



November 3, 2011

Fethi Benjema  
Department of Water Resources  
901 P Street, Suite 313A  
Sacramento, CA 95814

*Sent via email to: jemaa@water.ca.gov*

RE: Comments in Response to the Notice of Modifications to the Text of Proposed Regulation on Agricultural Water Measurement dated September 22, 2011

Dear Mr. Benjema:

On behalf of the Natural Resources Defense Council, we are writing to provide additional comments on the Department of Water Resources' ("Department") draft agricultural water measurement regulation, as revised by the California Water Commission at its meeting on October 19, 2011. While we continue to believe that several other provisions in the draft regulation fail to comply with the requirements of the Water Conservation Act of 2009 (SB 7x 7 of 2009, "Act") and are otherwise poor public policy,<sup>1</sup> these comments are focused on the proposed change adding section 597.1(i) to the draft regulation.

As we discuss in more detail on the pages that follow:

- I. The Department and Commission lack statutory authority to promulgate Section 597.1(i) and this provision violates the Act,
- II. Section 597.1(i) would exempt CVP contractors from verification of accuracy standards without valid justification, and
- III. Because of the scope of the exemption in Section 597.1(i) is unclear, the provision fails to meet the clarity standard of the APA.

For all of these reasons, the draft regulation should be rejected as unlawful, and the final regulation should be revised to exclude section 597.1(i) and make other changes to be consistent with the requirements of the Act and our prior comments.

---

<sup>1</sup> We note in passing that the Department's responses to comments in the Final Statement of Reasons were not available prior to our October 11, 2011 comment letter and that these responses to comments provide further evidence that the draft regulation unlawfully considers cost-effectiveness with respect to the upstream measurement exception in section 597.3(b)(1)(2).

**I. The Department Lacks Statutory Authority to Promulgate Section 597.1(i), and this Provision Violates the Requirements of the Water Conservation Act of 2009**

First, as we have discussed extensively in our prior comments,<sup>2</sup> the Department and Commission lack statutory authority to approve section 597.1(i) as part of the regulation. Although the statute exempts certain contractors of the Bureau of Reclamation from having to submit agricultural water management plans to report compliance, *see* Water Code §§ 10608.48(f), 10828, there is no similar exemption from the requirements for all agricultural water suppliers to measure the volume of water delivered to customers and implement volumetric pricing, *see* Water Code § 10608.48(b). The statute requires all agricultural water suppliers to implement these two critical water management practices, and the statute provides no exemptions from these requirements, whether based on cost-effectiveness, or for Bureau of Reclamation contractors. Water Code § 10608.48(b).

However, Section 597.1(i) effectively exempts certain contractors of the U.S. Bureau of Reclamation from the requirements of the regulation, including the requirement to verify the accuracy of measurement devices. In response to prior comments, the Department had removed this provision from the draft regulation, essentially conceding that it lacked statutory authority for this provision and that the provision violated the requirements of SB 7x7. In the Final Statement of Reasons distributed at the October 19, 2011 meeting of the California Water Commission, the Department acknowledged in responses to comments that:

- “... *DWR agrees that the exemption for CVP contractors seems to apply to the planning and reporting requirements and not from the water measurement requirements.*” (page 12) (emphasis added)
- “... including the CVP provision in the regulation (the deleted previous section 597.1 (i)) *would, in the Department’s view, improperly alter and enlarge the statute’s scope*, and it would extend the Department’s statutory authority beyond what section 10608.48(i)(1) allows.” (page 17) (emphasis added)

The Department’s responses to comments in the Final Statement of Reasons makes clear that the Department has concluded that it lacks statutory authority for this provision. The Department has previously explained that this provision is unlawful, as we noted in our prior comments. We strongly agree that section 597.1(i) is unlawful and should be removed from the regulation.

---

<sup>2</sup> Our prior comment letters, dated October 11, 2011, September 6, 2011 (joint comments), June 14, 2011, and May 17, 2011 are incorporated by reference. Because the draft permanent regulation is substantially the same as the earlier emergency regulation, our prior comments on the emergency regulation are applicable to this regulation as well.

## **II. Section 597.1(i) Would Unlawfully Exempt Some Bureau of Reclamation Contractors from Verifying the Accuracy of Measurement Devices, Without Valid Justification**

Second, it is clear that the provisions of 597.1(i) would exempt at least some contractors from the Bureau of Reclamation from meeting the requirements of the regulation and Act. The Department's response to comments in the Final Statement of Reasons acknowledges that,

*“Federal water suppliers that comply with the Reclamation Criteria and measure water using devices that are maintained and calibrated to meet the more stringent federal stands would easily meet the accuracy standards of this regulation. Federal suppliers already meeting the Reclamation Criteria would only incur minimal additional costs, if any, to comply with the State's regulation. Like any other agricultural water supplier, federal water suppliers will need to provide initial certification that their devices meet the accuracy standards.”*

