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State Water Resources Control Board
c/o Clerk of the Board
1001 I Street
Sacramento, CA 95814
Via Electronic Mail: commentletters@waterboards.ca.gov



Re: 12/17/15 Board Meeting Item 11 – Public Workshop on draft emergency regulations to implement the measuring and reporting requirements for diversion of water pursuant to Senate Bill 88

Dear Board Members:

Thank you for the opportunity to comment on the proposed emergency regulations to implement measurement and reporting requirements for diversion of water. Spaletta Law represents more than 40 individual landowners and companies who divert water pursuant to a variety of different types of water rights. Our clients are located throughout the state and will be significantly impacted by the proposed regulations.

These comments focus on the following:

1. Proposed Section 917 goes far beyond measurement and reporting and attempts to create a regulatory methodology for the Board staff to use to determine water availability for curtailment purposes. This is an improper subject for these regulations and was not authorized by SB 88.
2. Draft Sections 925 and 929 should provide that the permittees and licensees' annual progress reports are due, at the earliest, within six months of the close of the 12-month reporting period. Requiring that these reports be submitted within three months is too early, and staggering reporting deadlines for permits and licenses and statements will create confusion.
3. The proposed measurement threshold in Section 932 should be increased from 10 acre-feet to 500 acre-feet to ensure the intent of the regulation, to provide more time for small diverters, is met.
4. Draft Section 933 cannot, without a warrant, obligate all water right holders to make their measurement devices available for inspection by Board staff.

5. Proposed Section 934 should be amended to reduce the type of information that water users must submit to request approval for a measurement method. The current requirements are overly burdensome and inconsistent with SB 88. Section 934 should also be amended to remove the requirement that measurement methods “be capable of recording the date, time, and total amount of water diverted . . . in a format retrievable and viewable using Microsoft Xcel, Microsoft Access, or other software program authorized by the deputy director.” This obligation effectively requires measurement methods to be measurement devices. Finally, Section 934 should be amended to clarify that individual water users need not be part of a group in order to request approval for a measurement method.

Enclosed with this letter, I have provided a redlined version of the proposed text of Sections 917, 925, 929, 932, 933, and 934 that incorporates our comments.

A. Proposed Section 917

- 1. Section 917 should not be used as a back-door method to create a regulatory standard for water availability determinations that has no basis in law or fact and has not been properly vetted or noticed for public comment**

Proposed Section 917 allows the Deputy Director to require water diverters to submit monthly or more frequent reports “[w]hen flows or projected available supplies in a watershed or subwatershed are sufficient to support some but not all projected diversion demand.” It then describes what water right diversion demand and water availability projections may be based on:

Water right diversion demand projections . . . may be based on reported diversion and use data, including but not limited to data submitted with Progress Reports by Permittees, Reports of Licensees, Reports of Registration and Certificate Holders, Supplemental Statements of Water Diversion and Use, and reports filed by watermasters pursuant to Water Code section 5101, subdivisions (d) and (e).

§ 933(b).

Water availability projections may be based on:

- (1) Projected full natural flow data supplied by the Department of Water Resources or its successor;
- (2) Projections from the National Weather Service, California Nevada River Forecast Center, and similar sources;
- (3) Stream gage data; and
- (4) Other data the Deputy Director for the Division of Water Rights determines is appropriate, given data availability, data reliability, and staff resources.

§ 933(c).

We are very concerned that this regulation is a back-door method to create a regulatory standard for water availability determinations that has no basis in law or fact and has not been properly vetted, let alone noticed, for public comment. ***We urge the Board not to adopt Section 917 as proposed. It is not necessary to the regulatory scheme related to SB 88 and will create significant adverse consequences that can and should be avoided.***

Proposed Section 917(b)-(c) seeks to confirm the water availability analysis method used by Board staff in 2015 for curtailments. The validity of this method is questionable and is the subject of challenge in two pending enforcement actions involving West Side Irrigation District and Byron Bethany Irrigation District. Should the Board desire to adopt a regulation related to the determination of water availability, it should, at a minimum, wait until the conclusion of those proceedings, and any related litigation. Moreover, any regulatory effort to develop a methodology for determining water availability should be carefully and fully vetted with stakeholders in more than one public workshop or hearing prior to adoption. This issue is simply too important to be buried in this measurement and reporting emergency regulation.

2. Draft Section 917 is unnecessary and redundant considering Section 879 of the Code of Regulations

Draft Section 917 is also unnecessary and redundant considering Section 879 of the Code of Regulations.

Section 897(c)(2), which the Board readopted earlier this month, allows the Deputy Director, under certain circumstances, to “issue an order under this article requiring a water right holder, diverter or user to provide additional information related to a diversion or use described in (c)(1), including the claim of right; property patent date; the date of initial appropriation; diversions made or anticipated during the current drought year; basis of right and amount of a water transfer not subject to approval of the Board or Department of Water Resources; or any other information relevant to authenticating the right or forecasting use and supplies in the current drought year.”

