

FINAL STATEMENT OF REASONS

Pursuant to Administrative Procedures Act Government Code Section 11346.9

TITLE 23. WATERS DIVISION 2. DEPARTMENT OF WATER RESOURCES CHAPTER 5.1 WATER CONSERVATION ACT OF 2009 ARTICLE 2. Agricultural Water Measurement

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**TITLE 23. WATERS
DIVISION 2. DEPARTMENT OF WATER RESOURCES
CHAPTER 5.1 WATER CONSERVATION ACT OF 2009
ARTICLE 2. Agricultural Water Measurement**

A. UPDATE ON INITIAL STATEMENT OF REASONS

The Final Statement of Reasons, pursuant to Administrative Procedures Act Government Code Section 11346.9, is an update of information contained in the Initial Statement of Reasons. Consistent with Government Code Section 11347.3, the Department of Water Resources (the Department) has made a copy of its file of rulemaking in this matter available for public inspection.

B. IMPORTANT DATES OF NOTICES AND RULEMAKING ACTIVITIES

Date of Notice of Proposed Rulemaking:	July 12, 2011
Date of Initial Statement of Reasons:	July 12, 2011
Date of Notice of Modifications to the Proposed Regulation and Modified Text of Regulation:	September 22, 2011
Date of Notice of Addition of Documents and Information to Rulemaking File:	None added
Statement of First 15-Day Notice of Availability of Documents and Information:	September 22, 2011
Statement of Second 15-Day Notice of Availability of Documents and Information:	October 19, 2011
OAL Disapproval of Regulatory Action	February 2, 2012
Statement of Third 15-Day Notice of Availability of Documents and Information	February 28, 2012
Statement of Fourth 15-Day Notice of Availability of Documents and Information	March 26, 2012
Statement of Fifth 15-Day Notice of Availability of Documents and Information	April 18, 2012
Date of Notice on Status of Proposed Rulemaking:	None required

Date of Final Statement of Reasons:

May 18, 2012

Dates of all public participation events (comment periods and hearings):

The mandatory 45-day public comment period on the Agricultural Water Measurement regulation was held July 22, 2011 to September 6, 2011. The Department also conducted two public hearings on the proposed regulation on August 24, 2011 in Sacramento, and September 8, 2011 in Fresno. DWR modified the proposed text of regulation in response to comments received during the 45-day comment period. DWR provided a Notice of changes on September 22, 2011, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the first 15-day public comment period between September 23, 2011 and October 7, 2011. DWR modified the proposed text of regulation in response to comments received during the first 15-day comment period and provided a Notice of changes on October 19, 2011, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the second 15-day public comment period between October 20, 2011 and November 3, 2011. On February 2, 2012, the Office of Administrative Law (OAL) disapproved the above-referenced regulatory action because the proposed regulations failed to comply with the clarity, consistency, and necessity standards contained in Government Code section 11349.1, the agency failed to adequately summarize and respond to each comment made regarding the proposed action, and the rulemaking file failed to contain all required documents or required documents included in the file were defective. DWR modified the proposed text of regulation in response to comments received during the second 15-day comment period and the OAL disapproval of regulatory action and provided a Notice of changes on February 28, 2012, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the third 15-day public comment period between February 29, 2011 and March 14, 2012. DWR modified the proposed text of regulation in response to comments received during the third 15-day comment period and provided a Notice of changes on March 26, 2012, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the fourth 15-day public comment period between March 27, 2012 and April 11, 2012. DWR modified the proposed text of regulation in response to comments received during the fourth 15-day comment period and provided a Notice of changes on 18, 2012, to the Proposed Agricultural Water Measurement Regulation. DWR accepted written comments during the fifth 15-day public comment period between April 19, 2012 and May 3, 2012.

C. PUBLIC COMMENTS RECEIVED DURING THE COMMENT PERIODS

During the mandatory 45-day public comment period, the Department received five written comments and one oral comment. During the first 15-day public comment, the Department received eight written and no oral comments. During the Second 15-day comment period, the Department received one written comment and no oral comments. During the third 15-day comment period, the Department received five written and no oral comments. During the fourth 15-day comment period, the Department received two written comments and no oral comments. During the fifth 15-day comment period, the Department received three written comments and no oral comments. Please refer to the Department's rulemaking file for copies of these comments. Pursuant to Government Code Section 11346.9 (a) (3) and (a) (5), the Department has summarized and responded to the comments beginning on page 5.

D. DESCRIPTION OF REGULATORY ACTION

“Statement of Specific Purpose of Regulation Change and Factual Basis for Determining that Regulation Change is Reasonably Necessary:”

This statement remains unchanged from the Initial Statement of Reasons.

E. STATUTORY PROVISIONS MANDATING CHANGES TO THE REGULATION

No change made

F. CHANGES TO THE TEXT OF REGULATION

Changes made to the regulation consist of the following sections (with ~~strike-out~~ for deletions and underscore for additions):

(Sections 597.1(c), (g) and (h) were modified with the insertion of “water code” before the section number for clarification. Section 591.1(i) was deleted due to public comment and disapproval from OAL.)

- c) A water supplier providing water to wildlife refuges or habitat lands where (1) the refuges or habitat lands are under a contractual relationship with the water supplier, and (2) the water supplier meets the irrigated acreage criteria of Water Code §10608.12(a), is subject to this article.
- g) Pursuant to Water code §10608.8(d), an agricultural water supplier “that is a party to the Quantification Settlement Agreement, as defined in subdivision (a) of Section 1 of Chapter 617 of the Statutes of 2002, during the period within which the Quantification Settlement Agreement remains in effect,” is not subject to this article.
- h) Pursuant to Water Code §10608.12(a), the Department is not subject to this article.
- ~~i) An agricultural water supplier subject to Central Valley Project Improvement Act (CVPIA) (Public Law 102-575) or the Reclamation Reform Act (RRA) of 1982 shall be deemed in compliance with this article if all irrigation water delivered by that water supplier to each customer is delivered through measurement devices that meet the United States Bureau of Reclamation accuracy standards defined in Reclamation’s Conservation and Efficiency Criteria Standards of 2008.~~

(Sections 597.3(b)(1)(A) has been modified to delete redundant language. The phrase “downstream of the point of measurement” has been deleted as it is redundant to similar language appearing in paragraph 597.3(b)(1).) Section 597.3(b)(1)(B) has been modified in response to comments received from stakeholders and OAL to address comments regarding ambiguity of the cost effectiveness and in response to comments received from stakeholders and the California Water Commission decision on April 18, 2012 and on May 8, 2012.

b) Measurement Options at a Location Upstream of the Delivery Points or Farm-gates of Multiple Customers

1) An agricultural water supplier may measure water delivered at a location upstream of the delivery points or farm-gates of multiple customers using one of the measurement options described in §597.3(a) if the downstream individual customer's delivery points meet either of the following conditions:

A) The agricultural water supplier does not have legal access to the delivery points of individual customers or group of customers ~~downstream of the point of measurement~~ needed to install, measure, maintain, operate, and monitor a measurement device.

Or,

B) An engineer determines that, due to small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at a single farm-gate, accuracy standards of ~~When the measurement options in §597.3(a) cannot be met, as approved determined by an engineer,~~ by installing a measurement device or devices commercially available (manufactured or on site built or in-house built measurement devices) with or without additional components (such as gauging rod, water level control structure at the farm-gate, etc), that is comparable in cost to other measurement devices commonly in use, at each of the downstream individual customer's delivery points because small differentials in water level or large fluctuations in flow rate or velocity that occur during the delivery season at those delivery points exceed the device accuracy standard. When a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and ~~When~~ If conditions at the delivery points change such that can meet the accuracy standards of measurement options in §597.3(a)(2) at the individual customer's delivery points farm-gate can be met, an agricultural water supplier shall include in its Agricultural Water Management Plan, as specified in §597.4, a schedule, budget and finance plan to measure water at the individual customer delivery points in compliance with §597.3(a)(2) of this Article. Agricultural water supplier shall report in its Agricultural Water Management Plan schedule, budget, and plan and demonstrate progress over time to measure water at all the farm-gates using a commercially available or on site built measurement device consistent in compliance with §597.3(a)(2) of this Article.

(Section 597.3(b)(2) has been modified to add the word 'current' to ensure that up-to-date documentation gets submitted in the Agricultural Water Management Plans.)

2) An agricultural water supplier choosing an option under paragraph (b)(1) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(Section 597.3(b)(2)(A) has been modified to require suppliers claiming the lack of access to customers delivery points to make a certification through their legal counsel.)

A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall ~~self~~-certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those ~~eustomer~~ delivery points.

(Section 597.3(b)(2)(B) has been modified to require documentation of device unavailability and water level conditions to be consistent with the reasons described in section 597.3(b)(1)(B).)

B) When applicable, the agricultural water supplier shall document the water measurement device unavailability and that the ~~field~~ water level or flow conditions described in §597.3(b)(1)(B) exist at individual customer's delivery points downstream of the point of measurement as approved by an engineer.

(The title for Section 597.4(b) was modified with "of Existing Devices" for clarification.)

b) Protocols for Field-Testing and Field-Inspection and Analysis of Existing Devices

(Section 597.4(e)(4) has been modified to specify the Plan submittal date as specified in Water Code Section 10820(a).) **e) Reporting in Agricultural Water Management Plans**

4) If an existing water measurement device is determined to be out of compliance with §597.3(a), and the agricultural water supplier is unable to bring it into compliance before submitting its Agricultural Water Management Plan in December 2012, the agricultural water supplier shall provide in its 2012 plan, a schedule, budget and finance plan for taking corrective action in three years or less.

