

March 14, 2012

Fethi Benjema
Department of Water Resources
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SUBJECT: Response to Notice of Modifications to the Text of Proposed Agricultural Water Measurement Regulation

Dear Mr. Benjema,

As you know, we have actively participated throughout the process of developing the agricultural water measurement regulation mandated by SB X7 7 and have attempted to be proactive and supportive of the Department of Water Resources' (Department) efforts. The February 8, 2012 decision by the Office of Administrative Law (OAL) raised concerns similar to those we have raised in the past. The Department's response to OAL's comments does nothing to change the regulation from being a very expensive and essentially non-implementable program that does not address the requirements established by the legislation. Our comments are summarized below.

The Department Failed to Establish Sufficient Necessity in the Initial Statement of Reasons

In comment section (C) of OAL's decision, it stated the following:

“The Initial Statement of Reasons provided with this regulatory action is inadequate. For the most part, it describes "what" the regulations do, not "why" they are needed. The Initial Statement of Reasons fails to provide the public with the rationale for the determinations by the Department as to why the specific regulatory changes are needed to carry out the purpose for which they are proposed. This vital information should have been made available to the public during the rulemaking process so that the public is informed of the basis of the proposed action and can comment knowledgeably during the public comment period.”

In the attached December 13, 2010 letter from Glenn-Colusa Irrigation District (GCID) to the Department, it asked the same questions of why or what are the purposes of the regulation. At the close of the letter, five actions were offered that the Department should pursue; none of which have been considered. In fact the first action from the December 13 letter, stated below, asks the “why” question. This appears to be consistent with the concern raised by OAL.

“DWR should develop a Policy defining the purpose of measurement and pricing as it pertains to the legislation. If the purpose is conservation and water use efficiency, the Policy should clearly articulate how measurement and pricing will result in conservation and efficiency, and additionally, how quantifying levels of accuracy will meet that Policy directive.”

Unfortunately, DWR’s response to the OAL decision does not resolve the necessity issue as required by OAL as cited on page 7 of the decision:

“It is statutorily mandated that the Department articulate its reasons for adopting the specific regulatory provisions for each section so that the public has an opportunity to comment on the process and the reasoning of the Department. The Department will need to introduce a statement of reasons into the rulemaking file that resolves the necessity issues by making the document available during a 15-day notice of availability pursuant to Government Code section 11347.1.”

Following the Department’s resolution of the issues contained in the OAL decision, we firmly believe the regulation will likely require some further revisions, and perhaps relaxation of the requirements since they appear overly burdensome, expensive and inconsistent. Finally, we believe the regulation will require an additional public comment period.

Clarity Standard Related to “Cost-Effectiveness”

In comment section (A) on page 3 of OAL’s decision, it stated the Department was inconsistent in describing the applicability of cost-effectiveness of water measurement. The Department has stated the legislation was silent on cost-effectiveness; therefore; staff determined cost of measurement was not relevant and could not be included in this regulation. In other words because the legislation was silent there was not an allowance for consideration.

However, it is interesting that the Department has exercised complete freedom and liberty to take two words from the legislation, “sufficient accuracy,” to create a 10 page regulation. Certainly, the Department can make a decision to include cost effectiveness as a factor of what “sufficient accuracy” really means. If the legislation stated “absolute accuracy”, or “without error” then perhaps cost would have no meaning and agencies would be required to spend whatever is necessary to measure a turnout. However, the legislation says accuracy must be "sufficient," (i.e. enough, adequate, acceptable, agreeable, satisfactory) such that water agencies can report a single aggregated volume from all turnouts on a form (which the Department has stated it will not use). To state that the cost of measurement should be unlimited in order to write a single value on a report that the Department will not use is an abuse of agency funds, and would be an abuse of State funds if this were implemented by agencies smaller than 25,000 acres for which the State would need to provide grant funding to implement.

Additionally, implementation of this regulation will require that agencies expend hundreds of millions of dollars, for which the agencies will need to increase water rates or assessments from their constituents. As the Department understands and OAL should realize, water agencies cannot increase these rates unless the increase is consistent with Proposition 218 and approved by voters. If cost-effectiveness is not included in this regulation and measurement is too expensive, voters will not approve increased rates to comply with this regulation.

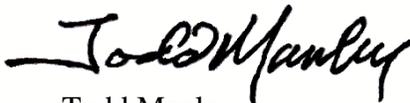
To not address the Proposition 218 issue and/or placing an agency attempting to comply in direct conflict with constituents and voters is not consistent with decision making and flexibility the Department has as it relates to interpreting the legislature's "sufficient accuracy" or "range of options" allowance.

In addition, the Department's attempt to address the concerns raised by OAL regarding Sec. 597.3(b)(1)(B), which OAL was able to describe by underlining two phrases, has ballooned into 15 separate changes to this section. The numerous changes and additions of text have done nothing to clarify the regulation and have increased the level of confusion for the parties responsible for implementation.

Given the significance of the issues raised in this letter and by OAL, an appropriate and legal resolution must be made to ensure the useful implementation of an agricultural water measurement program.

Please contact Todd Manley, Northern California Water Association at 916-442-8333 if you have questions regarding these comments.

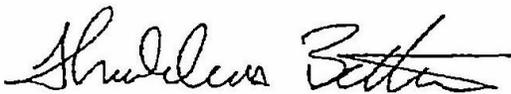
Sincerely,



Todd Manley
Northern California Water Association



Ted Trimble
Western Canal Water District



Thad Bettner
Glenn-Colusa Irrigation District



Tim O'Halloran
Yolo County Flood Control &
Water Conservation District



Brad Mattson
Richvale Irrigation District



Lewis Bair
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