

May 3, 2012

Mr. Fethi Benjemaa
Department of Water Resources
901 P Street, Suite 313A
Sacramento, CA 95814

RE: April 18 – Notice of FIFTH 15-day Comment Period and Revision to Regulation Text

Dear Fethi:

As entities subject to the agricultural water measurement regulation, we are in a unique position to provide the Department of Water Resources (Department) with insight into how this regulation could be implemented. Despite repeated attempts, through written comments (see attached) and even an informational tour within our region to inform the Department of the problems this confusing and burdensome regulation creates for those subject to it, our comments have been repeatedly ignored.

In particular, the lateral level measurement option in Section 597.3(b)(1)(B) that is the focus of this 15-day comment period was crafted without our input and does not meet the clarity standard established by Government Code section 11349. In fact, the Department's efforts to amend this section has only increased its ambiguity, has done nothing to establish its necessity, and could result in conflicting determinations by engineers attempting to implement this section. The inclusion of language requiring the use of multiple devices at a turnout (with or without additional components – a vague and unclear clarification) before a water supplier could consider measuring at the lateral level would likely eliminate the option of lateral level measurement. This in turn would eliminate the "range of options" for measurement required by the legislation (section 10608.48(i)(1)). Furthermore, this change would significantly increase the April 22, 2011 cost estimate and Form 399 Economic and Fiscal Impact Statement dated April 2, 2011, developed by the Department for the regulation. These cost documents now are more than twelve months old and no longer reflect the regulation that was to be adopted at that time. The requirement for multiple devices to be used at a turnout if one device is unable to accurately measure flows along with the elimination of the lateral level measurement option will substantially increase the cost of the regulation. This only serves to exacerbate the unrealistically low cost estimate developed for the regulation submitted to the Office of Administrative Law (OAL) last year.

The confusion and violations of the Administrative Procedure Act (APA) created by section 597.3(b)(1)(B) are not unique to this section. The regulation as a whole, as described by OAL in the February 8, 2012 Decision of Disapproval of Regulatory Action "failed to comply with the clarity, consistency, and necessity standards contained in Government Code section 11349." The limited efforts conducted by the Department to address this rejection of the regulation by OAL leaves this regulation flawed and is more unclear and further distanced from any necessity for the regulation established by the legislation.

Among the flaws that remain in the revised regulation are the following:

- In the statement of reasons, the Department equates implementing this measurement regulation to the “measurable outcomes” in Water Code section 10608(e) which references water use or efficiency. The Department has not stated how this regulation would result in measurable outcomes in water use or efficiency. The Department, in order to comply with OAL’s order, must document in this Statement of Reasons how measurement within this regulation, in and of itself, will reduce water use or increase water use efficiency.
- On page 3 of the Statement of Reasons, the Department equates range of options in the legislation, [*the Department is required to adopt regulations that provide for a range of options to comply with the measurement regulation*] to a “range of accuracy options” which is clearly a misrepresentation of the legislation.
- The Department claims that cost effectiveness cannot be used to guide the establishment of this regulation because the legislation is silent on the issue of placing a condition of cost effectiveness on water devices. It is the Department, in its stated effect of the regulation that claims that it cannot be used. OAL points out this discrepancy in the February 8 Decision of Disapproval and provides the Department with options to address it, “To resolve this issue, the Department needs to either [emphasis added] modify the text of section 597.3(b)(1)(B) in a 15-day notice of modified text so that section 597.3(b)(1)(B) is consistent with the stated effect of the regulations, i.e., no exemption to water measurement devices may be based on cost effectiveness, or provide a different legal analysis in the rulemaking file that supports the notion that cost effectiveness is allowed as a consideration is allowed as a condition to the water measurement requirement of Water Code section 10608.48(b)(1) [emphasis added]. This would not be without precedent.

The Department has stated several times, including references from its legal counsel, that it cannot include cost-effectiveness because the legislation was silent. However, we have also been engaged with the Department in the development of the methodology for quantifying the efficiency of agricultural water use (required by Water Code Section 10608.64. In this venue, the Department has, using its own discretion, included “performance indicators” such as economic production that do not quantify the efficiency of agricultural water and further, there was no language in Section 10608.64 regarding economic production.

Essentially, the Department has undertaken inconsistent and opposite approaches to the interpretation of legislation and the discretion that the Department may or may not have. This inconsistent interpretation is an abuse of the Department’s authority and should be addressed by the Water Commission and OAL.

- As mentioned above, the revised regulation will have a significant impact on the cost of this regulation and its burden on the regulated entities. A new cost estimate will need to be developed for this regulation and the Department will need to justify why the regulation is not subject to section 11340.1 of the Government Code, which states that

“agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process [emphasis added].”

In the Decision of Disapproval of Regulatory Action issued on February 8, 2012, OAL states that “All APA issues must be resolved prior to OAL’s approval [of the measurement regulation].” As we have outlined in this comment letter as well as in prior correspondence, we feel that the Department has fallen considerably short of the required changes outlined in the February 8 Decision of Disapproval. If the Department and the California Water Commission approve submitting this flawed regulation to OAL, we fully expect that OAL will once again disapprove of the regulation. It is our hope that when this occurs, the Department will finally work with the regulated community to craft a regulation that is clear, meets the “necessity” standard of Government Code section 11349.1, and can be implemented in a manner that is not unnecessarily burdensome to those subject to the regulation.

Sincerely,



Todd Manley
Northern California Water Association



Tim O'Halloran
Yolo County Flood Control &
Water Conservation District



Thad Bettner
Glenn-Colusa Irrigation District



Lewis Bair
Reclamation District 108



Ted Trimble
Western Canal Water District



Eric Miller
Richvale Irrigation District