G. Summary and Responses from the noticed 45-day public comment period (July 22, 2011 through September 6, 2011, first 15-day public comment period (September 23, 2011 to October 7, 2011), second 15-day public comment period (October 20, 2011 to November 3, 2011), third 15-day public comment period (February 28 to March 14, 2012, fourth 15-day public comment period (March 26 – April 11, 2012, and fifth 15-day public comment period (April 18-May 3, 2012).

G0: (8/8/2011 Public Hearing) Because Section 531 of the Water Code requires reporting of aggregated farm gate deliveries, I would like DWR to consider accepting an average accuracy of all devices across the turnouts of a district instead of requiring every single device to meet the accuracy requirement as proposed in this regulation.

Department Response: Reject. See responses to G 9, G10 and G21.

G1: Oppose to the use of years 2012 and 2015 as two Agricultural Water Management Plan records retention cycles since a cycle is 5 years.

Department Response: Reject - Agricultural Water Management Plans submittal years 2012 and 2015 are set by the SBx7-7 legislation.

G2: At the July 25, 2011 Ventura County Waterworks District No. 8 (City of Simi Valley) Board of Directors meeting, 2010 meter service charges were rescinded for former Agricultural customers. Those were placed into the Commercial category because the Agricultural category was eliminated. This led to astronomical financial impacts on the former Agricultural customers because many of them put in larger meters which increased the cost considerably.

Department Response: Reject - Comment outside the scope of this regulation.

G3: Comment related to components of Agricultural Water Management Plans and the Draft Agricultural Water Management Planning Guidebook.

Department Response: Reject - Comment outside the scope of the agricultural water measurement regulation.

G4: Comment related to the decrease in agricultural water accounts.

Department Response: Reject – Comment of general nature and outside the scope of this regulation.

G5: Add a definition for “Agricultural Water Users” and delete “Customer”.

Department Response: Reject - The SBx7-7 legislation specifically uses the term “Customer” and specifically requires the agricultural water suppliers to “measure the volume of water delivered to customers” and “adopt a pricing structure for water customers based at least in part on quantity delivered.”

G6: the proposed regulation will add to the volumetric water pricing structure. Decisions like the Calleguas Municipal Water District to no longer offer Agricultural Water Rates, and the Ventura County Waterworks District No. 8 (City of Simi Valley) eliminating the "Agricultural" rate category, speak volumes of impacts not foreseen by the DWR.

Department Response: Reject – Comment of general nature and outside the scope of the regulation.

G7: Add definitions.

Department Response: Reject - Some of the terms mentioned (‘In-House Built Devices’ and ‘On-Site Built Devices’) were used in previous drafts of the regulation and are no longer included in the current text of the regulation. Other terms were defined as needed.

G8: Same as comment G1.

Department Response: Reject.

G9: Allow supplier-wide averaging of device accuracies to comply with the proposed accuracy standard.

Department Response: Reject - This alternative has been discussed and deemed not meeting the intent of the law to achieve sufficient accuracy of the measurements. Consider the example of two flow measurement devices being evaluated in a district. One is +30% accurate and the other is -35% accurate. Evaluated individually, they are both quite inaccurate and would certainly not meet the proposed regulation, but measured in the aggregate they would be -5% accurate and meet the regulation. This simple example illustrates the basis for not allowing an average or aggregate accuracy for compliance where an aggregate or average accuracy could be shown to meet the requirements when in fact individual devices are well out of compliance. As a result, averaging device accuracies is not an acceptable method and is deemed unable to provide sufficiently accurate measurements of water deliveries to individual customers.

G10: The District operates and maintains over 700 propeller type meters to serve 90,000 acres of irrigated farm lands. At the time of installation, all of these met the requirements of §597.3(a)(2)(A). Since these meters are used for volumetric billing of water to its customers, the District has an active monitoring, repair, replacement and accuracy verification program. The accuracy verification is implemented by comparing the District's aggregate metering records to upstream metering conducted by DWR (using venturi rather than propeller meters - a different device type). Such comparisons are made monthly and consistently show values within the metering accuracy standards described in §597.3(a). Such comparisons effectively test 100% of the District meters in use in a given month (rather than 10% of meters over a year). This achieves a much higher standard than contemplated in §597.3(a). Therefore, the District has an effective accuracy verification system already in place that far exceeds the intent of §597.4(a)(1). However, it could be argued that because the District does not perform individual field meter tests as suggested in §597.4(a)(1), it would not comply with said section. Therefore, an additional paragraph (C) should be added to §597.4(a)(1), and read as follows (*added language in italics*):

"§597.4(a)(1)(C) Field testing wherein the aggregate accuracy of multiple devices can be verified via comparison with a set of upstream or downstream devices may be used to identify compliance provided that all farm gates within the reach being evaluated are metered. "

Department Response: Reject - Verification of aggregate accuracy of multiple devices via comparison with a set of upstream or downstream devices would only show that the accuracies of individual devices are within acceptable range on an aggregate basis. This is similar to showing compliance based on average accuracies of multiple devices described in 'Comment #G 0, G 9 and G 21' and deemed not meeting the requirements. However, since the accuracies of all individual devices at time of installation have already met the accuracy requirements of §597.3(a)(2)(A), these devices will be deemed in compliance with the accuracy requirements as long as they are field-inspected and analyzed as required by §597.4(a)(1)(B). The verification of aggregate accuracy can be part of the field-inspection and analysis approach that would also include inspection of individual devices performed by trained individuals.

G11: The appropriate standard is critically dependent on various factors including whether the standard is locally cost-effective. The District supports the standard in California Water Code §531.10 (b) which should be included or referenced in the proposed regulation: *"Nothing in this article shall be construed to require the implementation of water measurement programs that are not locally cost effective."*

Department Response: Reject - The legislation (SBx7-7) explicitly included the 'cost-effectiveness' condition for the implementation of other efficient water management practices listed under section 10608.48(c). The 'cost-effectiveness' condition was however left out from the water measurement requirement in section 10608.48(b) for agricultural water suppliers with irrigated acreage greater than 25,000 acres (the subject of this regulation).

G12: Section 597.3(b)(1)(A) impermissibly exempts water suppliers from measuring water deliveries at the farm gate if they lack legal access to the farm gate. Some water suppliers may have never needed legal access to the farm gate and may not currently have such access, but are authorized by law to acquire such access. In addition, urban water agencies have successfully implemented a similar statutory mandate to install meter waters on the private property of their urban customers, without resorting to this kind of exception.

Department Response: Accept in part - Measurement at laterals upstream of multiple farm-gates will be accepted only for special cases as specified in Section 597.3(b)(1) and a supplier has to demonstrate that measurement under section 597.3(a) is not legally accessible by demonstrating the lack of legal access as outlined in Section 597.3(b)(2)(A). Language pertaining to the certification of the lack of legal access has been strengthened.

Changes to the language of the regulation: Section 597.3(b)(2) has been revised as follows:

An agricultural water supplier choosing an option under paragraph (b)(1) of this section shall provide the following current documentation in its Agricultural Water Management Plan(s) submitted pursuant to Water Code §10826:

(A) When applicable, to demonstrate lack of legal access at delivery points of individual customers or group of customers downstream of the point of measurement, the agricultural water supplier's legal counsel shall ~~self~~-certify to the Department that it does not have legal access to measure water at customers delivery points and that it has sought and been denied access from its customers to measure water at those ~~customer delivery~~ points.

G13: Section 597.3(B)(1)(A) is overbroad and may allow water suppliers to avoid measurement at the farm gate, without even requiring the water supplier to ask for permission to access the private canal. For instance, this exception may prevent measurement at the farm gate if water is delivered through canals owned by mutual water companies, which could affect significant numbers of water suppliers.

Department Response: Reject - As mandated by the legislation, the regulation requires that suppliers measure water they deliver to their customers. Mutual Water Companies are considered as customers to the agricultural water supplier. Therefore the agricultural water

supplier is only required to measure the water it delivers to its customer (in this case the Mutual Water Company (MWC) and not the MWC's customers). Similarly, if a MWC is an agricultural water supplier, it will be required to measure water deliveries to its own customers (provided it meets the applicability thresholds as required by the legislation and outlined in Section 597.1).

G14: The Department has not provided a rationale why section 597.3(b)(1)(B) is limited to a single measurement device, particularly when two devices may effectively and accurately measure water deliveries at the farm gate. The obvious, albeit unstated, reason for this exception is the cost of requiring more than one measurement device. However, as we have previously noted, two provisions of SB 7X 7 conclusively demonstrate that a “locally cost effective” exemption does not apply to the measurement requirement. First, the Act includes explicit cost effectiveness exemptions for other efficiency practices in section 10608.48(c), but not with respect to water measurement and volumetric pricing requirements in section 10608.48(b).

In response to OAL decision of February 2, 2012 Department Response is updated. See “Department updated Responses G57, G58, and G59”

Department Response: Reject – DWR believes that requiring more than one measurement device to be installed at each farm-gate is not practical, technically challenging, and imposes undue hardship to the agricultural water supplier. The regulation does however require that suppliers measure water deliveries at farm-gate when a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and that can meet the measurement options in §597.3(a)(2).

G15: Section 597.1 of the draft regulation would provide that certain CVP and RRA contractors “are deemed in compliance” with the requirements of SB 7X 7, and thus exempts such contractors from having to comply with the measurement requirement of Section 10608.48(b). However, all Agricultural Water Suppliers subject to SB 7X 7, including CVP contractors, must meet the measurement requirement of Section 10608.48, and the proposed exemption is unlawful. SB 7X 7 specifically excludes certain CVP contractors from having to prepare and submit Agricultural Management Plans, permitting certain CVP contractors to instead submit the water conservation plan that has been accepted as adequate by the U.S. Bureau of Reclamation (Reclamation).