The four circumstances under which the Deputy Director can issue an information order are laid out in Section 897(c)(1) as follows:

- (A) Upon receipt of a complaint that staff determines to merit investigation alleging interference with a water right by a water right holder, diverter or user;
- (B) Where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment, and no Statement of Water Diversion and Use for such right was on file with the Board as of January 17, 2014;
- (C) Where a water right holder, diverter or user responds to an investigation, curtailment order or any notice of curtailment by asserting a right to divert under a contract or water

transfer for which the Board has not approved a change petition and for which no record had been previously filed with the Board; or

(D) Upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversions of water by any water right holder, diverter or user.

The Deputy Director has relied on Section 879 to require water users to submit, among other things, monthly water-use reports.¹

Draft Section 917 now proposes to give the Deputy Director further powers to require water users to submit water-use reports. The proposal is unnecessary given the Deputy Director's existing powers—and an agency cannot adopt a regulation, particularly an emergency regulation, unless it is reasonably necessary. The Board has authority to adopt emergency regulations only in an “emergency,” meaning “a situation that calls for immediate action to avoid serious harm to the public peace, health, safety, or general welfare.”²

No emergency exists that justifies the Board's adoption of Section 917, because there is already an emergency regulation in place that allows the Board to seek more frequent reporting.

3. Draft Section 917 should at the least be modified to clarify that the Deputy Director and Executive Director's water-availability determinations may not be used to establish that water is unavailable at any specific diversion point

At a minimum, proposed Section 917 should be modified to clarify that the Deputy Director and Executive Director's water-availability determinations are for the sole purpose of requiring more frequent reporting and not to affirmatively determine water availability for diversion under any particular priority of right at any particular location.

The Board's potential reliance on water-availability determinations made in Section 917 to curtail water users would perpetuate the use of faulty data to make curtailment decisions that are economically devastating to water users. Section 917 allow Board staff to make water-availability determinations based on data easily accessible to Board staff, but not representative of what is actually available in a given watercourse.

The Board's use of DWR full natural flow (FNF) data in its water-supply determinations is particularly problematic for the Delta. Full natural flow is intended to measure the natural water production of a river basin, unaltered by upstream diversions, storage, or by export or import of water to or from other watersheds. One significant flaw, and there are several, in using FNF projections to estimate water available in the Delta is that it fails to take into account the varied sources of water available in tidally influenced Delta channels. Available water in these channels includes inflows from tributaries to the north and east, accretions from groundwater, water that is

¹ Order WR 2015-0002-DWR.

² Gov. Code 11342.545.

carried into the Delta from the west by tidal action, salvaged or developed drainage water, irrigation return flow from each of these sources - and most importantly - water from all of these sources that entered the Delta several months prior and has been moving back and forth in the Delta channels with the tide. DWR's computed FNF flows do not account for this reality and have essentially no direct relationship to the amount of water available in the Delta at any given time.

Finally, the Board's potential reliance on water-availability determinations made in Section 917 to restrict diverters' ability to exercise their water rights would violate basic due process protections. The due process clauses of the state and federal constitutions impose constraints on governmental decisions that deprive individuals of property, including water rights. The fundamental requirement of these clauses is that the government must provide individuals with the opportunity to be heard "at a meaningful time and in a meaningful manner" before taking their property.³ Application of this requirement here means that the Board and its staff must, before concluding that no water is available under a diverter's water right, provide that diverter notice and the opportunity to be heard on the evidence the Board is relying on for its water-availability determinations. Section 917, however, does not allow the public to participate in the Deputy Director's water-availability analyses. Instead, these decisions are made behind closed doors based on any evidence the Deputy Director sees fit. The potential that the Board or its staff will nonetheless rely on these closed-door determinations to define whether water is available at a given point of diversion raises a significant due-process issue.

B. Proposed Sections 925 and 929

1. Proposed language

Proposed Sections 925 and 929 expedite the due date for permittees and licensees' annual progress reports. Under current regulations, reporting is due in July of each year. The proposed regulations require reporting "within three months of the close of the twelve month reporting period," or March.

2. Permittee and licensee reports should be due, at the earliest, six months after the close of the 12-month reporting period

Permittee and licensee reports should be due, at the earliest, six months after the close of the 12-month reporting period (i.e., June), consistent with the reporting deadline for water-right statement holders. As the Board recognizes, reporting data might not be finalized by March. The Board's proposed fix for this problem is to have permittees and licensees provide provisional data in March and final reporting in June; but requiring multiple reporting is burdensome and without adequate justification. It will also create confusion and potential errors with reporting if these reports are not completed at the same time as statement reports.

³ See, e.g., *Mathews v. Eldridge* (1976) 424 U.S. 319, 333.

C. Proposed Section 932

1. Proposed language

Proposed Section 932(a) requires every water right holder who is authorized to divert more than 10 acre-feet per year under a permit or license, who has diverted or plans to divert more than 10 acre-feet per year and is required to file a statement of water diversion and use, or who is 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, to “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.”

