



May 4, 2015



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

Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Flor  
Sacramento, CA 95814


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 City's previous comments are incorporated into the public record for the proposed hearing on May 5 and 6, so the City has attached its previous comment letters to this letter to ensure that all documents are properly considered by the SWRCB.

In summary, the City 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*. 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 SWRCB's underlying methodology that is applied 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.

As described in the attached documents, the City respectfully requests that the SWRCB issue regulations that better align with California's 165 year history of water rights laws and recognize the City's prudent planning to manage its water supplies.

Sincerely,



Matthew Brower  
City Manager  
[matthew.brower@lincolnca.gov](mailto:matthew.brower@lincolnca.gov)  
916.434.2449

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

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Administrative Services - City Manager's Office - Development Services  
Fire - Library - Recreation - Police - Public Services



April 22, 2015

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

Dear Ms. Bean,

The City of Lincoln (City) disagrees with the State Water Resources Control Board's (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> As described below, the City requests the SWRCB modify the proposed regulations to account for the City's water supply planning and investments, past conservation efforts, and the inequitable severity of the reductions required to achieve a 36 percent reduction during winter months.

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

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

The City also has assisted and continues to assist Californians during the prolonged drought by voluntarily reducing its water use – achieving an average monthly savings since July 2014 of 17%. Yet the reduction mandates included in the Proposed Regulations disproportionately punish the City for its regional self-reliant planning by illegally taking the City's water without compensation for use by those who have not planned for drought in accordance with California law.<sup>3</sup>

The City's primary investment for drought protection has been its prudent collaborative management of regional surface water and groundwater with its regional partners. Our investments in surface water assets, reclaimed water,

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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).

<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.

and groundwater assets have been managed expressly for drought mitigation after years of extensive regional water supply planning. Yet these investments must now remain idle as SWRCB forces the City's ratepayers who have made drought-savvy investments to take extraordinary conservation measures to benefit other areas in the state. SWRCB is forcing the City's ratepayers to forego our own locally-available resources to meet the needs of those who have failed to plan at significant cost and expense to the City.

### **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. The City is not the beneficiary of the water conserved pursuant to the Proposed Regulations. Rather, the Proposed Regulations punish the City for its past conservation and benefit others who have not planned for their future. The Proposed Regulations are illegal because they constitute an uncompensated reallocation of water resources based upon oversimplified notions of waste and unreasonable use. All water conserved by the City belongs exclusively to the City under Water Code Section 1011 and cannot be reallocated to others without the consent of the City.

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. However, the City has planned for these circumstances in its local region based upon the availability of local resources – the City 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 inequitable.<sup>5</sup>

### **The Regulations are Unworkable**

The Proposed 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.” The identified percentages are based on each supplier's July-September 2014 Residential Gallons Per Capita Day (R-GPCD). Our City's reduction target is 36%. Though we understand the appeal of the 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>

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<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.4th 1224

<sup>6</sup> The SWRCB lists several factors as part of an “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))

The Fact Sheet describing the Proposed 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 unworkable and inequitable during the winter months for City ratepayers.

During the winter months, outdoor irrigation in most cases is eliminated. As such, the SWRCB’s proposed regulations, which mandate the City have a 36% reduction regardless of the time of year, will require the City’s ratepayers reduce their **indoor use** by at least 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). It is not feasible to require our rate payers to reduce indoor water use by over 30%. Additionally, 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 (wintertime) 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.

Under this framework, a November-February required reduction target would be closer to 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 failed to plan for drought by punishing those that did plan. SWRCB is punishing the City’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 City’s ratepayers – ratepayers who have prepared for these exact drought circumstances with local resources and local planning.

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

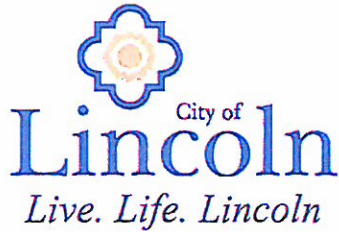
The mandated target of 36% for the responsible City of Lincoln ratepayers is illegal and inequitable.

Sincerely,

A handwritten signature in black ink, appearing to be 'JH', with a long horizontal flourish extending to the right.

Jennifer Hanson  
Public Services Director  
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600 Sixth Street, Lincoln, CA 95648  
916-434-2450

Cc: State Water Resources Control Board Members  
John Woodling, Regional Water Authority



April 13, 2015

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

Dear Ms. Bean,

The City of Lincoln appreciates the opportunity to comment on the State Water Resources Control Board's (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 City, 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 cities, farms and fish in real danger of cataclysmic failure. And it is becoming more apparent that droughts, like this one, are the norm. The City recognizes the impending peril and will continue to do its part to assist those in need; the City may find itself asking for assistance from other Californians in the future.

However, the City cannot stand idly by and condone purported resolutions to this crisis that will perpetually penalize the City's residents. The City, through its own policies and foresight, has secured local water assets, planned for extended droughts, developed a culture and economy in harmony with its environment, and invested hundreds of millions of dollars for infrastructure upgrades to handle drought calamities. The City 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 City 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 City's taxpayers and ratepayers.

