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September 6, 2011
By Email and USPS

Fethi Benjemaa
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901 P Street, Suite 313A
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jemaa@water.ca.gov

Re: *Comments to Department of Water Resources Proposed Regulations Related to Agricultural Water Measurements*

To Whom It May Concern:

These comments are submitted on behalf of Richvale Irrigation District and Biggs-West Gridley Water District to the Department of Water Resources' proposed agricultural water measurement regulations (Cal. Code Regs. [hereinafter "CCR"], Tit. 23, §§ 597, 597.1, 597.2, 597.3, 597.4). In short, the proposed regulations fail to satisfy the requirements of the Administrative Procedure Act; accordingly, the proposed regulatory action should not be approved until the deficiencies noted below are addressed.

Background

Richvale Irrigation District ("Richvale") and Biggs-West Gridley Water District ("Biggs") are local public agencies formed and operating under Divisions 11 and 13, respectively, of the California Water Code. Under the proposed regulations, Richvale and Biggs are "agricultural water suppliers" as that phrase is defined in 23 CCR § 597.2, subdivision (a)(2). Thus, Richvale and Biggs will be required to implement the mandates of the proposed regulations, including measuring surface water that they delivery to *each* customer at a specified accuracy level.

Richvale and Biggs previously submitted comments to the Department's emergency regulation on July 1, 2011, but those comments and the deficiencies outlined therein have not been addressed or responded to. These comments are submitted in addition to the earlier comments.

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Discussion

1. The Regulation Results in a Local Mandate; It is Inconsistent with Proposition 218

Government Code section 11346.5, subdivision (a)(5), requires a determination as to whether a mandate is imposed on local agencies that may require reimbursement pursuant to section 17500 et seq. STD. 399 claims that “No fiscal impact exists because this regulation does not affect any local entity or program.” The California Regulatory Notice Register 2011, Vol. No. 29-Z, page 1171, states “None” in answer to whether there is a cost to any local agency. Yet the Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement provides at page 2:

Costs of the regulation would fall directly on agricultural water suppliers, the vast majority of which are special districts (public agencies). They, in turn, will recover the costs through their water charges and assessments, so all costs would immediately be passed on to the customers (nearly all being private businesses and individuals.

This reasoning is deficient under the “consistency” standard of the APA.

“‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code § 11349, subd. (d)). The assumption that local public agencies like Richvale and Biggs can simply “pass through” the costs of complying with the regulation is inconsistent with and violates Proposition 218.

Local public agencies like Richvale and Biggs are subject to Proposition 218 (Cal. Const., Art. XIII D). Proposition 218 divests local public agencies of authority to impose or increase general taxes, assessments and fees without voter approval. (*See* Cal. Const., Art. XIII D, §§ 4, 6). Richvale, Biggs and other local public agencies that are agricultural water suppliers cannot pass through costs associated with complying with the regulation through to their customers without complying with Proposition 218.¹ It is important to note that Richvale’s and Biggs’ customers could reject an assessment or increased fee to pay for the costs of compliance with the regulation, yet Richvale and Biggs will still be subject to the regulations’ mandates.

Because the regulations result in costs imposed on local agencies, estimates must be prepared in accordance with Department of Finance instruction. (Gov. Code § 11346.5, sub. (a)(6); State Administrative Manual §§ 6601-6616). These estimates were not prepared.

¹ Complying with Proposition 218 is itself a cost upon local agencies, further demonstrating the inconsistency with the Department’s claim that there are no costs imposed upon local agencies.

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In sum, the Notice of Proposed Rulemaking must be consistent with applicable law, including Proposition 218. The erroneous assumption that local public agencies can simply pass through the costs of the regulation through to their customers is inconsistent with Proposition 218. The regulation should be disapproved (1) for being inconsistent and in conflict with existing provisions of law and (2) for failing to prepare estimates in accordance with instructions from the Department of Finance.

2. Incorrect Procedure/Poor Clarity

State Administrative Manual section 6601, subdivision (2), requires an estimate of the cost or savings to any state agency or local government. “Cost” includes direct and indirect costs. (SAM § 6602; Gov. Code § 11346.5, subd. (a)(6)). The costs imposed on local agencies must be identified and estimated when the imposition results in a reimbursable state mandate (SAM § 6606) and non-reimbursable local costs (SAM § 6608).

As already noted, Richvale and Biggs are local public agencies that are also “agricultural water suppliers” subject to the mandates of the proposed emergency regulation. The definition of “agricultural water supplier” contemplates suppliers, like Richvale and Biggs, that are “publicly...owned”. (23 CCR § 597.2, subd. (a)(2)). Inexplicitly, however, STD. 399 states “No fiscal impact exists because this regulation does not affect any local entity or program.”