Section 932(d) adds that the Executive Director may, beginning January 1, 2017, “increase the 10 acre-feet reporting threshold of subdivision (a) in a watershed or subwatershed incrementally to or above 25 acre-feet” after considering among other things “the total monthly quantities diverted in relation to the monthly quantity of water available within the watershed or subwatershed.”

2. The measurement threshold of Section 932 must be increased to at least 500 acre-feet

The measurement threshold of Section 932 must be increased to at least 500 acre-feet. Although SB 88 also generally requires water users who divert 10 acre-feet or more of water per year to install and maintain a measurement device or employ an acceptable measurement method, it also recognizes that this requirement may not be feasible or reasonable for all such water users. Section 1840(b)(1) of SB 88 accordingly provides that the Board may modify this monitoring requirement on finding either that (1) strict compliance is infeasible, is unreasonably expensive, would unreasonably affect public trust uses, or would result in the waste or unreasonable use of water, or (2) the need for monitoring and reporting is adequately addressed by other conditions of the water right.⁴

Strict compliance with Section 1840 is infeasible and unreasonably expensive for individual water users with small operations. A landowner who farms 150 acres likely diverts 300-500 acre-feet of water. Increasing the measurement threshold to 500 af is necessary to avoid imposing substantial costs on thousands of individual water users immediately who are unlikely to be able to comply with the regulation otherwise. This amendment would also focus measurement on the majority of water diverted, which will provide useful information in the near term.

⁴ See also Water Code Section 1840(b)(2).

Finally, in what appears to be a typographical error, Section 932(d) alternates between referring to a “measurement threshold” and a “reporting threshold” in Section 932(a). Section 932(a) sets a measurement threshold, not a reporting threshold. Edits are necessary to avoid confusion.

D. Proposed Section 933

1. Proposed language

Draft Section 933 establishes requirements for measuring devices used to comply with the new monitoring obligations. Subsection (j) and (k) of Section 933 allow Board staff to inspect all water right holders’ properties to determine whether their measuring devices have been installed and meet the Board’s requirements. The Board may penalize water right holders if it determines, at the inspection, that a measurement device fails to satisfy the Board’s regulations.⁵ And it may also penalize water right holders for refusing to allow the inspection.⁶

2. The Board cannot obligate water right holders, and particularly statement holders, to allow the Board to inspect their property without a warrant or permission

The Board cannot obligate all water right holders to allow the Board to inspect their property without a warrant.

The Fourth Amendment of the federal constitution provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” “The basic purpose of this Amendment, as recognized in countless decisions of th[e] United States Supreme] Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”⁷ And it fulfills this purpose, in the administrative context, by generally requiring government agencies to obtain a warrant or permission before conducting administrative searches of property.⁸

Section 933, as drafted, is inconsistent with the requirements of the Fourth Amendment and California law. Section 933 requires neither a warrant nor permission before requiring a water right holder to grant Board staff access to his or her property. And it imposes significant penalties on those water right users who decline to grant access. This requirement is particularly

⁵ See, e.g., Water Code § 1058.5(d).

⁶ See, e.g., Water Code § 1058.5(d).

⁷ *Camara v. Municipal Court of City and County of San Francisco* (1967) 387 U.S. 523, 528.

⁸ *Camara v. Municipal Court of City and County of San Francisco* (1967) 387 U.S. 523, 528, 533-34; see also Code of Civ. Proc. § 1822.50; *Tellis v. Municipal Court, Central Judicial Dist., Marin County* (1970) 5 Cal.App.3d 455, 458 [county ordinance authorizing entry to property by health officer without warrant would be unconstitutional].

problematic for statement holders, whose water rights are generally not subject to the Board's regulation and are not based on any permit or license issued by the Board.⁹

Section 933 must be amended to explain that the Board cannot require an inspection of water user's property without a warrant.

E. Proposed Section 934

1. The Board should clarify that individual water users need not be part of a group in order to request approval for a measurement method under Proposed Section 934

Proposed Section 934 describes measurement methods, other than the use of a measuring device, that water right holders can use to comply with the requirements of Section 932. As currently phrased, Section 934 indicates that a water right holder must be part of a group to request and use a measuring method to comply with Section 932. The Board should clarify that individual water users need not be part of a group in order to request approval for and use a measurement method under Section 934 to comply with Section 932's requirements. Notably, Water Code section 1840(a) permits an individual diverter to use a device or method. The regulation should not be more restrictive than the law.

2. The Board should streamline the process for requesting approval of a measurement method

The current language for Section 934(a) makes a request for approval of a measurement method overly burdensome.

Before using a measurement method to comply with Section 932's requirements, water users must submit a request for approval of measurement method, prepared by a California-registered Professional Engineer, that includes among other things the following unnecessary requirements:

- a. "A detailed description of how installing and maintaining a measuring device at each point of diversion is not feasible, would be unreasonably expensive, would unreasonably affect public trust resources, or would result in the waste or unreasonable use of water." The Board's demand for this information supposes that a water user must install a measuring device unless having one of a few accepted excuses. This requirement has no basis in SB 88's text. SB 88 allows a water user to either install a measuring device or employ an accepted measurement method, and treats both as equally satisfactory means of satisfying new monitoring requirements. The Board deviates from the Legislature's established programming in placing a strong preference on measuring devices.