Department Response: Accept in part - The Regulation did not exempt the CVP and RRA contractors. However, Water Code section 10608.48(b)(1)(i) limits the DWR's regulatory authority to the following:

“[P]roviding a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement in [section 10608.48(b)(1)].”

Water Code section 10608.48(b)(1) requires agricultural water suppliers to measure the volume of water delivered to customers with sufficient accuracy to comply with section 531.10 and nothing more. See *Barton v. Napa Co. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1480. The statute's clear and unambiguous regulatory authority to the Department to provide a range of

water measurement requirement options does not extend to interpreting section 10828, the so-called CVP water supplier statutory exemption. That section describes a possible exemption for certain federal water suppliers from state water plan requirements and falls outside of section 10608.48's regulatory charge to the Department. Affected water suppliers may interpret that provision's language as they see fit.

The U.S. Constitution's Supremacy Clause in Art. IV, could also affect whether the Department can interpret the CVP provision. A state regulation that conflicts with a federal statute, making compliance with the state law in effect impossible, would be pre-empted by the federal statute and a barrier to implementing the state regulation. *See Louisiana Public Service Comm'n v. F.C.C.* (1986) 476 US 355, 366.

Though the CVP provision's language is ambiguous, DWR agrees that the exemption for CVP contractors seems to apply to the planning and reporting requirements and not from the water measurement requirements.

In response to OAL decision of February 2, 2012 Department Response is updated. See "Department updated Response G47"

G16: The proposed accuracy standard should be revised downward from 12% to 10% so not to conflict with the statutory requirement that suppliers "Measure the volume of water delivered to customers with sufficient accuracy."

Department Response: Reject - Accuracy Standards in paragraph (1) of Section 597.3(a) are for existing devices installed in the field. The standard (12%) is slightly higher than that of new devices (10%) so that suppliers who already have measurement devices installed prior to the effective date of this regulation will not need to immediately replace those devices that are already meeting the slightly lower standard of 12% that is also deemed acceptable and meeting the statutory requirement of 'sufficient accuracy'. Furthermore, given the life cycle of measurement devices, existing devices will eventually need to be replaced and meet the 10% accuracy standard.

In response to OAL decision of February 2, 2012 Department Response is updated.

Updated Department Response: Section 597.4(b) title was modified in later drafts as "Protocols for Field-Testing and Field-Inspection and Analysis of existing Devices". The $\pm 12\%$ by volume accuracy pertains only to existing devices. As devices are replaced, the required accuracy will be $\pm 5\%$ by volume for laboratory certified devices, or $\pm 10\%$ by volume for in-field, non-laboratory certified devices.

G17: the Department has provided no explanation for what constitutes field inspection as a methodology for determining the accuracy of measuring devices, as provided for in section 597.4 of the draft regulation. To the contrary, the regulation appears to allow field inspection to certify the accuracy of all measurement devices without testing even a single measurement device, nor does the regulation provide any standard or criteria for assessing the accuracy of field inspections. Because nothing in the record explains how field inspections will determine the "sufficient accuracy" of the measurement of water deliveries, the draft regulation should be

revised to eliminate field (testing)*.

* *We believe the commenter meant ‘...regulation should be revised to eliminate field inspection’.*

Department Response: Reject - To avoid having a regulation that is too prescriptive, and given that testing protocols are device specific (agricultural water measurement devices include a vast array of device types including: propeller meters, acoustic meters, differential head meters, meter gates, slide or sluice gates, constant head orifices, weirs, flumes, radial gates, ...etc.), suppliers are required to use best professional practices and follow device manufacturers’ recommendations as stated in 597.4(b). In addition, the proposed regulation requires that field inspection and analysis shall be approved by a California Registered Professional Engineer. Deletion of field inspection and requiring field testing of water measurement devices would be very onerous. DWR believes that field inspection of devices, certified by a registered professional engineer, ensures compliance with the regulation. Additionally, field testing is an option that suppliers can always use to certify their device accuracy.

G18: The regulation must be consistent with applicable law including Proposition 218, which divests local public agencies of authority to impose or increase general taxes assessments and fees without voter approval. 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.

Department Response: Reject - DWR, in its document of April 13, 2011 “Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement” recognized that many categories of costs might be imposed on agricultural water suppliers. The major categories would include:

- Initial assessment of measurement devices
- Installation of new devices or repair/adjustment of existing devices, as needed
- On-going O&M of upgraded measurement devices (the incremental change in cost compared to what the supplier would have spent in the absence of the regulation)
- Periodic re-testing and certification
- Record-keeping, training, other administrative costs.

DWR recognizes that agricultural water suppliers may need to hold a Proposition 218 vote, and other costs to them may also include the cost of holding an approval vote for increased rates or assessments as may be required by Proposition 218 process. This however, does not mean that those fees and assessments won’t be eventually passed to the rate payers.

G19: 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). 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.

Department Response: Reject – The regulation applies to agricultural water suppliers, which recuperate any cost incurred in relation to delivering water from the agricultural water users (farmers). The agricultural water users are therefore deemed to be the entity economically impacted. Form 399 and the accompanying economic analysis document “Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement” reflect the above.

G20: The Department of Water Resources must obtain the concurrence of the Department of Finance in its findings and conclusions contained in STD 399.

Department Response: Reject - Finance approval and signature is only required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399. As noted in the responses to G18. and G19., DWR believes that costs are eventually passed to the rate payers, and as a result, SAM sections 6601-6616 does not apply and the ‘Fiscal Impact Statement’ section of Form 399 did not need to be completed. Furthermore, DOF review interest is when there is cost incurred by the State.

G21: Department has ignored a reasonable and less costly alternative consisting of permitting supplier-wide averaging of device accuracies to comply with the accuracy requirements.

Response: Reject - This alternative has been discussed and deemed not meeting the intent of the law to achieve sufficient accuracy of the measurements (see response to Comment G9). Allowing an average or aggregate accuracy for compliance will result in an average accuracy that could be shown to meet the requirements, when in fact individual devices are well out of compliance. As a result, averaging device accuracies is not an acceptable method to measure water deliveries to individual customers with sufficient accuracy.

G22: 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 why the specific technology or equipment is required.

Department Response: Reject - DWR, with input from the Agricultural Stakeholder Committee and the Measurement Subcommittee, considered three alternative frameworks for developing a range of options for measuring agricultural water deliveries: (1) develop a regulation that includes a list of acceptable measurement devices maintained in defined manners to achieve desired accuracy; (2) develop a regulation setting a performance standard that defines minimum benchmarks for device accuracy that could be met or bettered by a range of devices; or (3) develop a regulation that provides a process for suppliers to assess and report their own locally-determined standards for measurement accuracy.

Option (2) specifying a performance standard that defines minimum device accuracy benchmarks – provided the most appropriate framework and flexibility to establish a range of measurement options. A performance standard meets the intent of the legislation in the most flexible and cost-effective manner. No specific technology is required and no specific device is required. The only requirement is to use a device that meets an acceptable minimum accuracy

standard. The Department did not recommend adopting a specific technology or a list of acceptable measurement devices for the following reasons:

- Dictating specific devices can unintentionally constrain suppliers or impose unreasonable or unnecessary costs to accommodate the defined devices.
- Measurement technology changes over time, so a list of approved devices would need frequent review and modification.
- Measurement requirements are to assure agricultural water suppliers are able to meet 10608.48(b), which states “Measure the volume of water delivered to customers with sufficient accuracy...” The paragraph is stated in terms of measurement accuracy, not specific devices or technologies.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED FIRST 15-DAY PUBLIC COMMENT PERIOD (SEPTEMBER 23 THROUGH OCTOBER 7, 2011)

G23: Treat sub-laterals similar in size and operation to improvement districts and community service ditches/pipelines where the flows are certifiable at the headgate. The District can likely justify measurement improvements at the head of sublaterals, but we clearly cannot justify the high costs for improvements at every one of these turnouts, especially in the case of "dead-end systems" (those laterals that do not spill to a drain). If improvements are required at every turnout, the result could conceivably be that the District and other similar agencies will be situated like an improvement district, and practice a rotation style delivery like an improvement district, then it should be treated like an improvement district.

Department Response: Reject-All sub-lateral water delivery farm-gates are subject to the regulation. If conditions of Section 597.3 (b) apply, then the water supplier may use option b and install measurement devices upstream of multiple customers.

G24: Exempt turnouts servicing Garden-head acreage, usually less than 5 acres gross. Turnouts that serve these parcels are usually ranchet-type gates that are owned by individuals whose concern is not agricultural or farming, but rather landscaping or growing self consumed crops. These parcels tend to be located on small laterals which are hardly accessible. Should service be discontinued due to lack of funds needed to upgrade the turnouts, the District has no means of continually patrolling for illegal acquisition of water where accounting for water is totally lost.

Department Response: Accept in part - Turnouts that serve parcels owned by individuals whose purpose is not agricultural or farming, but rather landscaping or growing self-consumed crops are not subject to this regulation.

G25: Exempt or allow more lenient measures for measuring small acres (usually less than 10 acres gross) which irrigate infrequently. The District will be hard-pressed to justify necessary improvements on systems that have infrequently irrigated and may stay dry for years to come.

Department Response: Reject- Any water supply delivered to agricultural irrigated land is subject to the regulation regardless of frequency of irrigation.

G26: Consider adding definitions for: Accuracy Certification, Agricultural Water Management Plan, Agricultural Water Management Plan Cycle, Agricultural Water Measurement, Efficiency Water Management Practices, In-House Built Devices, and On-Site Built Devices.

Department Response: Reject - Some terms are already defined in other sections of the Water Code, others are included as needed.

