

May 25, 2016

State Water Board Nixes Flawed “One Size Fits All” Conservation Mandates

On May 18, 2016, the California State Water Resources Control Board (State Water Board) adopted new emergency conservation regulations that repeal and replace its prior drought regulations. The new regulations, which are effective from June 2016 through January of 2017, now allow local agencies to develop conservation standards based upon their unique circumstances.

These new regulations replace the controversial percentage reduction-based water conservation standard that failed to acknowledge the self-help measures that many communities had undertaken to make their water supplies sustainable and reliable even in dry-years. Here is how they work.

The new standards require local agencies to ensure a three-year water supply assuming a continuous shortage such as experienced in 2012–2015. Water agencies will be required to meet a conservation standard equal to the projected shortage in their supplies. From there the regulations enable urban providers to “Self-Certify” their supply reliability and to report to the State Water Board.

The shift in regulatory approach avoids complaints that the quantitative percentage reduction methodology was legally flawed. Critics contended that the regulations failed to adhere to customary reasonable use analysis, such as the sustainability of the reduced supplies, the efficiency of use or whether the regulation would result in waste by preventing beneficial use of stored supplies.

The new regulations are also welcome news for entities like the San Diego County Authority that have invested billions of dollars to achieve water supply reliability through water transfers, desalination, recycled water and conservation. Once again, water supply reliability can be pursued and achieved through proactive measures contemplated by approved Urban Water Management Plans.

Article 22.5, Section 864(a) continues to be based upon the declaration that to “prevent waste and unreasonable use of water and to promote water conservation ...” certain actions are prohibited. These prohibitions largely focus on wasteful water use practices by end users, and there is little doubt these prohibitions are lawful.

Section 864(c) also extends the conservation requirements to end users that do not take water from an urban purveyor. Section 864(c)(2) requires private end users to meet the conservation standards prevailing in the neighboring community. The basis for requiring reductions in use by purely private properties without regard to their relative water right priority is politically understandable. However, it remains to be seen whether these limitations would survive a legal “as applied” challenge absent a more complete record supporting the finding.

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