⁹ *Millview County Water Dist. v. State Water Resources Control Bd.* (2014) 229 Cal.App.4th 879, 893 ["[T]he Board 'does not have jurisdiction to regulate riparian and pre-1914 appropriative rights.'"].

Water Code Section 1840(b)(1)(A) highlights the Board’s overreach. That subsection provides that the Board may modify the requirement that a water user install a measuring device or employ an accepted measurement method if “strict compliance is infeasible, is unreasonably expensive, would unreasonably affect public trust uses, or would result in the waste or unreasonable use of water.” In other words, a water user may not need to employ an accepted measurement method if she can show “strict compliance is infeasible, is unreasonably expensive, would unreasonably affect public trust uses, or would result in the waste or unreasonable use of water.” But the Board’s current draft language turns this on its head—requiring a water user to show one of these quoted circumstances exists to even employ an accepted measurement method. This requirement should be deleted as it is more restrictive than and conflicts with the law.

- b. The water right holder’s “file number, owner name, water right type, priority of diversion, monthly and annual diversion amounts, place of use, purpose of use, and alternative sources of water.” In effect, the Board would have a request for approval effectively serve as an informational order. The request should only need to include the water right file number, owner name, and place of use. The balance of the information is irrelevant for purposes of establishing a measurement method.
- c. An “[e]valuation of public trust needs including minimum in-stream flows and water quality concerns or bypass requirements of any of the water rights involved.” Again, this information has no relationship to a measurement method. It might be relevant information for a water-right application, but it cannot be required for a request for approval of a measurement method.
- d. An “[e]valuation of enterprise income of the water users if claiming installing and maintaining measuring and monitoring devices would be unreasonably expensive.” The Board seems to be requesting income records for any water right holder who asserts that installing a measurement device would be unreasonably expensive. Again, the Board is supposing that a water user must install a measuring device unless having one of a few accepted excuses, such as that installing a measuring device would be unreasonably expensive. This position is wrong. In addition, the requirement that a water user provide her income anytime she claims something is unreasonably expensive is overly intrusive and unnecessary. Water Code section 1840 expressly allows measurement methods, as well as devices, provided they meet the statutory criteria for accuracy.

Section 934 should be amended to delete the above unnecessary and burdensome requirements.

3. The Board’s data recording requirements effectively require a measurement method to be a measurement device

Proposed Section 934(b) requires any measurement method intended to comply with Section 932’s requirements to “be capable of recording the date, time, and total amount of water diverted . . . in a format retrievable and viewable using Microsoft Xcel, Microsoft Access, or other software program authorized by the deputy director.” The Board, in other words, requires acceptable measurement methods to be measurement devices.

If the Legislature wanted Senate Bill 88 to provide that only measurement devices could be used to satisfy new monitoring requirements, it would have done so. But it did not—it allowed the use of either a measurement device or an approved measurement method. And the Board’s regulations must respect the Legislature’s choice to allow water user’s to comply with new monitoring requirements using measurement methods. The term “method” is a very broad term, defined in Merriam-Webster’s online dictionary as “a procedure or process for attaining an object.”¹⁰ A procedure or process, unlike a device, is not something reasonably understood to mean something capable of recording various types of information in a format retrievable and viewable in a variety of software programs. Subsection (b) of Section 934 should be deleted to avoid defining a measurement method as effectively a measurement device.

F. Conclusions

For these reasons, I respectfully request that the Board:

1. Delete Section 917 as unnecessary to address an emergency, or at the least, amend Section 917 to clarify that any water-availability determinations made under this section will not be used to establish that water is unavailable at a specific point of diversion.
2. Amend Sections 925 and 929 to require licensee and permittee annual reports no earlier than June.
3. Amend Section 932(a) to increase the measurement threshold to at least 500 acre-feet. The current draft requirement that diverters of 10 acre-feet install measuring devices or employ measuring methods to measure the rate of diversion is infeasible and unreasonably expensive for Delta users.
4. Amend Section 933 to explain that the Board cannot require an inspection of water user’s property without a warrant.

¹⁰ See Merriam-Webster’s online dictionary, first definition, at <http://beta.merriam-webster.com/dictionary/method>.

5. Amend Section 934 to clarify that individual water users need not be part of a group in order to request approval for a measurement method.
6. Amend Section 934 to reduce the type of information that water users must submit to request approval for a measurement method—namely, by deleting Section 934(a)(1)(E)(G)(H) and most of Section 934(a)(1)(F).
7. Delete Section 934(b) and its requirement that measurement methods “be capable of recording the date, time, and total amount of water diverted . . . in a format retrievable and viewable using Microsoft Xcel, Microsoft Access, or other software program authorized by the deputy director.”

