April 11, 2012

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

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

RE: Comments on proposed agricultural water measurement regulation

Dear Mr. Benjemaa:

On behalf of the Natural Resources Defense Council, Pacific Institute, and Sierra Club California, we are writing to urge the Department of Water Resources ("Department") and California Water Commission ("Commission") to modify section 597.3(b)(1)(B) of the draft agricultural water measurement regulation, in order to be consistent with the requirements of SB 7x 7 (the Water Conservation Act of 2009). As currently drafted, 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. While DWR's explanation why this provision is limited to a single measuring device is less than clear, the obvious rationale for providing this exemption is the cost of installing more than one measurement device. However, 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. As such, section 597.3(b)(1)(B) of the proposed regulation is not consistent with the statute.[1] Should the Commission and Department fail to modify section 597.3(b)(1)(B), the Office of Administrative Law ("OAL") should reject the regulation under the APA because this section fails the consistency and clarity standards of the APA and because DWR has failed to adequately respond to comments regarding section 597.3(b)(1)(B).

[1] NRDC's prior comments regarding section 597.3(b)(1)(B) of the draft regulation are incorporated by reference.

I. Section 597.3(b)(1)(B) 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

SB 7x 7 requires water suppliers to measure farm gate deliveries: the statute requires suppliers to measure the volume of water delivered to customers with sufficient accuracy to report farm gate deliveries (section 531.10(a)) and to implement volumetric pricing. Water Code § 10608.48(b).[2] However, section 597.3(b)(1)(B) allows measurement at the lateral, rather than at the farm gate, if a single measurement device cannot meet the accuracy standard. While DWR has eliminated some of the explicit cost considerations that were included in the prior version of section 597.3(b)(1)(B) that was disapproved by OAL, the underlying rationale for limiting this provision to a single measurement device is still considerations of cost. While DWR may be less explicit regarding cost considerations in this version of the regulation, there is no valid basis for limiting measurement at the farm gate to a single measurement device. *See* part II of these comments, *infra*. And as OAL concluded in its disapproval notice, "The exemption created by section 597.3(b)(1)(B) appears to be based on no other reason than placing a condition of cost effectiveness on water devices." OAL Disapproval notice at page 3.[3] As both OAL and DWR have concluded, cost effectiveness and cost considerations are not a valid justification for exempting water suppliers from measurement at the farm gate. *Id.*; *see* DWR, March 26, 2012 Supplement to the Initial Statement of Reasons. As such, section 597.3(b)(1)(B) fails to comply with SB 7x 7, and the draft regulation fails to meet the APA consistency standard.

While cost *per se* is not a valid statutory basis for exemption from measurement at the farm gate, we strongly believe that the regulation should allow water suppliers to determine the most cost effective way to measure water deliveries at the farm gate. That is why we have supported a regulatory approach that sets an accuracy standard that all suppliers must meet, and allowing suppliers to determine the best way of meeting the standard. Unfortunately, the department has crafted section 597.3(b)(1)(B) to effectively use cost considerations as a justification to exempt some suppliers from having to measure farm gate deliveries, and this section treats certain water suppliers in the Sacramento Valley different from other suppliers in the state.

In addition, DWR raised the issue at the last Commission meeting that regulatory provisions requiring certification that lateral measurement is sufficient for volumetric pricing would

---

[2] For instance, DWR has acknowledged in its guidelines on AB 1404 that compliance with section 531.10(a) of the Water Code, which is required by section 10608.48(b), requires a water supplier to "measure farm gate deliveries." *See* DWR Guidelines on AB 1404, available online at: http://www.water.ca.gov/calendar/materials/ab_1404_package__10096.pdf. DWR circulated these guidelines on November 10, 2010, and the quotation above is from page 2 of the Guidelines (page 12 of 15 of the PDF).

[3] Even assuming that cost considerations were a valid justification for excluding certain water suppliers from measurement at the farm gate, it is not clear that section 597.3(b)(1)(B) would actually save suppliers money. Under the draft regulation, water suppliers would have to install measurement devices at the lateral, and as soon as a measurement device was available that met the accuracy standard at the farm gate, they would have to install such a measurement device at every farm gate.

adequately respond to a range of concerns related to lateral measurement. Unfortunately, that is not the case. The statute requires "measurement" of water deliveries[4] in order to obtain accurate farm gate delivery data and to be able to implement volumetric pricing. Water Code § 10608.48(b). In the 2009 Water Plan Update (page 2-23), DWR concluded that, "Lack of data, mainly farm-gate irrigation water delivery data, is an obstacle for assessing irrigation efficiencies and planning further improvement" in agricultural water use efficiency. In addition, all of the methods and many of the indicators in DWR's draft report on quantifying agricultural water use efficiency[5] require accurate data on the volume of water delivered to the farm gate. Yet 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. *See* DWR, Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement, April 22, 2011, at p. 10. As such, there will be huge gaps in our understanding of water use efficiency, in addition to impeding the adoption of volumetric pricing. In addition, while the draft regulation requires water suppliers to certify that measurement at the lateral is sufficient for volumetric pricing, this provision does not address the other reasons why farm gate measurement is required by the statute and thus section 597.3(b)(1)(B) is not consistent with SB 7x 7.

