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Sent: Tuesday, January 25, 2011 4:54 PM
To: Agriculture Water Use Efficiency
Subject: Sustainable Conservation comments

A more formal version on stationery will follow, but I wanted to be sure to make the deadline.

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The Agricultural Stakeholders Committee (ASC) subcommittee on measurement has been engaged in intense discussions about how to measure agricultural water deliveries from agriculture water suppliers – what devices should be used, what the margin of error/degree of accuracy should be, etc. As we have stated in more than one meeting, close reading of the statute itself has led Sustainable Conservation to question whether a numerical standard for measuring accuracy is in fact required. We are concerned that, if the standard of accuracy is too restrictive, or if the level of accuracy is applied too uniformly, and without accommodation of various agricultural practices and measurement methodologies, this could have the unintended effect of making compliance effectively impossible or lead to slower adoption rates.

Sec. 10608.48(b) of SB 7x7 requires all agricultural water suppliers, as defined, to do the following:

- (1) Measure the volume of water delivered to customers with sufficient accuracy to comply with subdivision (a) of Section 531.10 and to implement paragraph (2).
- (2) Adopt a pricing structure for water customers based at least in part on quantity delivered.

Sec. 531.10(a) of the Water Code was enacted by AB 1404 (Laird). It requires an agricultural water supplier to submit an annual report to the Department of Water Resources (DWR) that summarizes aggregated farm-gate delivery data, on a monthly or bimonthly basis, using best professional practices. "Best professional practices" are defined as "practices attaining and maintaining accuracy of measurement and reporting devices and methods." The statute does not specify what those devices and methods are or define what constitutes "accuracy." Best professional practices are a non-specific standard because they are constantly evolving. In order to use this requirement as the basis for mandating numerical measurement standards in SB x7-7, it would be necessary to further define "best professional practices" in the regulations implementing AB 1404 to specify that "practices attaining and maintaining accuracy of measurement and reporting devices and methods" must include numerical standards.

DWR and the ASC have explicitly stated that they are not going to become involved in any way in establishing pricing structures for agricultural water suppliers. These will be determined through negotiations between the districts and their customers. Given this position, "sufficient accuracy" to fulfill the second requirement of 10608.48(b)(1) should be a flexible standard based on margins of error seen in practice with the types of irrigation measurement tools commonly used, and which have been proposed by suppliers and practitioners in the field. The means of measuring for this standard should be certified by third-party experts. Since the statute states that the measurement is to be used to adopt a volumetric pricing structure – not to sustain, review, monitor, or otherwise continue to administer the structure - DWR should establish this standard as a one-time starting point for volumetric pricing structures that would then become the responsibility of the water suppliers to administer, monitor, and refine. Suppliers will be motivated to maintain and increase accuracy due to business requirements to collect the

appropriate revenues and control supply, while customers will be motivated to demand accuracy to ensure that they pay only for the water they receive, and not more. These will provide much greater incentives for water suppliers to measure accurately than an externally-imposed mandate, which could be seen as a de facto involvement of DWR in the creation of specific volumetric pricing structures.

DWR's representatives to the ASC have stated that their legal counsel has told them that a numerical standard is statutorily justified. They have not yet told us what the statutory basis or other legal rationale for this position is. We hope that that explanation, when provided, will be rooted in the statute's language rather than externalities. While the determination of legislative intent can be an important part of any rulemaking, an appeal to it (particularly when not backed up by specific statements of intent within the statute or the findings and declarations language of the legislation) cannot trump the plain language of the statute.

We recognize the importance of the measurement issue to DWR and to the members of the ASC. However, we also believe that the greatest potential impact of SB x7-7 lies not with measurement per se, but rather with the agricultural water management plans and the wide range of efficiency options set forth in Sec. 16048.48(c). Volumetric pricing is an important tool in water efficiency, but it will be most effective and widely adopted if it is based on the supplier-customer dynamic rather than external mandates. We are concerned that if the standard of accuracy is too restrictive, or applied without accommodating the wide range of agricultural practices and measurement types, the ASC process could result in the unintended effect of making compliance effectively impossible and lead to litigation or penalties, which should not be the goal of a collaborative process. Sustainable Conservation believes that the ASC and DWR should strive to develop a flexible standard of functional accuracy as a starting point for a system in which increased precision will be achieved over time as volumetric pricing structures evolve, measurement becomes more widely adopted, and tools and techniques improve. Sustainable Conservation's intent with these comments, as in all of our work, is to find a way to bridge positional divides and work towards solutions to environmental problems that also make economic sense.

Sincerely,

J. Stacey Sullivan
Policy Director