Thank you for the opportunity to present these comments. For your convenience, I am including a proposed redline of the regulations.

Very truly yours,



JENNIFER L. SPALETTA

Attorney at Law

Enclosure

§917. Reporting—Insufficient Flows to Support All Diversions

~~When flows or projected available supplies in a watershed or subwatershed are sufficient to support some but not all projected diversion demand, the Deputy Director for the Division of Water Rights may require water diverters located within the watershed or subwatershed to electronically submit monthly or more frequent reports of water diversion.~~

~~(a) Reports of water diversion shall be submitted in accordance with a schedule approved by the Deputy Director for the Division of Water Rights. The schedule may require monthly, daily, or more frequent reporting. In determining the frequency of reporting, the Deputy Director for the Division of Water Rights shall not exceed the frequency of recording required under section 933, subdivision (b)(1), of this title.~~

~~(b) Water right diversion demand projections made under this section may be based on reported diversion and use data, including but not limited to data submitted with Progress Reports by Permittees, Reports of Licensees, Reports of Registration and Certificate Holders, Supplemental Statements of Water Diversion and Use, and reports filed by watermasters pursuant to Water Code section 5101, subdivisions (d) and (e).~~

~~(c) Water availability projections may be based on:~~

~~(1) Projected full natural flow data supplied by the Department of Water Resources or its successor;~~

~~(2) Projections from the National Weather Service, California Nevada River Forecast Center, and similar sources;~~

~~(3) Stream gage data; and~~

~~(4) Other data the Deputy Director for the Division of Water Rights determines is appropriate, given data availability, data reliability, and staff resources.~~

~~(d) The failure to electronically submit diversion reports requested in accordance with the applicable schedule approved by the Deputy Director for the Division of Water Rights is a violation subject to civil liability of up to \$500 per day pursuant to Water Code section 1846.~~

Alternative proposal for §917:

§917. Reporting – Insufficient Flows to Support All Diversions

When ~~flows or~~ projected available supplies in a watershed or subwatershed are sufficient to support some but not all projected diversion demand, the Deputy Director for the Division of Water Rights may require water diverters located within the watershed or subwatershed to electronically submit monthly or more frequent reports of water diversion.

(a) Reports of water diversion shall be submitted in accordance with a schedule approved by the Deputy Director for the Division of Water Rights. The schedule may require monthly, daily, or more frequent reporting. In determining the frequency of reporting, the Deputy Director for the Division of Water Rights shall not exceed the frequency of recording required under section 933, subdivision (b)(1), of this title.

(b) Water supply and demand projections made under this section shall ~~may~~ be based on ~~the best available information and analysis reported diversion and use data, including but not limited to data submitted with Progress Reports by Permittees, Reports of Licensees, Reports of Registration and Certificate Holders, Supplemental Statements of Water Diversion and Use, and reports filed by watermasters pursuant to Water Code section 5101, subdivisions (d) and (e).~~ The Deputy Director’s determinations under this section relating to diversion demand projections and water availability projections may be used

only for the purpose of determining whether water diverters within a given watershed or subwatershed should be required to submit monthly or more frequent reports of water diversion, and for no other purpose.

(c) Water availability projections may be based on:

(1) Projected full natural flow data supplied by the Department of Water Resources or its successor;

(2) Projections from the National Weather Service, California Nevada River Forecast Center, and similar sources;

(3) Stream gage data; and

(4) Other data the Deputy Director for the Division of Water Rights determines is appropriate, given data availability, data reliability, and staff resources.

-(d) The failure to electronically submit diversion reports requested in accordance with the applicable schedule approved by the Deputy Director for the Division of Water Rights is a violation subject to civil liability of up to \$500 per day pursuant to Water Code section 1846.

§ 925. Progress Reports by Permittee.

(a) As specified in section 847 of this title, water right permit holders are required to file annual progress reports. Section 846 of this title provides that permittees may also be required to submit a written statement of the quantities of water beneficially used. Annual reports required under this section are in addition to any specific reporting requirements in a water right permit.

(b) Annual progress reports by permittee shall be filed within three-six months of the close of the twelve month reporting period no later than July of the next year succeeding the year of diversion on forms available at the board's website. Provisional data and information may be used in the progress report if final data is not available by the reporting deadline. If provisional streamflow data are used in preparing the progress report, an amended report based on final data shall be filed within six months of the close of the twelve month reporting period. Any reports not timely amended shall be deemed final. A failure to file a progress report is a violation of permit terms.