G27: In 1992, the Central Valley Project Improvement Act (CVPIA) passed, supplementing the water conservation provisions of RRA. CVPIA required Reclamation to establish Best Management Practices (BMPs) and criteria (known herein after as Standard Criteria) for evaluating the adequacy of all water conservation plans developed by CVP contractors, including those plans required by RRA. Further, CVPIA required that all contracting districts or agencies entering into, renewing, or amending water service or repayment contracts for Central Valley Project water shall ensure that all surface water delivery systems within its boundaries are equipped with water measuring devices or water measuring methods of comparable effectiveness acceptable to the Secretary within five years of the date of contract execution, amendment or renewal. CVPIA also required that any new surface water delivery systems installed within its boundaries, on or after the date of contract renewal, also be equipped with measurement devices.

The requirements for water conservation Plans under CVPIA are much more rigorous and prescriptive than those in Section 210(b) of RRA. CVPIA changed the landscape of water conservation in the Central Valley and accelerated the water use efficiency efforts of CVP contractors. In creating the BMPs and Standard Criteria, water measurement became critical BMP 1 (non-exemptible). The BMP states that CVP contractors must measure the volume of water delivered by the contractor to each customer, except Class II water, with devices that are operated and maintained to a reasonable degree of accuracy, under most conditions, to +/- 6 percent by volume. The reporting of this is encompassed within a District's Plan that is submitted under the Standard Criteria. To date, all districts submitting Plans under the Standard Criteria are held to the +/- 6 percent in field accuracy. This represents 2,132,561 irrigable acres within the Central Valley, of which 2,045,999 acres have the potential to be affected by this regulation.

Plans submitted under the Standard Criteria contain the measurement compliance information. These Plans undergo a multi-tiered review and acceptance process that is different and much more rigorous than typical RRA Plans. The following process is specific to Plans submitted under the Standard Criteria.

At minimum, two technical staff members review each Plan for adequacy in meeting the Standard Criteria and proper implementation of the BMPs. Often times, there is considerable communication back and forth for clarifications and supporting documentation between districts and Reclamation before Plans are deemed adequate. Once the Plan is deemed adequate by the technical staff, the Plan is listed in the Federal register and the Plan is released for a 30-day public review and comment period. If no comments are received (which is most often the case), the Plan is considered accepted. If public comments are received, the comments are addressed,

and depending on the significance of required changes based on comments, the Plan may or may not be sent out for another public review. Reclamation tracks Plan compliance carefully and implements several strategies to deal with non-compliance. These strategies include, but are not limited to the following:

- Restrictions on contract renewals or assignments
- Ineligibility for any Reclamation grant program
- Restrictions on rescheduling
- Restrictions on water banking
- Restrictions on inclusion and exclusion requests

Department Response: Comment consists of a statement and not a request for change. However, 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. Federal water suppliers that comply with the Reclamation Criteria (stated in the comment) and measure water using devices that are maintained and calibrated to meet the more stringent federal standards would easily meet the accuracy standards of this regulation. See also response to G15.

G28: Valley Ag Water Coalition (VAWC) has always maintained that the Department is incorrect in its assertion that the locally cost effective standard does not apply to agricultural water measurement requirements as codified by SB X7-7. While measurement must occur under the mandate of SB X7-7, it must be held to a locally cost effective standard. The Department errs in reading the provisions of Section 10608.48(b)(1) to the exclusion of the locally cost effective standard set forth in subdivision (b) of Section 531.10. Reference only to subdivision (a) of Section 531.10 is merely appropriate statutory reference to the measurement requirement. The provisions of subdivision (b) of that section cannot be ignored or else a plain reading of the statute—and the clear intent of the Legislature—is turned on its head. The Department must balance achievement of the measurement mandate.

Department Response: Reject - The Water Code section 10608.48(a) requires implementation of efficient water management practices (EWMPs) in accordance to sections 10608.48(b) and (c). Section 10608.48(b) refers to two critical EWMPs, water measurement and adoption of a volumetric pricing structure. Section 10608.48(c) requires implementation of other EWMPs when locally cost effective. As such, the local cost effectiveness does not apply to the critical EWMPs, including water measurement.

G29: The proposed permanent regulation relies on the “Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement,” dated April 22, 2011. Yet, for purposes of that economic and fiscal impact analysis, suppliers subject to CVP Water Management Plans were excluded. Therefore, the estimated statewide costs to comply with the proposed agricultural water measurement regulation are not accurate within a reasonable range of direct costs. The Department, for example, estimated that nearly 21,000 current measurement sites statewide would require modification, repair or a new device and that the mid-range estimates of total present value of costs would be \$333 million over 20 years, and \$420 million over 40 years. These estimates are no longer valid with the elimination of the exemption for federal water contractors.

VAWC asserts that the record of the regulatory proceeding includes sufficient expert opinion to establish that it is neither necessary nor cost effective to require federal contractors to comply with a new state-imposed regulation that essentially duplicates federal requirements. VAWC does not believe it is in the public interest to create a duplicative requirement regarding agricultural measurement for federal water contractors.

Department Response: Reject - Federal water suppliers that currently comply with the Reclamation Criteria and measure water using devices that are maintained and calibrated to meet the more stringent federal standards 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. The certification can be done through field testing which is voluntary, alternatively they can perform field inspection of their devices by trained individuals and approved by a Professional Engineer. Any associated certification cost will be minimal given the fact that federal suppliers have already device inspection and calibration programs in place. (See also Response to Comment G27 & G 15)

G30: A significant change in the proposed permanent measurement regulation now requires an agricultural water supplier's legal counsel to certify to the Department that the supplier does not have legal access to measure water at a customer's delivery point. This change requires legal certification where the previous version required a supplier to "self certify." The addition of a legal certification requirement will necessarily impose significant legal expenses that VAWC does not believe were subjected to cost impact analysis. Self-certification by the governing body of a water supplier should be sufficient to address the matter of access to private property. Requiring the services of legal counsel will create an unnecessarily time consuming and very expensive mandate that will not likely result in better information.

VAWC asserts that the record of the regulatory proceeding includes sufficient expert opinion to establish that it is neither necessary nor cost effective to require a legal certification regarding access to private property.

Department Response: Reject - The clarification added does not change the regulation, it only requires that the water supplier's legal counsel to certify a matter that has legal implications to ensure that the claim is prepared by a subject matter expert and is legally defensible. The cost effectiveness claim does not apply as certification was already a requirement and the cost effectiveness criterion does not apply to water measurement provisions of SBX7-7. See also Department Response to G28.

G31: The proposed permanent regulation would require that all measurement devices be brought into compliance within three years of December 2012 instead of within three years of determining that they are out of compliance. This creates a conflict for devices that are found to be out of compliance after the December 2012 deadline. The previous three-year compliance schedule for devices found to be out of compliance provides a logical and cost-effective method for dealing with devices that are found to be out of compliance after 2012.

VAWC is unaware of any information in the record of the regulatory proceeding that addresses the cost impact of such a change. VAWC believes such a change is unnecessary, burdensome and not locally cost-effective.

Department Response: Reject – the inclusion of 2012 deadline to demonstrate compliance of existing devices with the regulation is a clarification. Section 597.4(d)(2) requires all devices installed to be in compliance at all times. Section 597.4(e)(4) requires existing devices that are not in compliance before 2012 shall be brought into compliance within three years after submittal of the 2012 plan. DWR recognized that requiring compliance of all existing devices that do not meet the regulation accuracy standards by 2012 might not be reasonable; thus allowed three-years beyond 2012 to bring noncompliant devices into compliance by Plan submittal date of 2015. All plan submittal dates are established by the statute. After 2012, if any device no longer meets the accuracy requirements, appropriate corrective actions has to be taken (597.4(d)(2) and after 2015 there is no reason for the device to not be compliant for three years. The inclusion of the 2012 date is not a change in the regulation; it only adds clarification to ensure that section 597.4(e)(4) is consistent with 597.4(d)(2).

G32: Section 597.4, d, 1 and elsewhere in the document it is implied that water measurement devices operation and maintenance are addressed. We suggest the group consider adding a subsection that explicitly discusses operation and maintenance (i.e. the need for an O&M plan, regular recertification, etc.) beyond the initial certification of existing and new devices.

Department Response: Reject – The regulation is already requiring reporting in §597.4(d)(1) that: All measurement devices shall be correctly installed, maintained, operated, inspected, and monitored as described by the manufacturer, the laboratory or the registered Professional Engineer that has signed and stamped certification of the device, and pursuant to best professional practices. To avoid having a regulation that is too prescriptive, and given that maintenance protocols are device specific (agricultural water measurement devices include a vast array of device types including: propeller meters, acoustic meters, differential head meters, metergates, slide or sluice gates, constant head orifices, weirs, flumes, radial gates, etc.), suppliers are required to use best professional practices and follow device manufacturers' recommendations.

G33: The law describes water measurement as needed to facilitate volumetric pricing. We suggest the group consider the appropriateness of adding language to add value to farm delivery water measurement by providing water volume data to the farmer at the times and units they can use for on-farm water management.

Department Response: Reject - The comment is beyond the scope of this regulation. The regulation is for setting accuracy standards and giving a range of measurement options that suppliers may use to comply with the measurement requirements. Suppliers' compliance with the volumetric pricing requirement is outside the scope of this regulation. It is the responsibility of the suppliers to adopt a volumetric pricing structure as required of them.

