



Sent via Email

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December 17, 2015

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: Comment Letter – Emergency Regulation for Measuring and Reporting the Diversion of Water

Dear Ms. Townsend:

The California Farm Bureau Federation (Farm Bureau) and the Wine Institute submit these comments for your review. Farm Bureau is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 53,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources. Wine Institute serves as the voice for the California wine Industry, representing over 1,000 California wineries and affiliated members. Our mission is to initiate and advocate public policy that enhances the ability to responsibly produce, promote and enjoy wine.

This letter was written jointly with Nick Bonsignore and Paula Whealen of Wagner and Bonsignore Consulting Civil Engineers, and Peter Kiel of Ellison, Schneider & Harris. Farm

Bureau appreciates the opportunity to comment on the Proposed Emergency Regulation for Measuring and Monitoring (regulation).

While the need to comply with the provisions of Senate Bill 88 is clear, the regulation adopted by the State Water Resources Control Board (SWRCB) should strive to make the process as practical, efficient, and understandable as possible. Much has changed for water users in California over the past few years and while most people are trying to comply, the number and significance of changes make full understanding and compliance very difficult, particularly for small farming operations and homeowners who may not have sufficient time or resources to engage fully in the process. Please consider the practical implications of the requested changes along with the pressures those changes put on smaller operations.

General Comments:

Technical Capacity – There are a limited number of individuals with the qualifications and skills necessary to assist the thousands of affected water users in complying with this regulation. Nearly all of these individuals are already very busy, particularly given the numerous recent changes, and it is likely that the availability of qualified expertise will constrain the ability of water users to comply with the regulations. For this reason the time frames for installation and certification of devices should be extended.

Clarification – The impact of the regulations on water users must be conveyed in a format more understandable to the typical layperson. The SWRCB estimates there will be approximately 12,000 water users impacted by these regulations, nearly all of whom are more focused on the holidays than the technical language of the regulation. While accurate technical language is necessary, such language should be accompanied by plain language summaries explaining the practical implications of the regulation and how water users will be expected to comply. For example, a person should be able to look at a single chart and see what has changed for them based on the type and size of their diversion. There should also be a summary of which forms a water user must fill out under what circumstances, accompanied by copies of the forms so it is easier to understand what will be expected. Additionally, the distinction between annual supplemental statements required under Water Code §5104 and the occurrence of additional reporting under section 917 of the regulation should be clarified – currently it is somewhat difficult to understand the different changes. This clarification should be provided prior to the SWRCB meeting when the regulations will be adopted so that water users can have a working knowledge of the regulations and will be better prepared to provide the SWRCB with field information to help improve implementation of the regulations.

Measurement by Method – The regulations do not appear to adequately allow for methods of measurement as identified in Water Code § 1840(a)(1)(B). Instead of providing for measurement by device or method, and then providing for a means of alternative compliance, the regulations focus on requiring devices and describe “methods” as a distinct alternative approach with more expansive requirements. For example, Water Code § 1840(a)(1)(B)(i) identifies electrical records dedicated to a pump and recent pump test as an appropriate method of

measurement, but this is not clear in the regulation that this is an acceptable means of measurement. This and other methods are effective and efficient options that should clearly be identified as acceptable methods of measurement. Additionally, the information required for certification of a “method” should be streamlined and stripped of information unrelated to the adequacy of method vis-à-vis Water Code section 1840(b) (e.g., “public trust” evaluation, “enterprise income” data, informational order-level detail, etc.). Requirements for a “method” should not bias the regulations in the direction of a “device,” or otherwise result in a *de facto* device-oriented standard (e.g., mandatory data submission is a downloadable spreadsheet format, etc.).

Season of Diversion – The regulation should clarify that the reporting requirement does not apply if a person is not actively diverting. For water users whose season of diversion is not during the period of time when there is a shortage, it is not necessary to report. If such reporting is required, there should be a simple means of compliance that does not involve, for example, hourly reporting of zeros.

Appeals – Additional provisions should be added providing for the ability to appeal decisions of the Deputy Director, including requests for measurement methods, requests for alternative compliance, and requests for additional time under sections 934, 935, and 936. The ability to appeal decisions should be similar to that authorizing appeal of an order on an increase in the measurement threshold, which is defined in section 932(d)(6) as being “subject to reconsideration under section 1122, et seq.” (Administrative appeal of a board decision or order.)

Editorial comments – References to “Xcel” should be changed to “Excel”. In Section 920(b) sentence 3 – add the word “form” after “statement of change”. Section 933(b)(2)(B) – are HUC 10 water basins available to the public on the SWRCB database?