(c) The annual reports shall include the following information:

(1) A statement affirming compliance or non-compliance with permit terms and conditions;

(2) The construction status of the permitted project and status of current water use;

(3) The purpose(s) for which water is diverted and used. Use information to be provided includes:

(A) irrigation, including crop type and acreage;

(B) frost protection, including acres covered;

(C) heat control, including acres covered;

(D) industrial, including type of activity;

(E) stock watering, including number and type of animals;

(F) municipal, including approximate population served, and seven digit public water system number or other identifier;

(G) domestic, including number of persons served, lawn or garden area, etc., and seven digit public water system number or other identifier, if applicable;

(H) power generation, including installed capacity in kilowatts, megawatts or horsepower;

- (I) recreational, including boating, fishing or other water sports;
- (J) additional uses not named above, including environmental use;-
- (4) The amount of water taken from each point of diversion in each month (or shorter timeframe if otherwise required) from the source, including amount directly diverted and amount collected to storage, and the total annual amount of water diverted. Each month must contain an entry. If no diversion occurred in a given month, a “0” should be entered;
- (5) The maximum rate of diversion achieved from each point of diversion at any time during each month (or shorter timeframe if otherwise required) of the year, if available;
- (6) For permits that authorize collection of water to storage, the annual report shall also include the measurement data required to be collected in section 933 of this chapter.
- (d) If a substitute or alternative water supply, such as groundwater, contract water, or recycled water, is being used in lieu of surface water that is required to be reported under this section ~~report~~, the report should indicate the source and amount of substitute or alternative water used and the amount of surface water offset on a monthly basis.
- (e) If ~~the use of an alternative supply of water or~~ any water conservation efforts have resulted in a cessation or reduction in use, the report should include a description of the conservation efforts employed and indicate the extent and monthly amount of the reduction in water use due to these water conservation efforts.

§ 929. Reports of Licensee.

- (a) As specified in section 847 of this title, water rights license holders are required to file reports when requested by the board. Annual reports required under this section are in addition to any specific reporting requirements in a water right license.
- (b) Reports of licensee shall be filed annually within ~~three-six~~ months of the close of the twelve month reporting period and not later than July of the next year succeeding the year of diversion on forms available at the board's website. ~~Provisional data and information may be used in the report of licensee if final data is not available by the reporting deadline. If provisional streamflow data is used in preparing the report of licensee, an amended report based on final streamflow data shall be filed within six months of the close of the twelve month reporting period. Any reports not timely amended shall be deemed final.~~ A failure to file a licensee report is a violation of license terms.
- (c) The annual reports shall include the following information:
 - (1) A statement affirming compliance with license terms and conditions;
 - (2) The amount of water diverted;
 - (3) The purpose(s) for which water is diverted and used. Use information to be provided includes:
 - (A) irrigation, including crop type and acreage;
 - (B) frost protection, including acres covered;
 - (C) heat control, including acres covered;
 - (D) industrial, including type of activity;
 - (E) stock watering, including number and type of animals;
 - (F) municipal, including approximate population served, and seven digit public water system number or other identifier;
 - (G) domestic, including number of persons served, lawn or garden area, etc., and seven digit public water system number or other identifier, if applicable;

(H) power generation, including installed capacity in kilowatts, megawatts or horsepower;

(I) recreational, including boating, fishing or other water sports;

(J) additional uses not named above, including environmental use;

(4) The amount of water taken from the source from each point of diversion in each month (or shorter timeframe if otherwise required), including direct diversion amount and amount collected to storage, and the total annual amount of water diverted. Each month must contain an entry. If no diversion occurred in a given month, a “0” should be entered.

(5) The maximum rate of diversion achieved from each point of diversion at any time during each month (or shorter timeframe if otherwise required) of the year, if available;

(6) For licenses that authorize collection of water to storage, the annual report shall also include the measurement data required to be collected in section 933 of this chapter.

(d) If a substitute or alternative water supply, such as groundwater, contract water, or recycled water, is being used in lieu of surface water that is required to be reported under this report, the report should indicate the source and amount of substitute or alternative water used and the amount of surface water offset on a monthly basis.

(e) If ~~the use of an alternative supply of water or any~~ water conservation efforts have resulted in a cessation or reduction in use, the report should include a description of the conservation efforts employed and indicate the extent and monthly amount of the reduction in water use due to these water conservation efforts.

§932 Applicability.

(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:

(1) Any person authorized to divert greater than ~~±~~500 acre-feet of water per year under a permit or license.

(2) Any person who has previously diverted or intends to divert greater than ~~50±~~0 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) Any person authorized to divert greater than ~~50±~~0 acre-feet of water per year or to have a storage facility with a capacity greater than ~~±~~500 acre-feet under a registration.

(b) Determination of Diversion Threshold for Requiring Measurement – the determination of whether a diversion meets the threshold for required measurement (stated in subsection (a) of this section or as adopted in accordance with subsection (d) of this section) shall be made by the deputy director. When making such a determination, the deputy director shall consider:

(1) Multiple points of diversion for a water right used by the same person or serving the same place and purpose of use.

(2) Multiple water rights with shared point or points of diversion.

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

(1) On or before July 1, 2016, for a water right holder with a right or a claimed right to divert ~~2±~~000 acre-feet of water per year or more.

(2) On or before January 1, 2017, for a water right holder with a right or a claimed right to divert ~~10~~000 acre-feet of water per year or more.

(3) On or before January 1, 2018, for a water right holder with a right or a claimed right to divert greater than ~~1500~~ acre-feet of water per year.