G34: As we have previously noted, SBX7-7 reauthorized the Agricultural Water Management Planning Program. (Sen. Bill No. 7X (2009-2010 Ex. Sess.) § 7.) Subdivisions (d) and (e) of Water Code section 10608.48 reauthorized the agricultural water management plan requirements

under Water Code sections 10800, et seq. While subdivision (d) requires that a contractor's plan include a report on which of the Efficient Water Management Practices (EWMPs) listed under Section 10608.48 have been or will be implemented, subdivision (f) provides that a CVP contractor "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to [BOR] that meets the requirements described in Section 10828." Section 10828, in turn, provides that water conservation plans submitted to the United States Bureau of Reclamation under the CVPIA or the RRA satisfy the requirements of the Agricultural Water Management Planning Program as long as: (1) the plan was adopted and submitted within the previous four years, and (2) the Bureau of Reclamation has accepted the water conservation plan as adequate. Thus, under Water Code section 10608.48(f), a plan that was adopted and submitted under the CVPIA or the RRA within the previous four years and was accepted by the Bureau of Reclamation as adequate is deemed to meet the EWMPs requirements of Water Code section 10608.48(d).

Throughout this regulatory process, we have been urging the Commission to adopt a regulation that reaffirms that agricultural water suppliers who prepared accepted water management plans under the CVPIA or the RRA that satisfy the requirements of Water Code section 10828 have fully complied with Water Code section 10608.48. Whether or not the Commission ultimately decides to adopt a regulation specifically reaffirming this point, the plain text of Section 10608.48(f) provides that federal water contractors "may meet the requirements of subdivisions (d) and (e) by submitting to [DWR] a water conservation plan submitted to [BOR] that meets the requirements described in Section 10828."

Department Response: See response to Comment G27.

G35: The language in SBx7-7 requires water suppliers serving 25,000 irrigated acres or more to measure the volume of water delivered to customers. Affected federal water contractors are already required to measure water deliveries and utilize a pricing structure that is at least in part based on the volume delivered. Without adequate clarification these contractors may unnecessarily be required to comply with two sets of regulations.

Department Response: See response to Comment G27

G36: Federal water contractors that are in compliance with federal water conservation criteria are already measuring water deliveries in compliance with 531.10(a).

Department Response: See response to Comment G27.

G37: Legal certification limiting access to private ditches – 597.3 (b) (2) (A). Additional changes in the measurement regulation now require "...agricultural water suppliers legal counsel to certify to the Department that it does not have legal access to measure water as a customer's delivery points..." This change requires legal certification where the previous version allowed a district to "self certify." If enacted with the new requirement of "legal certification," it will be necessary to engage in a host of title search processes that will be unnecessarily time consuming and very expensive. Self-certification by the elected Board of a water supplier should be sufficient to accommodate questions about access to private property.

To complicate the issue further, the new requirement conflicts with Water Code Section 22234 where the responsibility of engaging with the District for improvements clearly falls on the landowner:

Part 5, Chapter 2, Article 1 Sec. 22234. A district may contract to operate, maintain, or improve ditches and laterals not owned by the district upon petition of at least two-thirds of the owners of land served by such ditches or laterals.

Department Response: Reject - the comment that the land owners may have a contract with the water supplier supports the proposed regulation. When land owners have a contract with the supplier to manage and operate the private ditch, the supplier will have legal access to install and manage the water measurement device. See also Department Response to G30.

G38: This change in the regulation requires that all measurement devices be brought into compliance within three years of December 2012 instead of within three years of determining that they are out of compliance. This creates a conflict for devices that are found to be out of compliance after the December 2012 deadline. It is also unlikely that districts have accommodated for water measurement device assessments in their 2012 budgets in order to comply with the new water management plan deadline of December 2012. The previous three-year compliance schedule for devices found to be out of compliance more provides a logical method for dealing with devices that are found to be out of compliance after 2012.

Department Response: Reject. See response to G31.

G39: However, as noted in our prior comment letters, the proposed regulation allows measurement upstream of the farm gate if the supplier lacks legal access to the farm gate (§ 597.3(b)(1)(A)) or if the supplier cannot measure deliveries with a single measurement device “comparable in cost to other measurement devices commonly in use” (§ 597.3(b)(1)(B)). These exceptions are overbroad and are inconsistent with the mandate of the Water Conservation Act of 2009. We have repeatedly provided alternative language for these regulatory sections that are consistent with the requirements of the statute.

These exceptions have the potential to exempt a significant proportion of the water suppliers covered by the statute from measurement at the farm gate. For instance, the Department’s economic analysis estimates that, “half of the potentially affected irrigated acreage in the Sacramento Valley region would be measured at the lateral level.”³ That economic analysis further assumes that all other suppliers would measure at the turnout ⁴ but this assumption is arbitrary in light of the breadth of these two exceptions and the failure to consider whether other suppliers would utilize these exceptions. Thus it is likely that an ever greater proportion of affected water deliveries will not be measured at the farm gate.

Department Response: Reject - Measurements at locations upstream of farm gates are accepted only for restricted and special cases where farm-gate measurement is not technically or legally feasible. Suppliers can use this option only if they can demonstrate that measurement at farm gate is not legally accessible or technically feasible and cannot meet the required level of accuracy required. Section 597.3(b)(2) lists documentation that suppliers have to provide in order to use this option. Having a regulation that accommodates special cases and conditions that exist in the real world will ensure compliance by all suppliers. It is also an attempt to provide a range

of options as directed by the legislation to help agricultural water suppliers comply with the measurement regulation.

G40: Section 597.3(b)(1)(A) While the language proposed to be stricken appears to be merely redundant, the remaining language continues to be flawed. Some water suppliers may have never needed legal access to the farm gate in the past, but are authorized by law to acquire such access. This exception is overbroad and is inconsistent with the intent and requirements of the Act, and the language should be revised to provide a more narrowly drawn exception that is consistent with the intent of the law. We recommend that the language be amended to read: “The agricultural water supplier does not have, and lacks the legal authority to obtain, legal access ...”

Department Response: Reject - Agricultural water suppliers claiming lack of legal access are required to certify through their legal counsel that they do not have legal access to measure water at a customer’s delivery point. Requiring such certification to be made through the supplier’s legal counsel ensures that the claim is legally defensible. Additionally, those suppliers are required to document that they have sought and been denied access to measure water at customer farm-gates.

G41: Section 597.3(b)(1)(B) Similarly, the language proposed to be stricken appears redundant, but the remaining language provides an impermissibly broad exemption from measurement at the farm gate. The language of the Act does not support an exemption that turns on whether a measurement device is not simply “commercially available”, but “comparable in cost to other measurement devices” as well. Even if the cost of commercially available devices were a permissible consideration under the statute, the lack of guidance on making cost comparisons between measurement devices renders the provision unworkable.

We believe that a more narrowly drawn exemption, coupled with a reporting requirement that would document the specific field conditions where measurement accuracy could not be achieved with commercially available measurement devices, would strike the appropriate balance. We recommend that the language be amended to read:

“The agricultural water supplier has determined that the applicable accuracy standard of 597.3(a) cannot be met with commercially available measurement devices, where the agricultural water supplier provides documentation of the flow rates, elevations, and operating conditions that make it impossible to measure volume at each customer delivery point for which the measurement exemption is claimed, and these data and the finding have been reviewed, signed and stamped by a registered Professional Engineer.”

Department Response: Reject - DWR believes that requiring more than one measurement device to be installed at each farm-gate is not practical, technically challenging, and imposes undue hardship to the agricultural water supplier. The regulation does however require that suppliers measure water deliveries at farm-gate when a water measurement device becomes commercially available, that is comparable in cost to other measurement devices commonly in use, and that can meet the measurement options in §597.3(a)(2). If the supplier cannot meet the conditions stated in 597.3(a)(2) the supplier shall measure at the farm-gate.

G42: Section 597.3(b)(2)(A) We have no objection to this change, although as noted above, we believe that section 597.3(b)(1)(A) should be limited to water suppliers that lack the legal authority to obtain sufficient access to customer delivery points.

Department Response: Reject – see response to G39.

G43: Section 597.3(b)(2)(B) We have no objection to this change, although as noted above, we believe that section 597.3(b)(1)(B) should not be based upon the lack of availability a single measurement device (as contrasted with two devices, for high and low flows respectively) nor be based upon an vaguely stated standard of cost comparability.

Department Response: Reject – see response to G39.

G44: Section 597.4(e)(4) The Act requires that water suppliers “shall implement” the critical efficient management practices (volumetric pricing and water measurement) on or before July 31, 2012. Cal. Water Code § 10608.48(a). However, this section of the regulation provides a limited exception that allows certain water suppliers to avoid implementing the accuracy standards for water measurement by this statutory deadline. This exception applies only for agricultural water suppliers that are “unable to bring [an existing water measurement device] into compliance,” allowing them until 2015 to comply. It appears unclear what “unable to bring into compliance” means under the regulation (presumably this would not include cost-effectiveness, given the statutory scheme and structure of cost-effectiveness exceptions), and the December 2012 date appears inconsistent with the statutory requirement (as may this entire section). This section provides the only guidance on the implementation timing, and because the regulation provides this timing provision for existing devices, under accepted principles of regulatory and statutory construction the reasonable inference from the regulatory scheme is that all new devices must be installed and certified by the statutory deadline.

Department Response: Reject - DWR recognizes that requiring compliance of all existing devices that do not meet the regulation accuracy standards by 2012 might not be reasonable; thus allowed three-years beyond 2012 to bring noncompliant devices into compliance, by the 2015 water management plan submittal date, provided that the supplier provide in its water management plan a schedule, budget, and finance plan to bring those devices into compliance. However, after 2012, if any device no longer meets the accuracy requirements, and as stated in section 597.4(d)(2), appropriate corrective actions have to be taken that may include repair or replacement of the device.

