

LOCAL AGENCIES OF THE NORTH DELTA

1010 F Street, Suite 100, Sacramento, CA 95814
(916) 455-7300, osha@semlawyers.com

December 16, 2015

SENT VIA EMAIL (commentletters@waterboards.ca.gov)



Jeanine Townsend
Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814

RE: Comment Letter – Emergency Regulation for Measuring and Reporting the Diversion of Water

Dear Ms. Townsend:

This letter is submitted on behalf of Local Agencies of the North Delta (“LAND”) commenting on the proposed Emergency Regulation for Measuring and Reporting the Diversion of Water (23 Cal. Code Regs., §§ 907 et seq. (“Measurement Regs.”)) proposed for adoption pursuant to Senate Bill 88 (“SB 88”). LAND is a coalition comprised of reclamation and water districts in the northern geographic area of the Delta.¹ Agricultural water users within the districts comprising LAND have experience complying with the Board’s water reporting requirements, and some of these users were also subject to the State Water Resources Control Board’s (“Board”) February 4, 2015 Order for Additional Information (“Additional Info. Order”). LAND members are concerned that the Measurement Regs. as proposed are infeasible and require additional modification prior to adoption.

LAND urges that the Board take adequate time to adopt Measurement Regs. that are both feasible and implement SB 88. Variations in geography and hydrology across the state militate against a one-size-fits-all approach to water measurement. Protection of agricultural lands and agricultural operations is important to our state’s future and the

¹ LAND member agencies cover an approximately 118,000 acre area of the Delta; current LAND participants include Reclamation Districts 3, 150, 307, 317, 349, 407, 501, 551, 554, 556, 744, 755, 813, 999, 1002, 2111, 2067 and the Brannan-Andrus Levee Maintenance District. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms. This general area is also guaranteed adequate water supplies under the 1981 North Delta Water Agency Contract.

Board should take care that Measurement Regs. not provide further pressures that undermine the ability of agriculture to continue.

Comments on Proposed Regulations

§ 917(a) Reporting Reports of water diversion shall be submitted in accordance with a schedule approved by the Deputy Director for the Division of Water Rights. The schedule may require monthly, daily, or more frequent reporting.

It is critical to note that electronic data submission more “frequently” than monthly is nearly impossible. On a monthly basis, an operator can collect the data and then consolidate the information and then submit the numbers via the existing reporting system. Submittal of monthly information, however, is a burden and does increase the cost of agricultural operations. These increased costs were recognized at the time of the issuance of the 2015 Additional Info. Order.² The next time scale down would be weekly, this would be exceptionally onerous, but not necessarily infeasible in most cases. However, daily and hourly reporting basically forces all operators to get the most expensive, and in many case the most fragile, logging equipment, then specifically hire personnel to manually input data into eWRIMS. That requirement is unreasonable and in most cases simply infeasible.

The Measurement Regs. appear to imply by this hourly reporting standard that there is a yet to be defined information transfer system that would send the real-time information directly to that future program. That program would require a massive and complex telemetry system in areas in the mountains or in the Delta that lack cellular coverage. Data loggers and telemetry will undoubtedly result in large amounts of information replete with errors or gaps because they are not managed by humans, and therefore lack substantive quality control. Furthermore, the Board could not possibly receive and manage that information under any scenario. It appears that the this language may be tracking the approach Federal water project’s data logging and management complexity on the rest of the state without having the funding or the institutional capacity to support it.

LAND suggests that the Measurement Regs. include a periodicity for reporting requirements that is linked to a reasonable need for that level of information. For instance, in streams where fish passage is a concern, and water levels are very low, it is

² LAND is concerned that the Additional Info. Order. Still has not been lifted even though there does not appear to be a continuing need for the monthly frequency of reporting at this time.

conceivable that hourly data could serve an important purpose. In areas such as the Delta where water is always present, however, there would not be a conceivable need for that granular a level of data in order to address fish passage or related concerns. A one-size-fits-all approach is not appropriate, and excessive burdens on agricultural water users via the Measurement Regs. are unnecessary given the Board's ability to require submittal of more frequent reporting (as was done in February 2015) when the Board determines that the circumstances warrant the need for such information.

§ 933(b)(1) Data Recording. The measuring device shall be capable of recording the date, time, and at least one of the following: total volume of water diverted, flow rate, water velocity, or water elevation. The data shall be recorded in a format retrievable and viewable using Microsoft Xcel, Microsoft Access, or other software program authorized by the deputy director. The measuring device shall be capable of recording the required information as follows:

(A) For direct diversion:

- i. On an hourly or more frequent basis for a water right holder with a right or a claimed right to divert 1000 acre-feet of water per year or more.*
- ii. On a daily or more frequent basis for a water right holder with a right or a claimed right to divert 100 acre-feet of water per year or more.*
- iii. On a weekly or more frequent basis for a water right holder with a right or a claimed right to divert more than 10 acre-feet of water per year.*

The language associated with data recording for each of these classes of water rights is unclear as to equipment specifications. For instance, a weekly basis would allow the use of a simple flow totalizer, which is very robust and inexpensive. However, a more frequent basis appears to include all smaller increments of time. Therefore, the only compliant recorder installation under this description that could reasonable meet the finer increments of time would be the same expensive and fragile high-resolution equipment essentially required for the higher diversion amounts.