(d) Increasing the Measurement Threshold

(1) Beginning January 1, 2017, [t]he executive director may issue orders to increase the ~~5010~~ acre-feet ~~reporting-measurement~~ threshold of subdivision (a) in a watershed or subwatershed incrementally ~~to or above 25 acre-feet~~. The executive director may authorize an increased ~~reporting-measurement~~ threshold after:

(A) Considering the total monthly quantities diverted in relation to the monthly quantity of water available within the watershed or subwatershed; the requirements of any policy, decision or order of the board or a court; and the need for diversion and bypass information to evaluate impacts to public trust resources; and

(B) Reviewing any relevant information submitted by affected water right holders or other interested parties regarding a proposed increase in reporting threshold; and

(C) Determining the benefits of the additional reporting information at a specific reporting threshold are substantially outweighed by the cost of installing measuring devices or employing methods for measurement.

(D) The executive director shall not increase the measurement threshold in a watershed or subwatershed above those established in any other regulation, policy, decision, order or other legal requirement adopted by the board, a Regional Water Quality Control Board, or a court, unless the change is authorized by previous requirements.

(3) The executive director may review each proposal to increase the ~~reporting measurement~~ threshold on a case-by-case basis.

(4) The executive director may authorize an increased ~~reporting-measurement~~ threshold for a period not to exceed five years. If changing conditions warrant, the executive director may modify or cancel any such authorization.

(5) The executive director shall maintain a list of ~~reporting-measurement~~ thresholds for watersheds or subwatersheds greater than ~~5010~~ acre-feet.

(6) A decision or order issued under this section by the executive director is subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the Water Code.

(e) Other Measurement and Monitoring Requirements.

(1) Any person with a water right identified in or subject to a statute, order, policy, regulation, decision, judgment or probationary designation of the board, a Regional Water Quality Control Board, or a court is responsible for meeting the terms and conditions of the statute, order, policy, regulation, decision or judgment and the requirements of this Chapter. If there is any conflict or inconsistency between the measurement and monitoring requirements subject to the statute, order, policy, regulation, decision, judgment or probationary designation and the requirements of this Chapter, the more stringent requirement or requirements shall control in each instance.

(2) A permit, license, or registration holder is responsible for meeting the conditions of the permit, license, or registration and the requirements of this Chapter. If there is any conflict or inconsistency between the permit, license, or registration condition for

measurement and monitoring and the requirements of this Chapter, the more stringent requirement or requirements shall control in each instance.

§933 Measuring Device Requirements. [Relevant Portions]

(j) Accessibility. The measuring device shall be installed, to the extent feasible, in a manner such that it is readily accessible for reading, inspection, testing, repair or replacement. ~~The water right holder shall make the measurement device available for inspection by an authorized representative of the board upon request. The water right holder shall provide the board's representative with reasonable access to inspect the measuring device. Failure to provide such access is a violation of this regulation.~~

(k) Verification of Measuring Device. The board may ~~conduct a field inspection or~~ request additional information from the water right holder to determine if the measuring device has been installed and meets the requirements of this section. ~~The board may also inspect the measuring device of a water right holder to determine if the measuring device has been installed and meets the requirements of this section after obtaining any necessary consent or obtaining an inspection warrant pursuant to the procedure set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure.~~ Failure to timely install a measuring device or verify its accuracy is a violation of this regulation.

§934 Measurement Method. A measurement method is a protocol for measuring water diversions, other than through a measuring device at each authorized point of diversion, where the method is found by the deputy director to reasonably achieve the accuracy requirements of subdivision (d) of this section. The board encourages water right holders on a local or regional basis to cooperate and establish a measurement method or methods to measure direct diversion, diversion to storage, and withdrawal or release from storage in an efficient and cost effective manner which meets the accuracy requirements of subdivision (d) of this section. Any measurement method must be able to quantify the amount of water diverted under all separate priorities of rights being exercised.

(a) Request for Measurement Method.

(1) Form and Content. ~~One or more water right holders may submit to the deputy director a~~ Request for Approval of Measurement Method. A request shall be prepared by a California-registered Professional Engineer. The request shall describe how the measurement method will meet the requirements of this Chapter and include, at a minimum, the following information:

(A) Name and contact information of all participants, including designation of a manager to serve as the primary contact person.

(B) Map showing location of participants and covered lands (including all assessor parcel numbers). The map shall conform to the mapping requirements of article 7 of chapter 2 of division 3 of this title.

(C) Description of the measurement method, including how the method will be capable of measuring the volume of water diverted, rate of direct diversion, rate of collection to storage, and rate of withdrawal or release from storage.

(D) Documentation required under subdivision (d) of this section verifying the accuracy of the measurement method.