G45: Nevertheless, NRDC recognizes that fully complying with new measurement requirements will take time, and at several stages in the stakeholder process we have noted that the lack of clarity on the timing of implementing the measurement standard has created unnecessary uncertainty for agricultural water suppliers and frustrated attempts at consensus on the language of the rule. The lack of guidance on the time available for completion has hardened the demands of the regulated community for the regulation to require as little change as possible from the status quo. It was clear from the outset of the stakeholder process in the summer of 2010 that full implementation of farm gate measurement for some districts would require a multiyear process at best, and with significant issues pending in a protracted rulemaking, little time would be left to fully "implement" the required measures before the date of July 31, 2012 contained in

the act. Unfortunately, the Department has failed to provide much guidance to water suppliers as to the deadlines for implementation, and we believe the Department has missed an opportunity to reach consensus on stronger regulations that more fully comply with the Act's requirements while also providing a more realistic schedule for full implementation.

Department Response: Reject – the deadline for compliance with the regulation has been set by the SBx7-7 legislation. Although the scope of this regulation is to provide a range of measurement options that agricultural water suppliers may use; phasing the implementation schedule is outside the scope of the regulation. DWR believes that the regulation text, which is the culmination of over a year long process with participation and input from stakeholders, meet the intent of the legislation in putting forth a range of measurement options that provide for a reasonable and effective way to comply with the measurement requirements.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED SECOND 15-DAY PUBLIC COMMENT PERIOD (OCTOBER 20 THROUGH NOVEMBER 3, 2011)

G46: 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.

Department Response: Reject- The California Water Commission (CWC) considered all arguments and voted to reinsert the CVP provision indicating that section 597.1(i) of the regulation is a minimum requirement for federal water suppliers. The Reclamation's 2011 criteria are not effective until January 2012, so the CWC may be required to modify the

regulation at that time since the 2011 criteria requirements will supersede the 2008 criteria requirements.

Updated Department Response: Accept – 597.1(i) was deleted in future 15-Day Notices due to public comments.

G47: Section 597.1(i) would unlawfully exempt some Bureau of Reclamation contractors from verifying the accuracy of measurement devices, without valid justification.

Department Response: **Reject** – The Bureau of Reclamation’s 2011 Criteria require documentation verifying the accuracy standards of the measurement devices used. Given the fact that the 2011 Criteria will not be in effect until January 2012, the Commission decided to move forward with the agricultural water measurement regulation referencing the 2008 Bureau criteria. Once the new criteria are in place, DWR will have to amend its regulation to incorporate the 2011 criteria.

Updated Department Response: Accept – 597.1(i) was deleted, including the 2008 reference, in future 15-day Notices due to public comments.

G48: Because the scope of the exemption provided in Section 597.1(i) is unclear, the provision fails the Clarity Standard of the APA.

Department Response: **Reject** – See response to G46, above.

Updated Department Response: Accept – See updated responses to G46-G47.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED THIRD 15-DAY PUBLIC COMMENT PERIOD (FEBRUARY 28, 2012 THROUGH MARCH 14, 2012)

G49: The new regulation seems fair to all users and the large special interest loopholes for big agribusiness are gone. This new regulation will go a long way to ensure the human right to water for all water users in our state.

Department Response: Comment noted.

G50: Argues in support of aggregated farm gate measurements to satisfy the agricultural water measurement regulation accuracy requirements.

Department Response: **Reject** – See response to comments G10 and G21.

G51: As currently drafted, the draft regulation appears consistent with SB 7x 7 and is necessary to implement the requirements of section 10608.48(b) of the Water Code.

Department Response: Comment noted.

G52: In addition, we recommend that the Department and Commission consider three minor changes to clarify awkward and potentially confusing language in section 597.3(b)(1)(B). We have included a redline of these proposed clarifying changes. These changes do not change the substance of the regulation, but instead fix grammatical errors and clarify what we understand to be the intent of the regulation.

Finally, we believe there may be value in better clarifying what constitutes compliance with respect to the timing and extent of implementation of the measurement and volumetric pricing requirements of SB 7x 7. *See* Water Code §§ 10608.48(b), 10608.56(d).

Department Response: Comment Noted.

G53: Necessity issue as required by OAL is not resolved.

Department Response: Reject – The regulation is necessary to provide information to agricultural water suppliers to meet the intent of the Water Code and to implement the requirements of the various sections of the Water Code listed here:

1. Water Code declares under section 10608 (e) “The success of state and local water conservation programs to increase efficiency of water use is best determined on the basis of *measurable outcomes* related to water use or efficiency” [emphasis added]
2. Water Code Section 10608.4 declares the intent of the Legislature and under section 10608.4(e) states “Establish consistent water use efficiency planning and implementation standards for urban water suppliers and agricultural water suppliers”
3. Water Code Section 10608.48 (b) states “Agricultural water suppliers shall implement all of the following critical efficient water management practices”
4. Water Code Section 10608.48(i) requires DWR to adopt a regulation and develop a range of options the agricultural water suppliers may use or implement to comply with the measurement requirement in paragraph (1) of subdivision (b) of Water Code Section 10608.48.
5. Paragraph (1) of subdivision (b) of Water Code Section 10608.48 requires certain water suppliers to “Measure the volume of water delivered to customers with sufficient accuracy to comply with Water Code Section 531.10 and implement paragraph (2)”. See item 7 below.
6. Water Code Section 531.10 requires water suppliers to report aggregated farmgate delivery to DWR. Section 531.(a) defines “aggregated farmgate delivery to mean “information reflecting the total volume of water an agricultural water supplier provides to its customers and is calculated by totaling its deliveries to individual customers”.
7. Paragraph (2) of subdivision (b) of Water Code Section 10608.48 requires agricultural water suppliers “Adopt a pricing structure for water customers based at least in part on quantity delivered”.
8. Water Code Section 10608.48(d) requires agricultural water suppliers to report estimate of efficiency improvements in the agricultural water management plan.

Therefore, the regulation is necessary in order to comply with the measurement requirement in paragraph (1) of subdivision (b) of Water Code Section 10608.48 and to give agricultural water suppliers the necessary options for them to be consistent with the statute policy declarations and to comply with its requirements. Item (1) above justifies the need for water measurement. So it is

necessary to measure volume of water delivered to customers to assess water use and water use efficiency.

Item (2) above justifies the necessity of a regulation with consistent standards and terms for implementation.

Items (2) and (4) above, require adoption of the regulation by DWR for consistency, therefore, the development of the accuracy standards and other requirements of the regulation cannot be delegated to local agencies.

Furthermore, the regulation is necessary due to the extraordinary circumstances of water management in the State. The State is frequently water short due to limited or unreliable supplies and this regulation is a continuance of a long history of adopting newer management and technologies that aid the State water managers to better able manage water. This effort began in 1928 with the amendment to the State Constitution and continued with the Urban Water Management Planning Act of 1983 and the Agricultural Efficient Water Management Act of 1990. This most recent SBX7 7 Act and this resulting regulation is a revision and continuation of the two aforementioned Acts.

G54: Regulation need revision because requirements are overly burdensome, expensive, and inconsistent; DWR can decide to include cost effectiveness as a factor of “sufficient accuracy” really means; the numerous changes to 597.3(b)(1)(B)... has ballooned into 15 separate changes... have done nothing to clarify the regulation and have increased the level of confusion for the parties responsible for implementation.

Department Response: Reject- Regarding consistency, see response to G53 above and the Supplemental Initial Statement of Reasons.

Regarding cost effectiveness, see response to G28.

Regarding clarity, Section 597.3(b)(1)(B) and other sections were modified under this notice to improve clarity and implementation.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED FOURTH 15-DAY PUBLIC COMMENT PERIOD (MARCH 26, 2012 THROUGH APRIL 11, 2012)

G55: Continue to be very concerned that Department has not adequately responded to OAL Feb 8, 2012 decision (“why” regulations are needed).

Department Response: **Reject-** See response to G53 above and the Supplemental Initial Statement of Reasons.

G56: Regulation lacks sufficient necessity to justify numeric accuracy standards ($\pm 5\%$, $\pm 10\%$ or $\pm 12\%$); Dept has not established why this language necessitates or justifies levels of accuracy established by regulation; why wouldn’t sufficient accuracy be determined by the local water supplier... if the water users are comfortable with an accuracy of $\pm 15\%$?

Department Response: Reject - See response to G53. In addition, the statute requires sufficient accuracy for water measurement as required in Items (5 in Response to G53) and necessary for items (6) & (7) above, in Response to G50. DWR's proposed accuracy standards are +/-% 5, ±10%, and +/-12%. These accuracy standards are in line with current industry standards as reported in water measurement device manufacturers' specifications. Also, the federal 2011 criteria require federal water suppliers in California to measure water with accuracy of +/-6%. DWR also consulted with subject matter experts on the reasonable accuracy standards and were advised the regulation's ranges of accuracy standards are within an acceptable and achievable range.

The inclusion of the accuracy standards as specified in the regulation is justified to provide for sufficient accurate measurement of water deliveries to customers and for reporting aggregated farm-gate deliveries to DWR. The reason for individual device compliance with the accuracy standard is to ensure compliance with Water Code 531 (a) that requires measurement of water deliveries to individual customers (see item 6 above, in Response to G53)

The accuracy standards are to be applied to individual water measurement devices, as compared to aggregated accuracy (or average accuracy) of all the water supplier's devices. For example; where one device may report accuracy of 20 percent and the other device 4 percent, the average of the two is 12 but one of the devices is not in compliance.

Furthermore, the accuracy standards are necessary to ensure that the water supplier individual customers' water measurement devices are meeting the accuracy standards so that customers are able to be billed for volume of water delivered to them based on readings of their respective individual measurement devices and to provide equitable pricing and billing of all customers. The pricing structure (see item 7 above, in Response to G53) to be developed outside this regulation is required to be at least in part on the *quantity* [emphasis added] delivered. Therefore, measurement of water volume delivered to a customer is necessary to bill the customer on the quantity delivered.

