



State of California – Natural Resources Agency
 DEPARTMENT OF FISH AND WILDLIFE
 Ecosystem Conservation Division - Water Branch
 830 S Street
 Sacramento, CA 95811
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EDMUND G. BROWN JR., Governor
 CHARLTON H. BONHAM, Director



(12/17/15) Public Workshop
 Emergency Reg for Measuring & Reporting Diversions
 Deadline: 12/17/15 by 12:00 noon

December 16, 2015

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



Dear Ms. Townsend:

COMMENTS ON THE DRAFT EMERGENCY REGULATION FOR MEASURING AND REPORTING ON THE DIVERSION OF WATER

As trustee for California’s fish and wildlife resources, the California Department of Fish and Wildlife (Department) has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically sustainable populations of those species (FGC §1802). The Department has reviewed the Draft Emergency Regulation for Measuring and Reporting the Diversion and Use of Water and provides the following comments.

Watermaster Reports Filed by the Board (CCR §921)

A person who diverts water included in annual reports filed with a court or the board by a watermaster, which contains certain information described in Water Code sections 5101(d) and 5101(e), is not required to file a statement of diversion and use. If not for this exemption, those who divert in excess of 10 acre-feet a year would be required to file a statement of diversion and use and comply with the proposed measuring and reporting requirements.

Recommendation – To ensure compliance with the requirements of Water Code sections 5101(d) or 5101(e) has been achieved, the regulations should specify that Watermasters shall notify diverters and provide access to annual reports at the time of filing with the court or the State Water Resources Control Board (State Water Board).

Progress Reports by Permittee (CCR §925) and Reports of Licensee (CCR §929)

Annual reports of permit and license holders must include the source and amount of any substitute or alternative water supplies “such as groundwater, contract water, or recycled water” that were used in lieu of the water being reported under the permit or license. Permittees and licensees that have their rights curtailed could also switch to an alternative basis of right, such as a claim of riparian or pre-1914, in addition to using groundwater, contract water, or recycled water.

Recommendation – Information on all types of substitute or alternative water supplies, including water diverted under an alternative basis of right (i.e., claim of riparian or pre-1914), that is used in lieu of the permitted or licensed right should be included in annual reports.

Qualified Individual (CCR §931(g))

The installation, calibration, field-testing and field-inspection and analysis, and certification of accuracy of measuring devices described in section 933(e-h) must be overseen, approved, or conducted by a qualified individual. For diversions less than 100 acre-feet, a qualified individual is defined as “a person trained and experienced in water measurement and reporting. This may include the water right holder or the water right holder’s agent.” Terms such as “trained and experienced” can be interpreted very loosely.

Recommendation – Provide a standard for the level of training and experience required to be deemed a “qualified individual.”

Applicability (CCR §932(a-b))

A diverter serving the same place or purpose of use with multiple rights that are each authorized to divert less than or equal to 10 acre-feet, but when combined can divert in excess of 10 acre-feet, seems to be exempt from measurement requirements since the greater than 10 acre-feet threshold for requiring measurement is based on the amount diverted under a single basis of right.

Recommendation – Diversers with multiple water rights should be required to comply with the measurement requirements in section 932(a) based upon the total amount of water they are capable of diverting to serve the same place or purpose of use.

Increasing the Measurement Threshold (CCR §932(d))

The executive director may authorize increasing the 10 acre-feet reporting threshold in a watershed or subwatershed after 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 “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.”

Recommendation – The executive director should also use the same consideration and determination to *decrease* the reporting threshold in watersheds or subwatersheds potentially impacted by individual diversions less than or equal to 10 acre-feet that, when cumulatively considered, are negatively affecting public trust resources. A new

section titled “Decreasing the Measurement Threshold” could be added and should include elements that the executive director will consider when determining “the need for diversion and bypass information to evaluate impacts to public trust resources,” such as the presence of state or federally listed species; Fully Appropriated Stream status; streams with any minimum instream flow requirements in place or where the Director of Fish and Wildlife has established proposed streamflow requirements pursuant to Section 10002 of the Public Resources Code; or streams listed as critical habitat in a species recovery plan. An appropriate frequency of data recording and reporting should be required that would provide the necessary information needed for regulatory purposes.

