

**VIA ELECTRONIC MAIL**

April 22, 2015

Jessica Bean  
State Water Resources Control Board  
P.O. Box 100  
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commentletters@waterboards.ca.gov

Re: Draft Emergency Regulations

Dear Ms. Bean:

California Water Association (“CWA”) submits the following comments on the Draft Emergency Regulations issued by the State Water Resources Control Board (“State Water Board”) on Saturday, April 18, 2015 (the “Draft Regulations”).

CWA is a statewide association representing the interests of investor-owned water utilities (“IOUs”) that are subject to the jurisdiction of the California Public Utilities Commission (“CPUC”). On April 13, 2015, CWA submitted comments on the State Water Board’s Proposed Regulatory Framework, the preliminary document upon which these Draft Regulations are based. CWA appreciates the significant amount of work that the State Water Board has accomplished – in very short order – to consider the comments submitted by CWA other affected water suppliers and interested parties during the first informal comment period, and to refine the substance of the Draft Regulations in light of comments received.

CWA takes this further opportunity to comment on the Draft Regulations in order to highlight its support for certain of the latest round of refinements and modifications, and also to reiterate certain of its concerns with how the Draft Regulations may function once adopted to implement the Governor’s April 1, 2015 Executive Order.

**Increasing the Number of Water Reduction Tiers**

In its April 13, 2015 Comments, CWA expressed concern that a water system’s service area could be bumped into a significantly more challenging conservation tier than its R-GPCD would justify because of the rapid escalation from tier to tier (e.g. from 10% to 20%) set forth in the Proposed Regulatory Framework. The Draft Regulations do not abandon the tiers framework in favor of a conservation curve, whereby the water supplier service area’s R-GPCD would equate to a unique conservation standard. CWA agrees that the latter approach is not necessary at this juncture.

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Further, CWA agrees that nearly doubling the number of water reduction tiers reduces the potential for significant disparities among water supplier service areas with similar levels of water consumption. Draft Regulations Fact Sheet, p. 2. CWA also agrees that adding tiers creates a conservation standard schedule that better accounts for and acknowledges the past conservation efforts of those California communities that have heretofore worked hard to reduce water usage. *Id.*

However, despite the significant improvements to the conservation tier structure, CWA remains concerned that certain communities may be unfairly burdened. Simply increasing the number of tiers without looking behind the numbers does not address the impact on certain Central Valley customers that are in the 32% and 36% tiers. As CWA has previously observed, outdoor water usage in certain service areas is greatly impacted by climate. As a result, Central Valley customers may be unduly penalized for living in more affordable, but drier and hotter regions of the state, by being asked to curtail even already efficient water use.

While CWA acknowledges that time is of the essence to develop and implement these emergency regulations in this unprecedented drought, CWA encourages the State Water Board to consider the effect of climate conditions on water use efficiency in refining the Draft Regulations before they are released for further public comment on April 28, 2015. For example, the Draft Regulations could be modified to add a third scenario under which a water supplier could request to be placed into a lower conservation tier – if the requesting water supplier could show that hydrogeologic conditions in its service area justify a more appropriate conservation goal. Here is suggested language for the Draft Regulations:

Insert the following new Sec. 865 (c)(3) (and renumber accordingly):

“An urban water supplier may, notwithstanding its average July-September 2014 R-GPCD, submit for Executive Director approval a request to reduce its percentage conservation standard for each month as compared to the amount used in the same month in 2013. Any such request shall be accompanied by information showing that the supplier’s hydrogeologic conditions justify the reduction (*e.g.* local climatic conditions or a comparison of the supplier’s conservation standard against a 25% water use reduction from the 20 x 2020 conservation target for the requesting supplier’s hydrogeologic region).”

### **The Basis for Assigning Conservation Standards – R-GPCD**

The Draft Regulations assign conservation standards to water supplier service areas based on three months of summer residential gallons per capita per day data (July – September 2014), rather than by using a single month (September 2014) as the measure. CWA’s April 13, 2015 Comments on the Proposed Regulatory Framework requested this change be made in

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order to better normalize for irregularities present in a single month's data. CWA appreciates that the Draft Regulations incorporate this recommendation.