“A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exists: ... the language of the regulation conflicts with the agency’s description of the effect of the regulation...” (1 CCR § 16, subd. (a)(2)). Here, the language of the regulation applies to local public agencies, including the mandate to “measure surface water and groundwater that it delivers to its customers pursuant to the accuracy standards in this section.” However, the language of STD. 399 conflicts with the regulation by stating that the regulation does not “affect any local entity or program”.

The regulation clearly has an impact on local public agencies like Richvale and Biggs and, as such, must give a detailed summary and description of the fiscal effect on local government.

3. Failure to Obtain Department of Finance’s Concurrence to STD. 399 (Fiscal Impact)

Section 6615 of the State Administrative Manual requires concurrence from the Department of Finance in the estimate of the fiscal impact of a proposed regulation on governmental agencies when the “adoption, amendment, or repeal of a regulation results in local

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agency costs of savings, in state agency costs or savings, or in other nondiscretionary instances such as local/state revenue increases or decreases which must be depicted on the STD. 399....”

With the proposed regulation, it is undisputed that costs will be imposed on agricultural water suppliers, the predominant majority of which are local agencies (see section 1, above). Accordingly, the Department must obtain the concurrence of the Department of Finance in its findings and conclusions contained in STD. 399.

4. Incorrect Procedure/No Alternatives Statement and No Consideration of Alternatives Proposed

Government Code section 11346.5, subdivision (a)(13), requires a statement that the Department has determined that the regulation is the least burdensome reasonable alternative. The record contains no such statement; indeed, the Department has ignored reasonable and less costly alternatives presented by Biggs, Richvale and other interested parties.

Neither the Economic and Fiscal Impact Statement, nor any other document in the record, includes the statement required by section 11346.5, subdivision (a)(13). The Economic and Fiscal Impact Statement admits that no benefit or cost analysis was conducted for alternatives making it unknown if the regulation is the least burdensome reasonable alternative.

An alternative that Richvale and Biggs have suggested, but that the Department has ignored, is permitting supplier-wide averaging of farm-gate deliveries. Paragraphs (1) and (2) of Water Code section 10608.48, subdivision (b), requires suppliers’ reporting of aggregated farm-gate water delivery and adopting a volumetric water pricing structure. An alternative of averaging the farm-gate deliveries that, for example, is accurate on average within 12% by volume satisfies the Legislature’s goals when adopting Water Code section 10608.48 and is also less burdensome on suppliers. Aggregated farm-gate deliveries may still be reported and customers may still be charged for water on a volumetric basis; errors, if any, on an individual farm-gate measurement will be remedied either by the customer (if they believe the volumetric charge is too high) or by the Board of Directors or decisionmaking body of the supplier (if it believes the volumetric charge is too low).

The advantages of this alternative are numerous, including: it is less costly and onerous to the water supplier; allows for some outlier farm-gate measurements, while ensuring that most (i.e., the average) devices are reasonably accurate; and, most importantly, allows for a less burdensome reasonable alternative. In contrast, the regulation in its current form that requires individual device accuracy is unnecessarily strict and does not correspondingly meet the Legislature’s goals better than the alternative proposed by Richvale and Biggs.

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At minimum, Richvale's and Biggs' alternative deserves consideration from the Department and a response explaining how the regulation was amended to accommodate the alternative or explaining the reasons for rejecting the alternative. (See Gov. Code § 11346.9, subd. (a)(3)). To date, the Department has ignored and refused to respond to Richvale's and Biggs' proposed alternative.

5. Inadequate Initial Statement of Reasons – No Statement of Reasons for Mandating Specific Technologies or Equipment

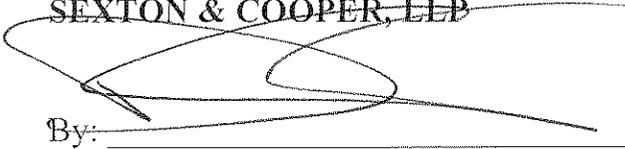
The proposed regulation requires the use of specific technologies or equipment, namely, water measurement devices that measure water within 12% accuracy by volume (for existing devices), 10% by volume (new device with non-laboratory certification) or 5% by volume (new device with laboratory certification). Despite this requirement, the Initial Statement of Reasons does not include the reason(s) why the specific technology or equipment is required, as mandated by Government Code section 11346.2, subdivision (b)(1).

Conclusion

The Department should amend the proposed regulation to correct the deficiencies and address the alternative noted above.

Very truly yours,

**MINASIAN, MEITH, SOARES,
SEXTON & COOPER, LLP**

By: 

DUSTIN C. COOPER

DCC:aw

cc: Biggs-West Gridley Water District
Richvale Irrigation District