Forfeiture Concerns – One of the key concerns water users have is that the new reporting requirements will increase the risk of forfeiture of their water rights when they implement conservation practices or use in lieu water. To alleviate this concern the regulations should clarify and streamline how water users should report conservation and in lieu water use to avoid risk of unintentional forfeiture. As with the comment above regarding the need for clarity, this issue in particular needs straightforward, plain language summaries so water users can understand how reporting under this regulation fits in with reporting conservation or in lieu use.

Specific Comments:

Section 917:

- ***Decision Maker*** – The determination to require additional reporting should be made by the Executive Director to ensure the appropriate legal and policy review is conducted.
- ***Additional Reporting Trigger*** – The trigger for additional reporting, described in the regulation as “when flows or projected available supplies in a watershed or subwatershed

are sufficient to support some but not all projected diversion demand,” is too broad. As a practical matter, most watersheds experience times when water is unavailable to certain users, but this is generally dealt with by the watermaster, compliance with permit/license terms, custom, or the simple fact there is no water to divert. These typical situations differ significantly from the conditions of the past two years where the SWRCB issued curtailment notices. Consequently, it is not appropriate for the additional reporting trigger to be anytime projected demand is not to be met. Additional reporting should only be required during a declared drought emergency.

- **Water Availability** – Language in the draft regulation concerning the use of water measurement information in determinations of water availability exceed the scope of Senate Bill 88 and the emergency regulations, have been improperly noticed as part of the scope of the current action, include no adequate due process protections, and are needless and potentially in conflict with existing section 879 of the board’s regulations.
- **Monitoring vs. Reporting** – The requirement to report water diversion on a more frequent schedule than annually may be significantly more onerous than the requirement to install devices that are capable of recording diversion data. For example, while it may be feasible to install a device capable of recording hourly measurement (e.g. pressure transducer data logger), arranging for this information to be electronically reported on a daily or more frequent basis would require a significantly more advanced system. This would require essentially real-time monitoring that is not necessary to achieve appropriate management and would be extremely costly to install and maintain.
- **Frequency of Reporting** – The potential frequency of reporting requirements should be clarified. The reporting requirement in 917 indicates that the reporting frequency “shall not exceed the frequency of recording required under section 933, subdivision (b)(1).” Section 933, subdivision (b)(1) then provides that recording for large diversions shall be “on an hourly or more frequent basis” (emphasis added). It should be clarified that the reporting will not be required on a “more frequent basis” even if the data recording is provided more frequently.
- **Penalties** – Because this is a new and significantly different requirement, and because there is no truly reliable way for the SWRCB to reach and explain to all water users the implications of the regulations, the potential fine should be changed. For example, instead of up to \$500 per day, the fine should be limited to \$500 for failing to report, and then once notified of noncompliance by the SWRCB, fines would then accrue on a daily basis.

Section 924

- There should be no additional reporting requirements for registrations and certificates. The amount of water utilized by registrations, particularly for stockponds, is not sufficient to warrant the additional reporting requirements.

- For many stockponds, the maximum rate of diversion would be very difficult to identify. As a practical matter, this occurs during the largest rainfall event of the year (unless the pond is already full) and would require significant investment to measure, while providing little benefit.

Section 931

- In subdivision (g), and elsewhere in the regulation (including Section 932(b)), it is not clear whether the term “diversion” applies to the actual amount diverted or the face value of the right. Use and application of the term “diversion” in section 931 (g) should be coordinated with other parts of the regulation, particularly sections 932 and 933.

Section 932

- Subsections (a) and (b) would be more consistent and clear with the following edits to Subsection (a):

(a) Except as provided in subdivision (d), ~~the following~~ water right holders shall install and maintain a measuring device or employ a measurement method capable of measuring the rate of diversion, rate of collection to storage, the rate of withdrawal or release from storage, and the total volume of water diverted or collected to storage for the following:

(1) A diversion under a permit or license authorizing a diversion greater than 10 acre-feet of water per year. Any person authorized to divert greater than 10 acre-feet of water per year under a permit or license.

(2) A diversion that is required under Water Code Part 5.1 to be reported in a Statement of Water Diversions that has been greater than 10 acre-feet of water per year. Any person who has previously diverted or intends to divert greater than 10 acre-feet of water per year and is required under Water Code Part 5.1 to file a Statement of Water Diversions and Use.

