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In reply refer to: L2015-018

April 10, 2015

VIA EMAIL TO jessica.bean@waterboards.ca.gov

Re: Proposed Regulatory Framework for Mandatory Conservation Measures

Dear Ms. Bean:

El Dorado Irrigation District appreciates the opportunity to comment on the State Water Board's proposed regulatory framework for implementation of the statewide 25% reduction in urban potable water use mandated by Governor Brown's April 1, 2015 Executive Order. The Fact Sheet accompanying the proposed framework included seven questions to help focus public comment. The District will address several of those questions, quoted below.

1. *Are there other approaches to achieve a 25% statewide reduction in potable urban water use that would also impose a greater responsibility in water suppliers with higher per capita water use than those that use less?*

Yes, there are. The current proposal is significantly flawed, because a singular focus on per capita water use, without more, is a poor means of determining each community's fair share of the conservation mandate. That is not just the District's opinion, it is also the State Water Board's: at its Drinking Water Information Clearinghouse website ("DRINC Portal," <https://drinc.ca.gov/dnn/Applications/UrbanWaterR-GPCD.aspx>) the State Water Board states, "It is not appropriate to use R-GPCD water use data for comparisons across water suppliers unless all relevant factors are accounted for. Factors that can affect per capita water usage include: rainfall, temperature, and evaporation rates. . . population growth. . . population density. . . socio-economic measures such as lot size and income. . . water prices."

Additionally, as proposed the framework will produce great disparities in the water conservation requirements imposed upon people and residences that are identical in all respects, except for what water agency happens to serve them. Such disparate treatment will undermine, not foster, the state-wide unity of purpose necessary to reach the 25% conservation mandate.

A fair regulation would adjust R-GPCD figures to take climate, population density, and past conservation performance into account, and it would set more stringent "baseline" conservation standards for all agencies throughout the state than the State Water Board has enacted to date. Following are some specific suggestions for including these factors.



Take climate into account

A statewide tier system that does not take climate into account does not make fair comparisons – as demonstrated by the predominance of coastal agencies in the proposed Tier 1 and lower half of Tier 2. Taking climate into account need not be complex: the State Water Board can greatly increase the fairness of its regulation by creating one set of conservation tiers for agencies located in cool coastal areas, and another set of tiers for agencies in the state’s interior. The tier breakpoints for coastal agencies would be lower than the breakpoints for the corresponding tiers of interior agencies.

Take population density into account

Customers of agencies that serve lower-density populations typically have larger, older homes and larger parcels. For those reasons, holding them to the same GPCD standards as newer, more efficient, and more densely constructed homes is not an equitable, “apples to apples” comparison. Using population per square mile of service area, the State Water Board should first sort agencies into low-, medium-, and high-density subcategories, and then apply a modest adjustment to the baseline GPCD number (downward for low-density agencies, and upward for high-density agencies) before assigning the agencies to the appropriate conservation tier.

Take past conservation performance into account

Although the State Water Board’s proposed tiers show each agency’s June 2014-February 2015 conservation performance, the proposed framework does not take that performance into account in any way. For example, Bella Vista Water District’s conservation rate was 48%, while California Water Service Company Antelope Valley’s rate was -16%. Yet both are mandated to conserve 35%, simply because their R-GPCD numbers were nearly identical. In other words, in the eyes of the State Water Board, Bella Vista has done no better job of conserving than has Antelope Valley. Furthermore, the framework places two-thirds of the few agencies (the District among them) that met the Governor’s prior call for 20% conservation in Tiers 3 and 4; only 11 of the 144 agencies assigned to Tiers 1 and 2 met that mark. Thus, the proposed framework tends to “go easy” on agencies with mostly substandard conservation in 2014, while “cracking down” on most of the agencies that responded well. These two examples highlight the manifestly unfair results of not taking past conservation performance into account.

There is a simple remedy. Once the State Water Board has populated its conservation tiers, it can sort the agencies within that tier according to their 2014-2015 conservation performance. The best-performing agencies within the tier would be assigned a lower conservation mandate, and the worst-performing agencies would be assigned a higher mandate. This approach would have the double benefit of recognizing past conservation performance, and “smoothing” what is



currently a very rough “step function” due to the small number of tiers. Smoothing the function has the benefit of reducing inequities that agencies can experience if they fall just above or just below a tier’s breakpoint.

