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February 14, 2018



VIA ELECTRONIC AND UNITED STATES MAIL

Chair Felicia Marcus and Board Members  
State Water Resources Control Board  
1001 I Street, 24th Floor  
Sacramento, CA 95814

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

**RE: Comment Letter – Changes to Proposed Regulations Prohibiting Wasteful Water Use Practices**

Dear Ms. Townsend,

The Imperial Irrigation District has reviewed the above-referenced proposed modifications to the regulations prohibiting wasteful water use practices. Because these modifications propose to define, regulate and prohibit “irrigation” practices that the State Water Resources Control Board considers wasteful, it is appropriate and necessary for IID to provide commentary.

IID has conserved over four million acre-feet of Colorado River water for use in the urban areas along southern California’s coastal region and for other purposes. In so doing, IID has found the following: (1) incentive-based conservation programs are far superior to command and control across-the-board regulations, (2) the potential for actual conservation is variable among uses and communities, even with the best will in the world, (3) local water users themselves are the best judges of optimum conservation potential and (4) the quantity of conservation varies with water supply and water quality and, most significantly, with the economic value generated through irrigation.

Monolithic across-the-board regulations that treat all water uses as though they are interchangeable will always be over-inclusive, sweeping within the reach of these regulations users from whom little is to be gained by conservation, and whom will bear disproportionate marginal costs. The proposed regulations will also be under-inclusive in that many whose actions could produce great savings may be minimally affected, though they could engage in greater savings at less cost than others.

Because of the variability by region and among communities within each region, broad uniform regulations also violate the principle of local control. For example, some communities value recreational uses, while others value wetlands for birds and riparian areas for fishing. Others value the beauty of vegetation that may have great economic and cultural benefits.

Given this diversity, state-mandated categorical prohibitions making certain uses illegal will necessarily preempt the local choices valued by California as a state. Principles of participatory democracy suggest that these kinds of choices should rightfully be exercised by those officials elected to carry out the wishes of their constituents. It is one thing to require that water use quantities be reduced across-the-board; it is quite another for a state agency to displace local economic and environmental value judgments with those by a far-off state agency.

To be clear, IID, as is demonstrated by its track record on conservation, is supportive of the SWRCB's efforts to ensure conservation in water use. Indeed, avoiding waste is mandated by the California Constitution, which requires that exercise of a water right be both reasonable and beneficial. But, what is reasonable and beneficial is only illuminated by context and is not subject to a universal template that can be overlain on a host of diverse uses. Because whether a use is reasonable and beneficial ("not waste") can only be determined on a case-by-case basis, the making of that determination is as an adjudicatory function. California law is clear on this point; the California Supreme Court, in its decision in *Environmental Defense Fund v. Superior Court* noted that what is wasteful depends on the individual circumstances of the matter, even though the question of reasonable use is a matter of statewide concern.

IID has been before the SWRCB in adjudicatory proceedings and has witnessed firsthand the manner in which the provision of due process notice, full opportunity to present testimony, expert reports and cross examination, not only by opposing parties, but also by the very experienced legal staff, both hones and refines the determination of whether a practice is wasteful. Across-the-board regulations do not provide that clarity of focus; indeed, regulations like those being considered by the SWRCB do not even pretend to address the variability across California.

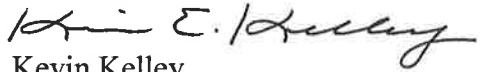
The SWRCB finds itself in a complex circumstance because it has the duty to exercise adjudicatory functions in all cases to prohibit waste. Yet, in exercising either its adjudicatory or regulatory function, the SWRCB must recognize that water rights are property rights. The United States Supreme Court has repeatedly found that requiring water users to cease use of their water entitlement can constitute an unconstitutional taking. See *International Paper Co. v. United States*, 282 U.S. 399 (1931); *United States v. Gerlach Live Stock Co.*, 399 U.S. 725 (1963); *Dugan v. Rank*, 373 U.S. 609 (1963); *Casitas Municipal Water Dist. v. United States*, 543 F. 3d. 1276 (Fed. Cir. 2008).

In California, water law is constitutional law. As Alexander Hamilton correctly observed in his essay upon the functions of the separate branches of our democratic system, "the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution." THE FEDERALIST NO. 78 (Alexander Hamilton). IID suggests that this observation is important. Given the vital need to protect the rights of California citizens to use water enshrined in the Federal and State Constitutions, IID suggests that the SWRCB cease

moving forward with these regulations. Instead, if and when a case of apparently wasteful use presents itself, the SWRCB can and should exercise its adjudicatory authority.

Thank you for your consideration of these comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kevin E. Kelley". The signature is fluid and cursive, with the first name "Kevin" and last name "Kelley" clearly distinguishable.

Kevin Kelley  
General Manager

cc: IID Board of Directors