Regarding why wouldn't sufficient accuracy standards be determined by the local water supplier, items (2) and (4) above (in response to G53) require adoption of the regulation by DWR for consistency of implementation statewide, therefore, the development of the accuracy standards and other requirements of the regulation cannot be delegated to local agencies.

G57: Support striking "or devices" in 597.3(b)(1)(B) because it helps to clear up what requirement regulated entities will be expected to meet.

Department Response: Reject- Department modified the text of section 597.3(b)(1)(B) for this notice to add "or devices, with or without additional components] for the purposes of clarity and consistency. More than one measurement device at a particular farm-gate or lateral may be necessary to accurately measure the volume of water delivered.

In response to Comment G58 and in response to OAL decision of February 2, 2012 regarding Consistency Standards, Department modifies the text of regulation section 597.3(b)(1)(B) and issued a 15-day public comment period.

G58: Section 597.3(b)(1)(B) of the proposed regulation would allow water suppliers to measure upstream of the farm gate if a single measurement device cannot meet the accuracy

standard. Both OAL and DWR have acknowledged that cost considerations are not a valid basis for an exemption from the statutory requirement to measure at the farm gate. 597.3(b)(1)(B) of the proposed regulation is not consistent with the statute... improperly allows water suppliers to measure at the lateral, rather than at the farm gate, if suppliers cannot meet the accuracy standard using a single measurement device. While DWR may be less explicit regarding cost considerations in this version of the regulation, there is not valid basis for limiting measurement at the farm gate to a single measurement device. The statute requires “measurement” of water deliveries in order to obtain accurate farm gate delivery data and to be able to implement volumetric pricing.

The Department has failed to adequately respond to comments regarding section 597.3(b)(1)(B) and its explanations fail to meet the clarity standard of the APA. Since May 2011, NRDC and others have repeatedly submitted written and oral comments that section 597.3(b)(1)(B) should not be limited to a single measurement device. Equally important, there is no basis in the statute for allowing measurement at the lateral instead of the farm gate based on DWR’s anticipation that farm gate measurement for some suppliers “is not practical, technically challenging, and imposed undue hardship.” March 26, 2012 Supplement to the Initial Statement of Reasons... fails to respond to comments, and this justification of “unusual” circumstances is belied by the fact that DWR’s economic analysis expects that half of all acreage subject to the regulation in the Sacramento Valley will not be measured at the farm gate. DWR has failed to respond to repeated comments that Section 597.3(b)(1)(B) should not be limited to a single measurement device, and DWR’s limited explanations and justifications for this section are inconsistent, without statutory authority, and support the conclusion that more than one measurement device is not required because of DWR’s conclusions regarding cost and cost-effectiveness. As such, OAL should reject the draft regulation as failing to meet APA requirements.

Department Response: Accept in part – In response to these issues raised, DWR will amend the rule language and issue another 15-day Notice that will address these concerns.

SUMMARY OF COMMENTS AND DEPARTMENT RESPONSES FROM THE NOTICED FIFTH 15-DAY PUBLIC COMMENT PERIOD (APRIL 18, 2012 THROUGH MAY 3, 2012)

G59: Section 597.3(b)(1)(B) does not meet the Clarity Standards

Department Response: Reject. DWR modified this Section directly in response to comments received in prior 15-day notices, and to the OAL decision regarding Clarity and Consistency Standards.

For additional information on clarity and consistency for implementation of the regulation the following specific criteria are necessary and have been included in the applicability section of the regulation:

a) Clarifies applicability to wholesale agricultural water suppliers that may deliver or supply water to other agricultural retail water agencies, through their facilities and do not have control of the delivery of water to their retail customers. This clarification is necessary because the Statute did not address this circumstance of wholesale water suppliers where an agency is simply transporting water to another supplier and not delivering it to the retail supplier’s customers.

- b) Clarifies applicability to suppliers providing water to wildlife refuges by determining that they pertain to this Article and to the acreage provisions in Water Code Section 10608.12(a). Many stakeholders were uncertain about the applicability of wildlife refuges and whether or not they are considered a customer of a water supplier as defined in the Statute and regulation. This statement clarifies the definition of customer by including wildlife refuges as a type of customer.
- c) Excludes agricultural water suppliers providing water to less than 10,000 irrigated acres as specified by Statute.
- d) Excludes agricultural water suppliers providing water to 10,000 or more irrigated acres but less than 25,000 irrigated acres, unless funding is provided as specified by Statute.
- e) Clarifies applicability to canal authorities and entities that only deliver water through federal facilities to other water agencies that then deliver the water to customers. This clarification is necessary because the Statute did not address this circumstance where an agency is simply transporting water and not delivering it to the retail supplier's customers.
- f) Excludes suppliers that are part of the Quantification Settlement Agreement as specified in the Statute.
- g) Excludes the Department of Water Resources as specified in the Statute.

G 60: Department has done nothing to establish its Necessity

Department Response: Reject. This comment does not pertain directly to the 15-Day Notice, and was addressed in previously. See Response to G53, G56

G61: The inclusion of the language would eliminate the “range of options” required by the legislation.

Department Response: Reject. The inclusion of the language would not eliminate the range of options. It provides clarity on the conditions for using section 579.3(b)(1)(B) and makes the regulation consistent with DWR legal analysis that water measurement is not subject to local cost effectiveness.

G62: We are writing with qualified support for the modifications to the proposed agricultural water measurement regulation, as adopted by the California Water Commission (“Commission”) for public comment on April 18, 2012. We urge the Commission to approve the modified proposed regulation and submit it to the Office of Administrative Law (OAL) for review.

The current version of Section 597.3(b)(1)(B) of the draft agricultural water measurement regulation is facially consistent with the requirements of SB 7x 7 (the Water Conservation Act of 2009).

We encourage quick and decisive action on behalf of the Commission to approve the regulation without any changes and submit it to OAL for review.

Department Response: Comment noted.

G63: In the statement of reasons, the Department equates implementing this measurement regulation to the “measurable outcomes” in Water Code section 10608(e) which references water use or efficiency. The Department has not stated how this regulation would result in measurable outcomes in water use or efficiency. The Department, in order to comply with OAL’s order, must document in this Statement of Reasons how measurement within this regulation, in and of itself, will reduce water use or increase water use efficiency.

Department Response: Reject. DWR has documented that the water measurement as defined by section 10608.48 is one of the two critical Efficient Water Management Practices. The law requires implementation of EWMPs to increase water use efficiency. The regulation directly affects one of the two critical EWMPs, the water measurement. Water measurement in accordance to the terms of the regulation would give water suppliers a consistent method to show the supplier has met the implementation of the critical EWMP. While pricing structure is not contained in the regulation, it is required by Statute and is a second critical EWMP which is dependent upon the measurement EWMP. Water measurement would lead to better water management, provides a necessary tool for volumetric billing, which in turn would increase water use efficiency and save water. By analogy, and similar to the urban sector, metering has been shown to further water use efficiency and conservation.

G 64: On page 3 of the Statement of Reasons, the Department equates range of options in the legislation, [*the Department is required to adopt regulations that provide for a range of options to comply with the measurement regulation*] to a “range of accuracy options” which is clearly a misrepresentation of the legislation.

Department Response: Reject in part. The “Range of options” available to water suppliers by the regulation include the followings: installing water measurement devices at the farm-gate, installing water measurement devices at the lateral (upstream of multiple farm-gates) if certain technical conditions are met, installing water measurement devices upstream of multiple farm-gates when water supplier demonstrates it has no legal access to individual farm-gates, suppliers may certify their measurement devices using either lab accuracy or field accuracy determinations certifying water measurement devices by inspection, certifying water measurement devices by testing , using manufactured or onsite built devices, and an additional option is to allow for slightly less accurate pre-existing devices. The Accuracy levels provided in the regulation are performance measures to ensure that measurement is sufficiently accurate. The set of accuracy numbers ($\pm 5\%$, $\pm 10\%$, and $\pm 12\%$) are indeed another way of providing agricultural water suppliers with a range of options to comply with the measurement requirement.

G65: The Department claims that cost effectiveness cannot be used to guide the establishment of this regulation because the legislation is silent on the issue of placing a condition of cost effectiveness on water devices. It is the Department, in its stated effect of the regulation that claims that it cannot be used. OAL points out this discrepancy in the February 8 Decision of Disapproval and provides the Department with options to address it, “To resolve this issue, the Department needs to either [emphasis added] modify the text of section 597.3(b)(1)(B) in a 15-day notice of modified text so that section 597.3(b)(1)(B) is consistent with the stated effect of the regulations, i.e., no exemption to water measurement devices may be based on cost effectiveness, or provide a different legal analysis in the rulemaking file that supports the notion that cost effectiveness is allowed as a consideration is allowed as a condition to the water measurement requirement of Water Code section 10608.48(b)(1) [emphasis added]. This would not be without precedent.

As mentioned above, the revised regulation will have a significant impact on the cost of this regulation and its burden on the regulated entities. A new cost estimate will need to be developed for this regulation and the Department will need to justify why the regulation is not subject to section 11340.1 of the Government Code, which states that “agencies shall actively seek to reduce the unnecessary regulatory burden on private individuals and entities by substituting performance standards for prescriptive standards wherever performance standards can be reasonably expected to be as effective and less burdensome, and that this substitution shall be considered during the course of the agency rulemaking process [emphasis added].”

Department Response: Reject. In response to comments by stakeholders (See G58), DWR modified section 597.3(b)(1)(B) to ensure consistency with the effect of the regulation. Cost effectiveness is not a condition or factor for water measurement and therefore for eligibility for section 597.3(b)(1)(B).

G66: Department has stated that it cannot include cost effectiveness, however, Department in the development of methodology for quantifying the efficiency of agricultural water use (required by section 10608.64) has, using its own discretion, included “performance indicators” such as economic production that do not quantify the efficiency of agricultural water use, while there was no language in section 10608.64 regarding economic production. The inconsistent and opposite approaches to the interpretation of the legislation is an abuse of the Department’s authority.