With just a little more work, the State Water Board’s methodology could also take into account the fact that conservation did not begin in 2014 – many agencies, such as the District, have steadily reduced their GPCD figures in recent years, particularly since the enactment of the 20% by 2020 legislation. Rather than using 2013 as the sole GPCD baseline, the State Water Board could allow agencies to substitute the average of any period of three or more consecutive years in which GPCD has been measured for 20% by 2020 compliance.

Improve baseline conservation practices

The State Water Board’s recently enacted conservation practice regulation was widely criticized as too timid. When combined with the proposed framework, it will foreseeably result in scenarios like the following: two families of four live in identical 1500-square foot houses on 10,000 square-foot lots with typical landscaping; one lives in the Sacramento region, the other in the Bay Area. The regulation mandates Family A’s agency to reduce consumption by 35%, so the agency restricts watering to twice per week and bans the installation of new swimming pools. Inspired to do their part, Family A turns off its front- and back-yard irrigation and uses pool water to irrigate its trees. Family B’s agency has a 10% mandate, so it continues to allow watering five days per week and imposes nothing but the state’s baseline conservation measures. Family B continues to irrigate its landscape, installs a new pool, and invites Family A to a Fourth of July pool party. Family B returns home after the party demoralized and confused. They refill their pool, and set the front- and back-yard irrigation timers to water twice per week.

Combining the proposed regulation with more stringent baseline conservation measures applicable to all agencies state-wide will minimize such hard-to-explain and counterproductive regional disparities, and help preserve the sense of common purpose that will be vital to success. And these more stringent baseline measures will still impose greater responsibility on higher per-capita users by forcing more significant lifestyle changes.

2. How should the regulation differentiate between tiers of high, medium and low per capita water users?

The regulation should establish separate sets of conservation tiers for coastal and interior agencies, take into account population density and past conservation performance, and employ methods to “smooth” the conservation mandates that the tiers establish, as discussed above. Additionally, the regulation should include more than four conservation tiers to allow finer distinctions among levels of R-GPCD, and it not rely upon a single data point (September 2014) to assign an agency to its conservation tier. Discussion of the latter two comments follows.



Including additional conservation tiers

The proposed framework provides only four conservation tiers, with mandates of 10%, 20%, 25%, and 35%. The regulation should have more tiers, for two reasons.

First, the varying percentage differences between tiers appear arbitrary. A set of six tiers would allow mandates (prior to adjustment for past conservation) to be stepped in uniform 5% increments from 10% to 35%. More tiers would allow mandates to exceed 35%, if appropriate and necessary to achieve the statewide 25% rate.

Using only four tiers also does not permit appropriate distinctions among the agencies throughout the range. State Water Board staff has publicly explained that the first tier breakpoint of 55 GPCD was derived from the 20% by 2020 legislation, which allocates 55 GPCD to indoor use. However, the remaining breakpoints have no apparent rationale other than the arbitrary fact that they are multiples of 55. The result is that Tier 4 ranges from 165.5 GPCD all the way to 584.3 GPCD – seven times the span of the other tiers. It is manifestly inequitable that an agency that has an R-GPCD of 584.3 and 2014-15 conservation of -2% should have the same conservation mandate as the District, which conserved 24% and has an R-GPCD less than one-third of that. Adding tiers, particularly at the upper end, will address this inequity by allowing finer distinctions among various levels of use.

The regulation should not rely on a single data point

The framework relies on a single data point – R-GPCD reported for September 2014 to assign agencies to conservation tiers. This is arbitrary and prone to error, as will be explained. The regulation should instead utilize at least a two-month period to calculate R-GPCD for purposes of assigning agencies to conservation tiers.

The framework justifies the choice of September 2014 by noting that R-GPCD will be highest in the summer months, and stating that summertime water use is generally more consistent because the weather varies less from year to year than in the winter. Neither of these rationales supports the choice of September 2014 as the single data point for imposing conservation mandates. First, the rationales apply to a season, not a month. Second, because all agencies are measured during the same time period, the relevant issue would be the geographical variance of weather *within the state*, not variance *from year to year*.

