as the regulatory suggestions provided in this letter. If you have any questions about the issues described in this letter, please contact me directly through the communication channel provided below; I will immediately respond.

Sincerely,

A handwritten signature in black ink, appearing to read "Tom R. Gray", enclosed within a hand-drawn oval.

Tom R. Gray  
General Manager  
Fair Oaks Water District

tgray@fowd.com

c: State Water Resources Control Board Members  
Board of Directors, Fair Oaks Water District  
John Woodling, Regional Water Authority