(3) A diversion under a registration authorizing a diversion greater than 10 acre-feet of water per year. Any person authorized to divert greater than 10 acre-feet of water per year or to have a storage facility with a capacity greater than 10 acre-feet under a registration.

- As shown in the proposed edit above, subsection (a)(3) should be amended to delete “or to have a storage facility with a capacity greater than 10 acre-feet” to parallel the structure of (a)(1) for permits and licenses. Water Code section 1228.1 limits diversions under livestock stockpond and small domestic registrations to 10 acre-feet or less per year; however, there are livestock stockpond and small domestic registrations for storage facilities with a volume greater than 10 acre-feet, but with maximum diversion limits of 10 acre-feet or less.

- Subsection (c): The deadline to install and certify a measuring device on water rights of 1,000 acre-feet per year or more should be changed from July 1, 2016 to January 1, 2017. First, in many instances it will likely be unnecessarily disruptive to complete the installation work during the irrigation season when facilities need to be operating. Second, if the work is conducted in a stream channel, there may be permits required that are not readily obtained in such a short time frame and which conditions may prevent work during much of the winter and spring. Third, installation of measuring devices in a reservoir is best accomplished when the reservoir is empty or at least significantly drawn down, which typically occurs in the fall after irrigation season is over. The deadline to install and certify a measuring device on water rights of 1,00 acre-feet per year or more should be changed from January 1, 2017 to July 1, 2017. Section (c) should be updated to include the following edits:

(c) Effective Dates. The deadlines for the installation and certification of measuring devices or method shall be:

(1) On or before **January 1, 2017** ~~July 1, 2016~~, for a water right holder with a right or a claimed right to divert 1000 acre-feet or more of water per year.

(2) On or before ~~January 1~~ **July 1**, 2017, for a water right holder with a right or a claimed right to divert 100 acre-feet of water or more per year, **but less than 1000 acre-feet of water per year.**

(3) On or before January 1, 2018, for a water right holder with a right or a claimed right to divert greater than 10 acre-feet of water per year, **but less than 100 acre-feet of water per year.**

Section 933

- **Data Retention** (b)(3) – A 10-year document retention period is unreasonably long. Typical document retention periods for regulatory permits and tax records are two or three years, and do not exceed five years. It is unclear why the raw device data must be retained for such a long period given the requirements to report synthesized data annually or more frequently to the Board.
- **Accuracy** (e) – While accuracy is important, before creating a “smog certificate” process for water diversion, the SWRCB should do a cost benefit analysis to identify how frequently, if at all, it is actually necessary to recertify the accuracy of certain devices. Additionally, there should be a simple process to certify existing staff gauges and similar measurement devices.
- **Certification Date** (e)(1) – This section unfairly burdens diverters who have already installed measuring devices (before January 1, 2016). These diverters must submit certification of accuracy with the next "water use report" which would be by June 30, 2016. Alternatively, Sections 932(c)(2) and (3), and (1), if the SWRCB agrees to change it, allow diverters without devices already in place to have until 2017 or 2018 to install and certify devices. A diverter that already has a device in place should not be required to submit certification sooner than a diverter that that does not have a device.

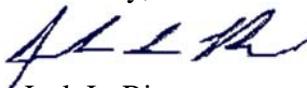
- **Accessibility** (j) – Devices should be installed in a manner that is “reasonably” accessible, not “readily” accessible. Many points of diversion are not “readily” accessible due to their remote location, so it may be impossible to comply with a regulatory requirement for the device to be “readily” accessible, to the extent that term is commonly understood. Beyond these practical considerations, there are significant, unaddressed legal difficulties associated with the regulation’s assumed authority for access to land without adequate notice or the landowner’s consent.

Section 934

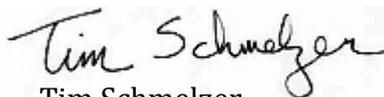
- The statutory language clearly provides that both devices and methods are appropriate, whereas the language of section 934 imposes additional requirements unrelated to the accuracy of the method. For example, (a)(1)(E), (G) and (H)) are not relevant to the accuracy of a method to measure diversion and more appropriately belong in the section providing for alternative compliance.
- Section 934(b)(1) requires data “recording” at the same frequency as measuring devices set forth in Section 933(b). An accepted measurement ‘method’ should have some flexibility in the frequency of determining the amount of water diverted, rather than being held to the same standards as those employing one of the acceptable measuring devices.

Thank you for considering these comments. If you have any questions please feel free to contact Jack Rice at (916) 561-5667 or jrice@cfbf.com.

Sincerely,



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California Farm Bureau Federation



Tim Schmelzer
Wine Institute