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July 1, 2015

Via email: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

Chair Felicia Marcus and Boardmembers  
State Water Resources Control Board  
c/o Jeanine Townsend, Clerk to the Board  
P.O. Box 100  
Sacramento, CA 95812-0100

Re: Comment Letter: Conservation Pricing

Honorable Chair and Boardmembers:

The League of California Cities and the California State Association of Counties appreciate this opportunity to comment on the Board's efforts to implement Directive 8 of Executive Order B-29-15 to facilitate the use of fines or tiered pricing to encourage water conservation in this historic drought. We do so on behalf of our 474 member cities and 58 member counties, many of which serve as wholesale and retail water utilities and all of which use water in municipal operations.

*Question 1: What actions should the State Water Board take to support the development of conservation pricing by water suppliers that have not yet developed conservation rate structures and pricing mechanisms?*

First, the League and CSAC note with respect that the statutory powers of your Board must be implemented consistently with our Constitution, including the power reserved to cities to operate water utilities and to set rates for their services. (Cal. Const., art. XI, section 9; *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133 [power to establish and operate public utility under art. XI, § 9 includes power to make rates].) Accordingly, your Board has no power to make rates for local governments or to compel them to do so in any particular way. In addition, of course, your Board cannot relieve cities of their obligations under the Constitution, including Proposition 218's restrictions on retail rates (Cal. Const., art. XIII D, section 6, subdivision (b)) and Proposition 26's restrictions on wholesale and other rates and charges imposed by water utilities (Cal. Const., art. XIII C, section 1, subd. (e)).

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However, your Board can assist local governments which make rates for wholesale and retail water services by:

- Providing technical assistance
- Initiating and supporting legislation
- Providing amicus support in litigation.

Technical assistance would be most helpful in identifying best practices and in developing practical and externally validated (by the Board's expertise or the opinions of other experts) methods to allocate costs to tiers of water use, perhaps with reference to the peaking characteristics of water use by customers who use water in the volumes assigned to upper-tier rates. Legislation which your board might sponsor or support may include proposals to reemphasize the Legislature's view of the appropriate harmonization of Propositions 26 and 218 with article X, section 2's conservation mandate. Your Board would seem an especially appropriate sponsor for legislation harmonizing Propositions 26 and 218 with the water conservation mandate of article X, section 2. Amicus support would be welcome in such cases as *Capistrano Taxpayers Association v. City of San Juan Capistrano*, in which your Board has already sought depublication, and other similar cases pending the appellate courts.

We have one specific proposal to suggest: Proposition 218 protects water service recipients from over-pricing of "water" as a property-related service. The water service deemed to be property related can be understood to be limited to that volume necessary for most any reasonable use of property – i.e., the volume for reasonable residential use under the Supreme Court's reasoning in *Richmond v. Shasta Community Services District* (2004) 32 Cal.4th 409 and *Bighorn-Desert View Water Agency v. Verjil* (2006) 39 Cal.4th 205. A policy statement of your Board or legislation might articulate this understanding of those cases and the provisions of Proposition 218 to which they apply so as preserve the authority in water providers to charge higher rates for use of water in excess of reasonable amounts to encourage conservation.

We suggest the technical assistance materials be developed cooperatively with local government and other stakeholders. A model for such collaboration can be the recent development of Best Management Practice 1.4.

*Question 2: What actions should the State Water Board take to support water suppliers that have already developed conservation rate structures and pricing mechanisms to improve their effectiveness?*

The League's and CSAC's comments under Question 1 are equally applicable here. Even agencies with rates in place can defend their rates from challenge on the basis of the technical assistance and proposed legislation noted above and amicus support can be of value to them, too.

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*Question 3: What actions should the State Water Board take to assist water suppliers in demonstrating that existing rate structures harmonize competing legal authorities associated with water rates?*

The League's and CSAC's comments under Question 1 are equally applicable here. In addition, the Board might sponsor or support legislation (i) to amend the Government Claims Act to allow local governments to establish claiming requirements for refund and other damages suits challenging water rates as required to partially address the decision in *McWilliams v. City of Long Beach* (2013) 56 Cal.4th 613 (Government Claims Act preempts local claiming ordinances and protects State, but not local, rates from class action challenges) or (ii) to establish a meaningful statute of limitations to bring certainty to rate-making in light of *Howard Jarvis Taxpayers Association v. City of La Habra* (2001) 25 Cal.4th 809 [new cause of action to challenge utility tax arises with each payment].)

We note that Directive 8 of Executive Order B-29-15 also mentions the use of fines by water providers to accomplish conservation objectives. We recognize this strategy is not the focus of your July 8th hearing or this request for input, but we recommend your Board consider technical support for water providers as to this strategy, too. Although the Court of Appeal rejected an argument that fines might justify tiered rate structures in the San Juan Capistrano case, that case might be depublished as the Board and the League, CSAC, and ACWA have requested. Even if it is not, however, fining individual water users, after notice and some opportunity for hearing, for violating water conservation standards is an available strategy to accomplish compliance and should remain available for use in appropriate circumstances. Your Board might provide technical support for such approaches and this might be included in the collaborative process discussed above for preparing other technical assistance documents for water providers.

Thank you for the opportunity to comment. We look forward to participating in your hearing on this issue on July 8, 2015. If the Board accepts our proposal for a collaborative process to development technical assistance tools on this subject, the League and CSAC each pledges its full support for that effort.

Sincerely,



Christopher McKenzie  
Executive Director