Using any single data point is inherently arbitrary, because of unique factors that can influence one agency's results, but not another's. But using a single month is particularly prone to error in this context because many agencies bill on a bi-monthly cycle. Therefore, the billings for any given month can vary, depending upon what portion of the service area is being billed. The



District is a good example of this phenomenon: the eastern portion of its service area includes significant agricultural use, while the western portion is almost entirely residential. Therefore, as noted in each of the District's monthly reports to the State Water Board, "The estimated percentages for residential and agricultural use vary from month to month due to the District's bi-monthly meter reading cycles."

These fluctuating percentages produced R-GPCD figures for the District of 188 in September and 77 in August, according to the State Water Board's DRINC Portal website. Such large R-GPCD differences are artifacts of the reporting periods; they are not real. And bi-monthly billing cycles are common among California water agencies. Therefore, at minimum the regulation should use a two-month period to calculate R-GPCD, and more data points would be better still. The State Water Board can easily do so; the DRINC Portal website has nine months of R-GPCD calculations – every month from June 2014 through February 2015.

6. *How and when should compliance with the required water reductions be assessed?*

Monthly reporting is useful; however, because many agencies are on a bi-monthly billing cycle, compliance should be assessed only provisionally on a monthly basis. At minimum, a two-month period is necessary to be certain whether or not compliance is being achieved. This factor should be taken into account during enforcement. Further, if compliance is to be assessed on both a monthly and cumulative basis, as the framework proposes, enforcement decisions should take into account that a single monthly "bust" could adversely influence the cumulative total long after it occurs, even if subsequent monthly targets are met or exceeded. Agencies determined not to be in compliance must be afforded appropriate pre- and post-enforcement due process.

7. *What enforcement response should be considered if water suppliers fail to achieve their required water use reductions?*

Enforcement should focus on improving an agency's mandated conservation actions, because compliance cannot be achieved without customer cooperation. Fines or other punitive actions against the agency will not create water, nor will they incentivize customers to improve their conservation. One means of creating a positive incentive would be to allocate state grant monies for conservation and other activities based upon an agency's conservation performance. Each acre-foot or percentage of reduction beyond a specified threshold would "earn" the agency an allocation of grant funds. Conversely, the regulation could incrementally restrict an agency's eligibility for conservation and other grant funds based upon performance.



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Question not asked – How can the conservation mandate be reconciled with water rights law?

In closing, the District wishes to comment on the legal anomalies associated with mandating reduction in the use of legally entitled water rights. In this drought, great effort is being expended to come up with new ways to allocate water shortages. This is curious, because for 150 years, California has had a well-established means of allocating water shortages – the legal doctrine of water rights priority. That doctrine, described by the California Supreme Court as having “long been the central principle in California water law,”¹ requires junior appropriators to cease their use when necessary to ensure that senior water rights holders can receive their full entitlement.

California – and the entire arid West – adopted this principle because it gives the most certainty to users and is the most reliable method of allocating scarcity. Instead of being the central principle of applicable law, seniority is about to be rendered meaningless by regulations that mandate shared sacrifice of water supplies, regardless of the priority of the underlying legal rights. Make no mistake: the District recognizes that the current drought has reached crisis proportions. We fully support the objectives of the Governor’s Executive Order, and we recognize that the State Water Board is bound to implement that order. However, no emergency justifies casting aside the central principle of this state’s water law, and the District cannot silently condone this overt departure from governing law.

The District appreciates this opportunity, however abbreviated, to comment upon the proposed regulatory framework. Unfortunately, in our view it is seriously flawed and not well-suited to achieve success. We hope the State Water Board will seriously consider our proposed remedies, which are straightforward and feasible, when crafting its draft and final regulation.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Thomas D. Cumpston', is written over a printed name and title.

Thomas D. Cumpston
General Counsel

TDC:pj

cc: EID Board of Directors
Jim Abercrombie, EID General Manager

¹ *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243; see also *El Dorado Irrigation District v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 961-962.