### **Regulatory Enforcement Orientation**

CWA acknowledges that the Governor's Executive Order places a challenging mandate on the State Water Board to achieve a mandatory aggregate statewide 25% reduction in potable urban water use through February 2016, and that all Californians – from water regulators to water suppliers to water end users – will have to step up efforts to promote conservation in order to accomplish such a substantial use reduction. But as CWA observed in its April 13, 2015 Comments on the Proposed Regulatory Framework, water suppliers can encourage and educate, and they can institute stronger price signals and steeper tiers to induce conservation, but ultimately they cannot directly control their customers' usage behavior.

The Proposed Regulatory Framework's heavy emphasis on enforcement actions against water suppliers carries through to the Draft Regulations, despite water suppliers' inability to guarantee a successful conservation campaign through their diligent efforts. Accordingly, CWA reiterates its recommendation that the Draft Regulations be revised to clarify that a water supplier's failure to convince its customers to meet the service area's conservation target, despite having implemented comprehensive drought response measures, does not necessarily amount to a violation of State Water Board regulations. Specifically, CWA suggests the following addition to the Draft Regulations:

Insert the following after the last period of Sec. 866(a)(1):

“A water supplier's failure to meet its conservation standard required by section 865 shall not be deemed a per se violation of this Article 22.5.”

### **Waste and Unreasonable Use of Water**

The Draft Regulations would impose various mandates and empower the Board to take various actions under its authority to “prevent the waste and unreasonable use of water.” The use of this terminology in certain of the Draft Regulations' provisions concerns CWA because it invokes the cornerstone of California's water rights laws – the Reasonable and Beneficial Use Doctrine. To briefly paraphrase decades of constitutional, statutory, case law and administrative decisions on the subject, the Reasonable and Beneficial Use Doctrine provides that all water use must be reasonable and beneficial regardless of the type of underlying water right. The Draft Regulations rely on this “waste and unreasonable use” terminology to justify several provisions of the Draft Regulations. CWA is particularly concerned by the reliance on this terminology: (i) to require water suppliers to reduce total potable water production (Section 865(c)(1)); and (ii) to implement additional enforcement tools against water suppliers (Section 866(a)). If adopted in this form, the regulation would require a reduction in water use by a

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water supplier and impose sanctions for failure to achieve such reductions without regard to any criteria traditionally applied to in consideration of waste and unreasonable use. Thus, invoking the Reasonable and Beneficial Use Doctrine in this context is confusing and inappropriate. Moreover, the State Water Board only need point to promoting conservation and the Executive Order itself to justify taking the steps outlined in Sections 864(c)(1) and 866(a). Therefore, CWA recommends revising each of the aforementioned sections to read as follows:

Sec. 865(c)(1):

“To ~~prevent the waste and unreasonable use of water and to~~ meet the requirements of the Governor’s April 1, 2015 Executive Order, each urban water supplier shall reduce its total potable water production by the percentage identified as its conservation standard in this subdivision. Each urban water supplier’s conservation standard considers its service area’s relative per capita water usage.”

Sec. 866(a)(1):

“To ~~prevent the waste and unreasonable use of water and to~~ promote conservation *and water use efficiency*, when a water supplier does not meet its conservation standard required by section 865 the Executive Director, or his designee, may issue conservation orders requiring additional actions by the supplier to come into compliance with its conservation standard.”

### Conclusion

CWA strongly urges the State Water Board to consider CWA’s comments and concerns. The Draft Regulations should be revised to clarify that a water supplier’s failure to convince its customers to meet the service area’s conservation target, despite the water supplier having implemented comprehensive drought response measures, does not necessarily amount to a violation of State Water Board regulations. We look forward to providing further feedback as the formal emergency rulemaking process gets underway.

Very truly yours,



Jack Hawks

cc: Commissioner Catherine J.K. Sandoval – California Public Utilities Commission  
Rami S. Kahlon – CPUC Director, Division of Water & Audits  
California Water Association Regulatory Committee