## **Do More**

The City of Lincoln is being asked to disproportionately carry California's drought burden. The City is being asked to reduce its residential per capita water use by 35% and its commercial-industrial usage by a similar percentage, so that California can meet a 25% statewide water conservation objective. This mandate for the City to "do more" is fundamentally wrong.

The City has secured reliable local water supplies (not imported supplies) and built its own infrastructure and conveyance system to manage droughts and other water reliability issues in harmony with its culture and environment. The City secured water assets from Placer County Water Agency (PCWA) and Nevada Irrigation District (NID) (its local surface water supply wholesale agencies), developed uses and infrastructure for reclaimed and other non-potable water supplies, and secured and managed its groundwater resources to endure critically dry years. In other words, the City 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. Despite this current epic drought crisis, the City's good water planning would allow the City to continue to serve our residents adequate water supplies to meet their fundamental needs and beyond.

However, the state of California seeks to punish the City for good planning (calling it waste) by telling the City's residents that they must disproportionately carry the water supply burden for all of California by reducing their usage by 35%. In particular, the City's residents are being forced to 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 City'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 City is also being asked to "pay more" and disproportionately bear California's drought costs, despite the City's shrewd investments in its reliable water supplies and long-term conservation planning. The state of California is telling the City's residents that although the City's taxpayers and ratepayers have paid to acquire the City's reliable water assets that protect the City's residents from drought, the City should share those water assets with other Californians at the City's sole expense. In other words, the City should give its water supply away for free even though the City's taxpayers and 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 City's financial coffers rely upon the monthly fees paid by the City's residents for their water consumption, the City 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 City's taxpayers and ratepayers to assume the economic burden for the inadequate water supply planning in other areas in the state that are beyond the City's control.

In addition, by forcing reductions in commercial and industrial demand, the State is directly impacting the City's business economy. Companies that have located businesses in the City, because of its well-planned and reliable water supplies, may now be forced to limit or cease production by SWRCB decree. Reduced business productivity directly impacts the City's business tax revenues. This impact contradicts the State's notion of "equitable conservation standards." The Proposed Framework mandates that the City disproportionately carry the financial burden of this drought in order to benefit all of California.

The City's ratepayers and taxpayers should not be forced to perpetually "do more" and "pay more" to rectify the inadequate water supply planning of other areas in California. The cost of the Proposed Framework to the City's taxpayers and ratepayers will exceed \$2.4 Million Dollars on top of the similar uncompensated costs born by those taxpayers and ratepayers in 2013 and 2014, when the drought was gaining momentum. The disproportional assignment of drought-related burdens and costs to the City's ratepayers and taxpayers who have planned well for their futures is, in its purest form, unjust and inequitable.

### **The Details**

The City has spent a considerable amount of time assessing the details provided in the Proposed Framework. The City'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.

It is confounding why the SWRCB would use the methodology it expressly denounces 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, 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 City. Punishing a City 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 City’s commercial and industrial economy is just as important to the City’s economic well-being and requires the same protections that the Governor has decreed for agriculture.

Solution: Let the City determine how it will meet its required GPCD reduction rather than 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 City goes about doing it. The SWRCB should allow the City to determine what is in the City's best interest to meet conservation targets and how the City 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 City. Existing land use plans and permits for houses that are approved but not yet constructed would require modification that may trigger other legal obligations for the City or require the City to halt home building altogether. Such action is overkill in light of the other priority actions that could make more water available for drought mitigation in California.

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 houses and buildings are 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 City’s tiered R-GPCD and CII conservation mandate to historical periods where the City 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 City’s compliance assessment. This timeline condemns those agencies that responded to the drought in its earliest stages.

Solution: We suggest that the comparison period be established as June 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 City.

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 City simply

cannot be responsible for leaky pipes inside a City resident's home with a potential fine to the City amounting to \$10,000 per day. The Proposed Framework fails to describe how the regulatory enforcement will apply to the obligations of the City and therefore the City 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 City of up to \$10,000 per day for "compliance" that the City 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.

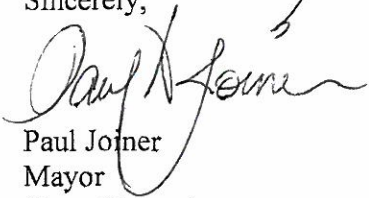
Solution: Reassert the legal principles in California's water rights priority system so that there is no misunderstanding among water purveyors and users in the state that failure to adequately plan for drought with local supplies and local investments may lead to cessation in water supply availability 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 City is hopeful that SWRCB staff, management and Board Members will deeply reflect upon the underlying inequities of the Proposed Framework that affect

the City 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 any of the communication channels provided below.

Sincerely,



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Cc: State Water Resources Control Board Members  
John Woodling, Regional Water Authority