El Dorado Irrigation District

In reply refer to: LBP2016-013

December 19, 2016

Felicia Marcus, Chair
State Water Resources Control Board
101 I Street
Sacramento, Ca 95814

VIA EMAIL TO wue@water.ca.gov

Attn: Jeanine Townsend, Clerk to the Board

Re: "Making Water Conservation a California Way of Life" November 2016 Public Review Draft

Dear Chair Marcus and Board Members D'Adamo, Doduc, Moore, and Spivey-Weber:

El Dorado Irrigation District (EID or District) appreciates the opportunity to provide comments on the above-named framework document, which hereafter, is referred to as the Conservation Framework. The District is a signatory to comments provided by the Association of California Water Agencies (ACWA) as well as the Regional Water Authority (RWA). This letter incorporates by reference the comments contained in those two letters, and focuses on four fundamental issues: (1) The Conservation Framework fails to incorporate water rights priorities; (2) imposing mandatory water budgets disincentivizes investments in water supply reliability; (3) Article X Section 2 does not support the Conservation Framework's per se determinations of reasonable use; and (4) the Conservation Framework methodology risks violating the Constitutional prohibition against taking property without just compensation.

1. The Conservation Framework Fails to Incorporate Water Rights Priorities

The Conservation Framework's proposal to impose permanent water-use limitations on all water rights holders ignores the long-established doctrine of water rights priority, which "has long been the central principle in California water law." (*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.) Priority of right is what provides certainty to the right holder. Without certainty, there would be scant investment in the infrastructure necessary to supply water. Likewise, it is certainty in the nature and priority of the water right that provides incentives to maximize, and invest in, water supply reliability and water use efficiency. Indeed, the Legislature has acknowledged the importance of ensuring certainty of water rights, even while encouraging water use efficiency: "The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights." (Water Code § 109.)

The District agrees with the ACWA policy principle pertaining directly to the relationship of conservation mandates to water rights: "Implementation of water conservation and water use efficiency programs must be consistent with existing state law in that the act of conservation cannot be allowed to undermine the water rights of the entities implementing the water conservation or water use efficiency program, or interfere with existing water conservation or water use efficiency projects. State policy should affirm that undertaking aggressive water conservation and water use efficiency will preserve, not diminish, water rights." Unfortunately, by imposing mandates without regard for water rights priority, the Conservation Framework is at odds with the very policies it is ostensibly crafted to promote.

2. Imposing mandatory water budgets disincentivizes investments in water supply reliability.

The Conservation Framework also relies solely upon regulatory action, rather than market-based transactions, to make water conservation a way of life. Market-based transactions, however, are more effective than regulatory actions in reallocating water supplies because they rely on pricing signals to move water to where it is needed, are voluntary, are less costly and controversial, and incentivize innovative approaches to water allocation and demand reduction. Market-based, rather than regulatory, action also help protect the ultimate value of extensive local and regional infrastructure investments ratepayers have made to proactively increase their water supply reliability and partially insulate themselves from the uncertainties of drought. In contrast, regulatory action that effectively confiscates these investments poses Constitutional issues, as discussed below.

The Conservation Framework – and all subsequent implementing legislation – must unequivocally state that agencies retain their legal rights to water supplies beyond those delivered consistent with achieving potential water-use targets and overall water budget limitations. This is essential to protect existing water rights, the value of prior investments in resiliency, public confidence in making new ones, and to preserve agencies' financial ability to respond to similar future state mandates.

This principle is consistent with existing provisions of the Water Code. Section 1011(a) deems any cessation or reduction in use due to conservation to be a reasonable beneficial use of the conserved water and forbids forfeiture of permitted or licensed water rights as a result of conservation. Subdivision (b) of that statute affirms that the freed-up water is transferable. Water Code section 109 further declares that "it is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import." (Water Code § 109(a).) Subsection (b) of that statute further directs the SWRCB, DWR, "and all other appropriate state agencies to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer." (*Id.* at § 109(b).)

Not only does the Conservation Framework fail to incorporate this legislative admonition, it directly frustrates it, by imposing blanket conservation mandates without any assurance that conserved water will be transferable. This will likely strand existing and planned investments in water supplies and water-use efficiency projects.

The Conservation Framework's proposal to impose state-wide reductions without respect to priority of right, and without any assurance of the transferability of conserved water undermines other fundamental characteristics of the water rights system developed to encourage conservation and reuse. These include the right to recover return flows, the right to priority ownership of treated wastewater, and the right to store water in native aquifers. These rights provide water conservation project proponents with certainty that their investment will be protected by applicable laws. Blanket reductions that fail to provide recognition for such activities undermine that certainty and disincentivize investments in water supply reliability and water use efficiency.