Data Recording (CCR §933(b)(1))

The frequency of data recordation is determined by the method of diversion, either direct diversion or diversion to storage, and the maximum annual amount that can be diverted under the right. A diversion to a reservoir or pond with a storage capacity that is greater than 10 acre-feet but less than 50 acre-feet is required to record data at monthly intervals, while direct diversions greater than 10 AF but less than 100 AF must record weekly. Monthly diversion data would not provide the level of detail needed to analyze adverse impacts to public trust resources in watersheds with high numbers of 10-50 acre-foot diversions to storage.

Recommendation – At a minimum, weekly data should be required for all diversions and more frequently if it is determined that there is a “need for diversion and bypass information to evaluate impacts to public trust resources” in specific watersheds (see above recommendation).

Additionally, the Fact Sheet for the Draft Emergency Regulation states that the State Water Board is seeking input on whether real-time telemetered monitoring should be required of diversions in the future and if so under what circumstances. Real-time telemetered monitoring should be required when it is determined that such data is needed to ensure protection of public trust resources or proper administration of the water rights system.

Measurement Method (CCR §934)

Request for Measurement Method – A Request for Approval of Measurement Method will be reviewed and approved by the deputy director. All requests must include, among other things, an “evaluation of public trust needs including minimum instream flows and water quality concerns or bypass requirements of any of the water rights involved.” Depending on the location of the diversions and the individual water rights covered by the measurement method, minimum instream flows and/or bypass requirements may not exist.

Recommendation – The deputy director should consult with the Department during the evaluation of public trust needs prior to approval of a measurement method.

Data Recording and Required Accuracy – The measurement method shall be capable of recording the total amount of water diverted in accordance with the requirements of section 933(b) and shall reasonably achieve accuracy standards comparable to the standards listed in section 933(d). However, the various water rights covered by a measurement method may be a combination of direct diversions and diversions to storage, each individually capable of diverting different quantities of water.

Recommendation – Clarification is needed on how the frequency of data recording and required accuracy will be determined for proposed measurement methods. The Department suggests that the individual rights covered by a measurement method be totaled and viewed cumulatively as one large right and require data recordation at the shortest frequency and highest level of accuracy applicable. Additionally, the need for diversion and bypass information to evaluate impacts to public trust resources should be considered when determining the appropriate frequency and accuracy.

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.

Recommendation – Clarification is needed on how the frequency of data recording and required accuracy will be determined for a group of water right holders using a shared measuring device. The Department suggests that the water rights using a shared point of diversion be totaled and viewed cumulatively as one large right and require data recordation at the shortest frequency and highest level of accuracy applicable. Additionally, the need for diversion and bypass information to evaluate impacts to public trust resources should be considered when determining the appropriate frequency and accuracy.

Alternative Compliance for a Measuring Device or Measurement Method Requirement (CCR §935)

The deputy director may consider alternative compliance to one or more of the requirements of sections 933 and 934 upon finding that strict compliance is not feasible, would be unreasonably expensive, would unreasonably affect public trust uses, or would result in the waste or unreasonable use of water.

Recommendation – Similar to the requirements of the executive director before increasing the measurement thresholds in specific watersheds (CCR §932(d)), the deputy director should consider “the need for diversion and bypass information to

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evaluate impacts to public trust resources” when reviewing requests for alternative compliance under this section, and consult with the Department regarding potential impacts to public trust resources prior to approval of any alternative compliance.

Thank you for the opportunity to provide comments on the Draft Emergency Regulation for Measuring and Reporting the Diversion and Use of Water. The Department looks forward to working with the State Water Board to ensure that public trust resources are adequately protected as the emergency regulations are implemented. Questions regarding this letter or further coordination should be directed to James Rosauer, Environmental Scientist, at (916) 445-8360 or James.Rosauer@wildlife.ca.gov.

Sincerely,



for Scott Cantrell
Chief, Water Branch

cc: California Department of Fish and Wildlife

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