~~(E) A detailed description of how installing and maintaining a measuring device at each point of diversion is not feasible, would be unreasonably expensive, would unreasonably affect public trust resources, or would result in the waste or unreasonable use of water.~~

~~(F) Description of the permitted, licensed, registrations, certificates and water right claims covered by the measurement method including: file number, owner name, water right type, priority of diversion, monthly and annual diversion amounts, and place of use, purpose of use, and alternative sources of water.~~

~~(G) Evaluation of public trust needs including minimum in-stream flows and water quality concerns or bypass requirements of any of the water rights involved.~~

~~(H) Evaluation of enterprise income of the water users if claiming installing and maintaining measuring and monitoring devices would be unreasonably expensive.~~

(2) Action by the deputy director. Only complete forms accompanied by maps will be accepted for review. No action will be taken on incomplete requests.

(A) The measurement method will be reviewed and, if found to reasonably meet the purposes of this section, authorized by the deputy director. A measurement method may be conditionally authorized if it meets the requirements of this Chapter.

(B) A measurement method shall not be authorized for any project with an existing or prior gage, or where any requirement of any contract, policy, order, decision, judgment, determination, or other regulatory requirement of the board, a Regional Water Quality Control Board, or a court requires that diversions be gaged. A measurement method shall not be authorized for any project where it can reasonably be interpreted that gaging is necessary to meet such regulatory requirements.

(3) Initial Term and Renewal. The deputy director may authorize a measurement method for a period not to exceed five years. Any request for renewal shall be on a form available on the board's website, and shall not be deemed complete unless the accuracy of the measurement method has been reviewed and re-certified by a California-registered Professional Engineer.

~~(b) Data~~

~~(1) Data Recording. The measurement method shall be capable of recording the date, time, and total amount of water diverted in accordance with the requirements of section 933 subdivision (b) of this title. The data shall be recorded in a format retrievable and viewable using Microsoft Excel, Microsoft Access, or other software program authorized by the deputy director.~~

~~(2) Data Submittal. Each water right holder or claimant shall submit data from the measurement method to the board pursuant to chapter 2.7 of division 3 of this title, or within 30 days of request of the board. Water use data for each twelve month reporting period shall be submitted on a form available on the board's website with the appropriate water use report including a Progress Report by Permittee, Report of Licensee, Supplemental Statement of Water Diversion and Use, and Water Use Reports of Registration and Certificate Holders.~~

(c) Required Accuracy. The accuracy of the measurement method to determine the volumes of water diverted, diverted to storage, and withdrawn or released from storage shall reasonably achieve accuracy standards comparable to the standards listed in section 933 subdivision (d) of

this title for individual measuring devices. The accuracy of the measurement method shall be determined by a California-registered Professional Engineer.

(d) Certification of Measurement Method Accuracy. The accuracy of a measurement method shall initially be certified and documented by field-testing performed by an individual trained in the use of relevant field-testing equipment. The results from the field testing shall be documented in a report approved by a California-registered Professional Engineer and shall be filed with the subsequent water use report. When the measurement method applies to water diverted for agricultural use, the certification shall be based on a statistically significant number of sampling points based on field size, include field testing and measurement during multiple phases of the crop-growth cycle, include all factors which influence water consumptive use demands, and calculate tailwater return flows. Field notes, calculations, and other materials used in the certification shall be included in the report.

(e) Shared Measurement Point Upstream of the Delivery Point or Farm Headgate. A group of water right holders may measure water diverted at a location upstream of their respective delivery points or farm headgates or at shared points of diversion if an agreement accepted by the deputy director is in place for the water right holders to share a measuring device located at the shared point of diversion. Water right holders using a shared measuring device under this subdivision shall report the following additional information to the board on an annual basis:

(1) The methodology used to apportion the volume of water delivered from the shared point of diversion to each downstream water right holder.

(2) The field or flow condition at each individual water right holder's delivery point downstream of the point of measurement including the duration of water delivery to the individual water right holder, annual water use patterns, irrigated acreage (including GIS map showing assessor's parcel number and USDA field identification number), crops planted, onfarm irrigation system, and other relevant distinctions in beneficial uses and water management practices.

(3) Any differences in consumptive use of water among the individual water right holders.

(f) Operation and Performance Requirements. A measurement method shall be operated and maintained to ensure the accuracy standards of subdivision (c) of this section are met. Field testing and re-analysis that the measurement method meets the requirements of this section shall be performed by a California-registered Professional Engineer upon installation, and at least once every three years thereafter.

(g) Inadequate Measurement Method. If a measurement method fails to meet the accuracy standards of subdivision (c) of this section or the conditional approval by the deputy director, the measurement method shall be corrected to ensure it complies with these requirements.

(1) Notification. The water right holders employing a measurement method shall notify the board in writing within 30 days of finding a measurement method does not comply with the accuracy standards of subdivision (c) of this section or the conditional approval by the deputy director. The notification shall include a plan to take appropriate, timely corrective action.

(2) Enforcement. Failure to correct defects or to ensure the measurement method complies with the accuracy standards of subdivision (c) of this section is a violation of this regulation.

(3) Measuring Devices Required. If defects in the measurement method are not timely corrected, measuring devices shall be installed at each point of diversion previously

covered by a measurement method within 90 days of notification from the board that such measurement method has been deemed inadequate.