Notably, legislation in 2009 seeking to improve California water management and water use efficiency – the Water Conservation Act (i.e. SB X7-7 or "20 x 2020"), and the Delta Protection Act – both included clear safeguards upholding the sanctity of the State's water rights system. The legislature enacted Water Code sections 10608.8(a)(1) and 85031(a), as integral to those respective legislative schemes. The former explicitly extended Section 1011 protections to the water use efficiency measures required in the 20 x 2020 law; the latter affirmed area-of-origin and pre-1914 water rights were not affected in any manner by the Delta Protection Act.

The Draft Framework and all subsequent implementing legislation must take the same approach and include similarly specific language, if not the same caveats. As a practical matter, they should go farther, to provide clear and firm regulatory direction to make feasible the type of conservation-based water transfers that Section 1011 allows in theory, but bureaucratic obstinacy has made nearly impossible in fact.

3. Article X, Section 2 does not support the Conservation Framework's per se determinations of reasonable use.

Blanket determinations about how much water use is reasonable by imposing permanent conservation mandates is not consistent with Article X Section 2 jurisprudence. Judicial precedents interpreting Article X, Section 2 of the California Constitution, have held that reasonable beneficial use is question of fact dependent upon unique circumstances of the situation, requiring a case-by case determination. (See e.g. *Joslin v. Marin Municipal Water District* (1967) 67 Cal.2d 132, 140.) The reasonableness of two identical water uses will vary according to the context of those uses, taking into account factors that include location, local customs and standards, water rights, access to alternative water supplies, and whether there are any resulting harms to other users.

By contrast, no legal authority exists for the legislature or the SWRCB to establish a permanent, blanket rule declaring that water use in excess of a regulatory target or formula is unreasonable per se.

4. The Conservation Framework methodology risks violating the Constitutional prohibition against taking property without just compensation.

Furthermore, many local agencies have invested heavily in facilities in reliance upon those property rights, to enable prudent local use of water even during drought or other shortages. Restricting the exercise of water rights by imposing permanent mandatory reduction targets, as the Conservation Framework proposes, could constitute an unlawful taking of property rights. A water right is a vested property right protected by the Fifth Amendment, which prohibits the state from taking property without just compensation. (*Casitas Municipal Water Dist. v. United States* (Fed. Cir. 2008) 543 F.3d 1276, 1288.) Although one recent case upheld the SWRCB's decision to restrict the use of water for certain purposes during drought conditions (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1485), imposing mandatory permanent targets on water rights holders state-wide under the reasonable use doctrine or other legal theories constitutes an entirely new direction that is not consistent with the Constitutional Takings Clause. The potential taking of water rights and the stranding of substantial investments in those rights, either through an assertion of Article X, Section 2 authority or by frustrating the use or transfer of water supplies in excess of the budget numbers, must be addressed in the Conservation Framework.

Conclusion

The District applauds the Governor's and the "Executive Order" Agencies' desire to meaningfully contribute to the responsible management of the State's precious water supply resources. The Conservation Framework's approach, however, seems to assume that imposing conservation mandates for conservation's sake is a good thing that comes without significant cost, and that is simply not true. It also assumes that conservation mandates, applied through a uniform water budgeting methodology, on water agencies irrespective of the agencies' supply portfolios, somehow results in increased water supply reliability statewide. Again, this is not true. Executive Order B-37-16 represents that statewide conservation during 2015-2016 saved "enough water during this period to provide 6.5 million Californians with water for one year[.]" This statement misleadingly suggests that water conserved in 2015-2016 was provided to 6.5 million Californians in need. There is no reservoir where water conserved all over the State is somehow stored and used to provide to 6.5 million Californians for one year. In fact, much of the 30% of water conserved in the District's service area in 2015-2016 spilled over the District's reservoirs and was released from Folsom Dam in the Spring of 2016. That water flowed into and out of the Delta to the Pacific Ocean. It did not add to water supply reliability anywhere, much less in the communities with water supply insecurity in 2016. Water flowing out to sea obviously serves beneficial environmental purposes, but to suggest that such water was available and used to supply Californians with water for a year is simply not true.

Rather than continue to rely solely on regulatory action to make conservation a way of life in California, the Conservation Framework should focus on how to implement market-based transactions which, as discussed above, protect investments in water supply reliability, incentivize innovative approaches to conservation, and most importantly, provide water to those in need when they need it. The approach currently taken is counterproductive as public policy and marred by fundamental legal flaws. The Governor advanced a much more effective, comprehensive approach in 2014's California Water Action Plan. The Conservation Framework should be modified and greatly expanded to incorporate the Governor's market-based, "all of the above" vision articulated in that Plan.

Thank you for considering these comments.

Sincerely,

Thomas D. Cumpston
Acting General Manager

TDC:BDP:pj

cc: Jim Abercrombie, General Manager
Brian D. Poulsen, Acting General Counsel
The Honorable Ted Gaines
The Honorable Jim Nielsen
The Honorable Frank Bigelow
The Honorable Brian Dahle
The Honorable Kevin Kiley
The Honorable James Gallagher
Dave Bolland, ACWA
John Woodling, RWA
John Kingsbury, MCWRA