Final Statement of Reasons at page 18. (emphasis added) The Department has determined that verification is important for determining that water deliveries are measured with sufficient accuracy. However, section 597.1(i) would exempt certain agricultural water suppliers from these verification requirements (and potentially other requirements, *see infra*), with no justification for treating these suppliers differently from other suppliers.<sup>3</sup>

However, it is clear from the public comments and discussion at the October 19, 2011 and September 21, 2011 meetings of the California Water Commission that there is no verification of the accuracy reporting by contractors to the Bureau of Reclamation and that without section 597.1(i), the contractors of the Bureau of Reclamation would not comply with the requirements of the regulation. Sheri Looper of the Bureau of Reclamation acknowledged in public testimony that the Bureau of Reclamation does not verify the accuracy of measurement devices reported by U.S.B.R. contractors, that they “self-report” accuracy information, and thus if 597.1(i) is not included, these contractors would not be in compliance with the regulation. *See* webcast of October 19, 2011 meeting at the 1:30, and 1:44 mark. The discussion also acknowledged that the cost of complying with the verification standard would range from minimal costs to a maximum of \$32M, and that this provision would exempt these agricultural water suppliers from having to incur those costs.

There is no dispute that on paper, the Bureau of Reclamation requires CVP contractors to measure the volume of water delivered to customers “with devices that are operated and maintained to a reasonable degree of accuracy, under most conditions, to +/- 6 percent by

---

<sup>3</sup> We also note that the Department has previously acknowledged that cost-effectiveness is not a valid basis for exemption from the water measurement regulation. *See, e.g.*, Final Statement of Reasons at 10, 17.

volume.”<sup>4</sup> See USBR comments dated October 4, 2011 at 1. However, because the Bureau of Reclamation does not actually require verification, there is no evidence that these measurement devices actually meet the standards of the CVPIA (and thus would comply with the accuracy standards in the state regulation). There is a compelling need to ensure that all agricultural water suppliers in the State are utilizing accurate measurement devices that meet the requirements of the Act, and the Department has determined in the regulation that verification is an essential element of ensuring adequate accuracy. There is no valid justification for exempting certain Bureau of Reclamation contractors from these requirements, particularly when they have never verified the accuracy of their existing measurement devices.

### **III. Because the Scope of the Exemption Provided in Section 597.1(i) is Unclear, the Provision Fails the Clarity Standard of the APA**

Third, because the scope of the exemption provided in section 597.1(i) is unclear, the provision wholly fails to meet the clarity standard of the Administrative Procedures Act, *see* Gov. Code §§ 11349.1, 11349(c); 1 Cal. Code Regs. § 16. For instance, the Department appears not to know which Bureau of Reclamation contractors would be “deemed in compliance” under section 597.1(i), and which would actually have to comply with the requirements of the regulation. For instance, the Bureau of Reclamation recently submitted comments and oral testimony stating that Central Valley Project contractors in the Sacramento Valley would not be “deemed in compliance” with the regulation under section 597.1(i), because these contractors do not deliver “all water ... through measurement devices that meet the United States Bureau of Reclamation accuracy standards defined in Reclamation’s Conservation and Efficiency Criteria Standards of 2008.” See comments from S. Looper dated October 4, 2011. Despite the fact that the Bureau of Reclamation has approved their plans, the Bureau has stated that they would not be exempt. But it’s not clear if the Department shares that interpretation, and/or which contractors would be exempted by it.<sup>5</sup>

Likewise, section 597.1(i) fails to specify at what location measurement must take place, which creates a potentially huge loophole to exempt additional Bureau of Reclamation contractors. Neither section 597.1(i) nor the CVP standard criteria explicitly identifies whether measurement must take place at the farm gate, as required by the state statute and regulations. It could be read as allowing CVP contractors to be “deemed in compliance” with the regulation if their water is measured at the lateral (or river intake) to plus or minus six percent. This is inconsistent with the requirements of section 10608.48(b), and even with the flawed requirements of section 597.3(b)(1)(B) of the draft regulation. Thus section 597.1(i) contains a potentially even larger exemption for CVP contractors who currently do not measure water deliveries at the farm gate.

---

<sup>4</sup> In addition, it is not clear what the scope of the phrase “under most conditions,” means in terms of accuracy overall. Could the devices be accurate to 10% when actually installed and operated in the field, even though under “most conditions” in a laboratory they would be more accurate?

<sup>5</sup> We request a listing of such contractors before the regulation is adopted, in order to ensure some clarity on the scope of this exemption.

Because section 597.1(i) can logically and reasonably be interpreted as having several different meanings, the scope of the exemption provided under this section is unclear and the Office of Administrative Law should reject this provision under the clarity standard of the APA.

**IV. CONCLUSION**

For all of these reasons, we strongly urge the Commission (or Office of Administrative Law) to reject the draft regulation as violating the Administrative Procedures Act and Water Conservation Act of 2009. Section 597.1(i) is unlawful and bad public policy.

Thank you for consideration of our views. We would be happy to answer any questions you have.

Sincerely,

A handwritten signature in cursive script that reads "Doug Obegi".

Doug Obegi