II. 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 at least 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. However, the Department's response to comments in the Final Statement of Reasons, and its explanation of the regulation in the subsequent supplements to the initial statement of reasons, fail to respond to NRDC's comments and demonstrate that no valid justification exists for limiting this provision to a single measurement device. As such, DWR has failed to meet the clarity standard of the APA.

First, the December 2011 Final Statement of Reasons, in response to comments about limiting section 597.3(b)(1)(B) to a single measurement device, states that,

> 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

[4] When the point of measurement is in a canal or lateral serving several fields (or "farm gates"), the amount of water delivered to each farm gate will necessarily be an estimation, rather than a measurement. The statute requires suppliers to measure, not estimate, the volume of water that is delivered to the farm gate.

[5] This report also was required by SB 7x7. *See* Water Code § 10608.64. The latest draft of the report is available online at: http://www.water.ca.gov/calendar/materials/draft_methodology_for_quantifying_efficiency_of_ag_water_use_02032012doc_13394.docx, and is incorporated by reference.

> measurement devices commonly in use, and that can meet the measurement options in § 597.3(a)(2).

Final Statement of Reasons, December 15, 2011, at page 8. The Department explicitly included cost considerations in its stated justification for this exemption, which is not surprising since the text of the regulation also explicitly included cost considerations. 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 imposes undue hardship."[6]

Since OAL disapproved the draft regulation, DWR's explanations have become more opaque and have not responded to repeated comments that section 597.3(b)(1)(B) should not be limited to a single measurement device. The February 28, 2012 Supplement to the initial statement of reasons ("ISOR") states that upstream measurement is allowed because "existing technology does not allow for a device to accurately measure the variable flows," but the supplement does not address why the provision is limited to a single measurement device. Similarly, the March 26, 2012 Supplement to the ISOR admits that "DWR cannot make the water measurement subject to local cost effectiveness," but again fails to explain why section 597.3(b) is limited to a single measurement device. It states that,

> inclusion of section 597.3(b) allows water suppliers who are unable to measure water at the individual customers' delivery points with the specified accuracies to install a device that measures water upstream of multiple customers. This provision is included to allow flexibility for unusual legal and field physical circumstances…

March 26, 2012 Supplement to the Initial Statement of Reasons. This explanation 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. *See* DWR, Cost Analysis for Proposed Agricultural Water Measurement Regulation in Support of Economic and Fiscal Impact Statement, April 22, 2011, at p. 10.

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 considerations. As such, OAL should reject the draft regulation as failing to meet APA requirements.

---

[6] In addition, as noted below, several water suppliers that serve rice farmers, including Reclamation District 108, are already implementing cost-effective ways to measure at the farm gate using multiple devices in order to accurately measure high and low flows.

III. Conclusion

We are deeply disappointed in the failure by the Department and Commission to adopt an agricultural water measurement regulation that is consistent with the statute in a timely manner, and we find it especially objectionable that DWR sought to fundamentally change the meaning of section 597.3(b)(1)(B) of the draft regulation at the last meeting of the California Water Commission without any opportunity for written comment.

Under SB 7x 7, water suppliers are required to measure the volume of water delivered to the farm gate and to implement volumetric pricing as of July 31, 2012. Water suppliers, themselves, are aware of this requirement and a recent field-tour of irrigation districts organized by the Department revealed that even in rice-growing regions, water suppliers were developing cost-effective ways to measure water deliveries at the turnout level using more than one device (see, for example, Reclamation District 108).

More than two years have passed since SB 7x 7 was enacted into law in late 2009, and nearly 20 months have passed since the Agricultural Stakeholder Committee (ASC) first met in July 2010 to begin the process of developing this regulation. Unfortunately, this process has unnecessarily prolonged the period of regulatory uncertainty for agricultural water suppliers covered by the Act. Once an adequate regulation is finalized, we are willing to work with the Department, water suppliers, and other interests to better clarify 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).

Thank you for consideration of our views. Please contact us at your convenience if you have any questions about these comments or would like to discuss them in advance of the Water Commission meeting.

Sincerely,

Doug Obegi
Natural Resources Defense Council

Juliet Christian-Smith
Pacific Institute

Jim Metropulos
Sierra Club California