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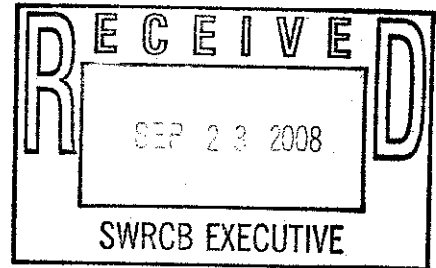
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September 23, 2008



State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Attn: Jeanine Townsend, Clerk of the Board
commentletters@waterboards.ca.gov

Re: Comment Letter – Proposal to Mandate Water Conservation Management Practices

Honorable Board Members:

Thank you for the opportunity to comment on the proposed regulatory program to encourage urban water conservation. These comments are based on our long experience in the representation of many local public agency urban water providers and are not made on behalf of any particular client or interest.

The Discussion Paper places heavy emphasis on inverted block rate pricing as a means to reduce urban water consumption. While inverted block rate pricing probably provides powerful and effective incentives to reduce urban water demand, there is widespread and serious legal concern that inverted block rates may be unconstitutional under Article XIID of the California Constitution (Prop 218). After the Supreme Court's decision in *Bighorn-Desert View Water Agency v. Verjil*, (2006) 39 Cal.4th 205, it is clear that water rates in the urban setting are subject to both the procedural and substantive provisions of Prop 218. The substantive provisions of Prop 218, Cal. Const., Art. XIID, § 6(b), require a strong nexus between the water rates charged by a retail urban water agency and that agency's cost of providing the water service. Taken literally, Prop 218 requires cost of service to be analyzed on a parcel by parcel basis, not merely averaged in the aggregate, and appears to allow no room for non-cost water pricing objectives, such as demand management. Since inverted block rates are intended to meet objectives not related to cost recovery, local agencies will be put at significant risk of a challenge to their rates, with the attendant legal costs and potential financial

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uncertainty, if the State mandates inverted block rate pricing structures on retail water providers.

However, there also is substantial legal thought that water conservation financial incentives or penalties may be imposed, separate and apart from water "commodity rates" per se. Authority for such non-rate conservation incentives or penalties may be found in the State Constitution, Art. X, § 2, and Water Code §§ 100 et seq. and 350 et seq., but must be structured in a way to meet the constitutional constraints of Prop 218. We suggest the State Board should work with the appropriate legal authorities within the State government to develop the legal rationale and a possible model framework or pattern for local agencies to use in imposing non-rate, financial incentive/penalty measures which will pass the constitutionality test of Prop 218.

Thank you for this opportunity to comment.

Very truly yours,

MCCORMICK KIDMAN & BEHRENS, LLP


ARTHUR G. KIDMAN

CC: Whitnie Henderson, ACWA