Department Response: Reject. Comment is a general objection not applicable to the statute’s charge to the Department as described in section 10608.48(i). Section 10608.64 is a different part of the statute with different requirements.

G67: Compare aggregated farm-gate delivery calculated from water balance with the deliveries from billing records, instead of requiring individual device accuracy standards. Revise the regulation, making the +/-12% accuracy standard apply to the aggregated farm-gate deliveries, not the individual farm-gates or delivery points.

Department Response: Reject- This comment is not applicable to the current notice. Furthermore, this comment has been addressed previously in G10, G21, and G50 responses. The +/-12% standard would apply to existing devices. A new or replacement measurement device would be certified to be accurate to +/-5% by volume, if it is laboratory certified, or, +/-10% by volume in the field if using non-laboratory certification. These standards are not burdensome, as the Bureau of Reclamation requires +/-6% accuracy at the farm gate for all devices (see Comment G27). The commenter doesn’t address (1) how the discrepancies between calculated farm-gate deliveries and deliveries based on billing records would be rectified? (2) How would accuracy be determined? (3) How the effect of water losses in the system would be separated from the effect to device accuracy? (4) And how sufficient accuracy for individual customers would be achieved? Department relied on the Water Conservation Plans submitted to the Reclamation in 2010 and 2011 that report many agricultural water suppliers comply with the Federal CVPIA standard of 6% accuracy or better (see summary of information prepared from the Water Conservation Plans in the Materials Relied Upon).

G68: Alternatively, if water measurement accuracies are established at the customer delivery point, revise the regulation to provide the same amount of time to implement water measurement as urban water suppliers were given.

Department Response: Reject. The compliance date of July 31, 2012 for implementation of the Efficient Water Measurement Practices is set in Water Code §10608.48(a). DWR believes that it is reasonable to allow 3 years to become compliant for the next Agricultural Water Management Plan that is due in December 31, 2015. Urban water suppliers' compliance with water metering was established by the Legislature. Section 10608.48 did not mandate a similar schedule.

G69: Update the Economic and Fiscal Impact Statement to be reflective of the revised regulation.

Department Response: Accept in Part. The cost of implementation may change depending on the options water suppliers would be eligible for. At this time it is unknown what percentage of water suppliers will use the section 597.3(b)(1)(B). The assumption in the Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement (FIS) dated April 22, 2011 is that 50% of the farm-gates in the Sacramento Valley (estimated to be about 2978 farm-gates) would be eligible for section 597.3(b)(1)(B), hereafter referred to as Group A, and the remaining 50% would measure at the farm-gate, Group B. Currently, the present value of the total cost is estimated to be \$333 and 429 million for 20 and 40 year horizon. If we assume that due to the modifications to section 597.3(b)(1)(B) (before the 5th comment period) less than 50% of the farm-gates would become eligible for section 597.3(b)(1)(B), the cost of Group A will decrease and the cost of Group B would increase. Assuming that the water suppliers who would become eligible for section 597.3(b)(1)(B) be reduced from 50% to 25%, DWR estimates that the total cost of the regulation for 20 and 40 years would be 350 and 451 million. In other words, the number of measurement of lateral devices is reduced from 50% to 25% and the number of farm-gate devices will increase from 50% to 75%. Additionally if we assume that 75% of the devices at the farm-gates have to be replaced with new devices (compared with 50% assumed in the April 2011 estimate), the present value of costs would be \$376 and \$484 million, for 20 and 40 years, respectively. Therefore, the Department's Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement is updated. Assumes average initial cost of \$7,570 plus average annual cost of \$2,500 per affected farm; Farm size 313 acres. See Addendum to Department Cost Analysis.

G70: Department will need to justify why the regulation is not subject to 11340.1 of the Government Code which states that "agencies shall reduce regulatory burden by substituting performance standards for prescriptive standards.

Department Response: Reject. DWR has included accuracy standard values as "performance standards" instead of prescribing specific water measurement devices or equipments or trade mark. Water suppliers may choose any options they are eligible for and use any measurement device(s) that meets the performance accuracy standards. Additionally, once a compliant device is selected, the operation and maintenance is held to best professional practices (performance standards).

H. AUTHORITY AND REFERENCE

Under the authority included under California Water Code Section 10608.48(i)(1), the Department of Water Resources is required to adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirements in paragraph (1) of subdivision (b) of Section 10608.48.

Water Code Section 10608.48(i)(1) states:

The department shall adopt regulations that provide for a range of options that agricultural water suppliers may use or implement to comply with the measurement requirement in paragraph (1) of subdivision (b).

The section above refers to Section 10608.48(b), which states:

Agricultural water suppliers shall implement all of the following critical efficient management practices:

- (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.*

I. DETERMINATIONS

I.1 Local Mandate Determination:

The proposed regulation does not impose a mandate on school districts. The regulation would impose specific farm gate water delivery measurements and reporting requirements on local agricultural water districts that supply water to more than 25,000 acres of irrigated land.

I.2 Estimate Cost and Savings:

I.2.1 Non-federal water suppliers

There is significant uncertainty regarding the potential cost to agricultural water suppliers associated with compliance with the regulation due the large range of data and assumptions. The mid-range estimates of total present value of costs are \$350 million over 20 years. About \$70 million of that would be initial assessments and capital improvements, and the remainder is the present value of annual O&M, administration, and capital replacement. Costs could be as little as half that amount or as much as twice that amount. Average costs per acre potentially affected were estimated to be \$24 in initial costs and \$6.5 in annual ongoing O&M costs. Costs to individual farms are likely to vary significantly.

I.2.2 Federal (CVPIA and RRA) water suppliers

Federal water suppliers that comply with the Reclamation Criteria would comply with the State Regulation, provided the water suppliers submit initial certification signed by a professional engineer, that they meet the federal standards and devices are maintained and calibrated to operate to accuracy of +/- 6 percent, under most conditions. If the federal contractors have not been complying with the Reclamation criteria DWR has estimated the maximum cost to federal water suppliers, for doing field testing, to be approximately \$32 million assuming that there is 1.8 million acre of irrigated land with 22 water suppliers greater than 25,000 acres of irrigated land that would be in the same condition as other non-federal water suppliers in terms of measuring water. However, federal water suppliers have been under the Standard Criteria for many years and therefore should have implemented devices with accuracy of +/- 6%. Consequently, we anticipate the only cost to the federal water suppliers would be the cost of initial certification of compliance (needed with the 2012 Agricultural Water Management Plans) for existing devices by a Professional Engineer. Though no analysis was done to estimate the cost of initial certification it is expected to be minimal.

I.3 Economic Impact on Small Business:

Fiscal impacts and costs to water suppliers are indirectly dealt with in this section, as costs to the agricultural water suppliers associated with complying with the regulation will be passed on to their customers (i.e., farmers) through higher water rates and assessments. Though agricultural water suppliers might need voter approval to increase rates since they are subject to Proposition 218, which divests local public agencies of authority to impose or increase general taxes assessments and fees without voter approval. Nevertheless, the legislation has clearly singled out two efficient water management practices and considered them as 'critical' including the water measurement requirement. Unlike other efficient water management practices that are required only when locally cost effective under section 10608.48(c), SB X7-7 legislation does not provide any exemptions from the water measurement requirement of 10608.48(b)(1).

Only Agricultural water suppliers that provide water to more than 25,000 acres of irrigated land are subject to this regulation. As mentioned, costs to those agricultural water suppliers will be passed on to their customers. However, as required by legislation, agricultural water suppliers have to measure water deliveries to their customers in order to adopt a billing structure that is based at least partially on volume of water delivered. The volumetric pricing of water deliveries is expected to achieve an equitable billing for the agricultural water users, as well as encourage water use efficiency and conservation.

I.4 Assessment of Cost Impacts Incurred By Private Sector:

The agency is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

I.5 Assessment of Effect on Jobs/Business:

The proposed regulation for agricultural water measurement will not:

- Eliminate jobs within California;

- Eliminate existing businesses within California:
- Affect the expansion of businesses currently doing business within California

I.6 Reports Required From Business:

The proposed regulation for agricultural water measurement will require new criteria and methods in reports submitted in Agricultural Water Management Plans.

I.7 Significant Effect on Housing Cost:

None.

I.8 Small Business Determination:

The proposed regulations may affect small businesses.

I.9 Alternative Determination:

DWR considered three alternative frameworks for developing a range of options for measuring agricultural water deliveries: (1) develop a regulation that includes a list of acceptable measurement devices maintained in defined manners to achieve desired accuracy; (2) develop a regulation setting a performance standard that defines minimum benchmarks for device accuracy that could be met or bettered by a range of devices; or (3) develop a regulation that provides a process for suppliers to assess and report their own locally-determined standards for measurement accuracy.

This regulation is based on alternative (2), which specifies a performance standard that defines minimum device accuracy benchmarks. This alternative provided the most appropriate framework and flexibility to establish a range of measurement options. A performance standard meets the intent of the legislation in the most flexible and cost-effective manner. No specific technology is required and no specific device is required. The only requirement is to use a device that meets an acceptable minimum accuracy standard.

Pursuant to Administrative Procedures Act Government Code 11346.5 (a) (13), the Department has determined for the reasons discussed above in this Final Statement of Reasons and in the summary and response to comments to the initial 45-day comment period and two subsequent 15-day notices that no alternatives considered would be more effective in carrying out the purposes for which the Agricultural Water Measurement proposed or would be as effective and less burdensome to affected private persons than the adopted Agricultural Water Measurement.

J. Updated Informative Digest:

No revision to the original informative digest needed.