The scale for water reporting also appears to be significantly disproportionate for the associated water use and total water diversion. For example, a diversion of 10 acre-feet of water is nominally only able to support a total of 3 acres of an efficient crop, in a moderate climate. Those conditions only exist for some small specialist or 'hobby' operations. These operations are least likely to be able to implement and maintain data

logging equipment. LAND suggests the Board consider modifying the scaling as follows:³

- i. On an hourly or more frequent basis for a water right holder with a right or a claimed right to divert 3,000 acre-feet of water per year or more.
- ii. On a daily or more frequent basis for a water right holder with a right or a claimed right to divert 1,000 acre-feet of water per year or more.
- iii. On a weekly basis for a water right holder with a right or a claimed right to divert more than 300 acre-feet of water per year.

The above approach to reporting thresholds could potentially provide a more reasonable approach. For instance, for a farming operation with about 100 acres supplied by a water diversion might use about 2-3 af/acre, for a total of 200-300 af/yr. In any case, the technical demands of metering should be more in alignment with actual farming practices, and scale of water demand and use. If additional time is needed to fully explore these technical details, LAND urges the Board to take that time before adopting Measurement Regs.

§ 934 Measurement Method. *A measurement method is a protocol for measuring water diversions, other than through a measuring device at each authorized point of diversion, where the method is found by the deputy director to reasonably achieve the accuracy requirements of subdivision (d) of this section. The board encourages water right holders on a local or regional basis to cooperate and establish a measurement method or methods to measure direct diversion, diversion to storage, and withdrawal or release from storage in an efficient and cost effective manner which meets the accuracy requirements of subdivision (d) of this section. Any measurement method must be able to quantify the amount of water diverted under all separate priorities of rights being exercised.*

It is unclear how a measurement method for a diversion could be capable of differentiating the basis of the right being claimed for that diversion. This language should be stricken.

(a) Request for Measurement Method.

(1) Form and Content. A Request for Approval of Measurement Method shall be

³ As explained above, LAND suggests that the periodicity of any reporting requirements also be linked to a reasonable need for that level of detail in the particular water body.

prepared by a California-registered Professional Engineer. The request shall describe how the measurement method will meet the requirements of this Chapter and include, at a minimum, the following information:

- (A) Name and contact information of all participants, including designation of a manager to serve as the primary contact person.*
- (B) Map showing location of participants and covered lands (including all assessor parcel numbers). The map shall conform to the mapping requirements of article 7 of chapter 2 of division 3 of this title.*
- (C) Description of the measurement method, including how the method will be capable of measuring the volume of water diverted, rate of direct diversion, rate of collection to storage, and rate of withdrawal or release from storage.*
- (D) Documentation required under subdivision (d) of this section verifying the accuracy of the measurement method.*
- (E) A detailed description of how installing and maintaining a measuring device at each point of diversion is not feasible, would be unreasonably expensive, would unreasonably affect public trust resources, or would result in the waste or unreasonable use of water.*
- (F) Description of the permitted, licensed, registrations, certificates and water right claims covered by the measurement method including: file number, owner name, water right type, priority of diversion, monthly and annual diversion amounts, place of use, purpose of use, and alternative sources of water.*
- (G) Evaluation of public trust needs including minimum in-stream flows and water quality concerns or bypass requirements of any of the water rights involved.*
- (H) Evaluation of enterprise income of the water users if claiming installing and maintaining measuring and monitoring devices would be unreasonably expensive.*

It is unclear why an engineer must prepare a report including all of the information listed in (A)-(G) above. Several items are administrative, and only Items (C) and (D) appear to be directly related to engineer qualifications, and even this activity could also be simply supervised by an engineer. Other items could better be addressed by the water users and other individuals besides engineers, especially for smaller farming information. Especially Items (G) and (H) do not appear to be items that are directly relatable to engineering. With respect to (G), public trust needs, those issues should be addressed as necessary in the water rights and special status species enforcement processes as needed. It is unclear why the certification of a measurement method must include such an analysis. With respect to Items (E) and (H), economic concerns, such an analysis would also not need to be completed by an engineer, and an engineer may not have special expertise in this area.

Most of the information listed in section 917 should not be required to be prepared by an engineer. These requirements as written would create an unreasonable and unnecessary financial burden on ongoing agricultural operations. These requirements should be modified to limit the scope to require engineer preparation of only that information that is necessary.

§ 917. Reporting Insufficient Flows to Support All Diversions *When flows or projected available supplies in a watershed or subwatershed are sufficient to support some but not all projected diversion demand, the Deputy Director for the Division of Water Rights may require water diverters located within the watershed or subwatershed to electronically submit monthly or more frequent reports of water diversion.*

(a) Reports of water diversion shall be submitted in accordance with a schedule approved by the Deputy Director for the Division of Water Rights. The schedule may require monthly, daily, or more frequent reporting. In determining the frequency of reporting, the Deputy Director for the Division of Water Rights shall not exceed the frequency of recording required under section 933, subdivision (b)(1), of this title.

(b) Water right diversion demand projections made under this section may be based on reported diversion and use data, including but not limited to data submitted with Progress Reports by Permittees, Reports of Licensees, Reports of Registration and Certificate Holders, Supplemental Statements of Water Diversion and Use, and reports filed by watermasters pursuant to Water Code section 5101, subdivisions (d) and (e).

(c) Water availability projections may be based on: (1) Projected full natural flow data supplied by the Department of Water Resources or its successor; (2) Projections from the National Weather Service, California Nevada River Forecast Center, and similar sources; (3) Stream gage data; and (4) Other data the Deputy Director for the Division of Water Rights determines is appropriate, given data availability, data reliability, and staff resources.

(d) The failure to electronically submit diversion reports requested in accordance with the applicable schedule approved by the Deputy Director for the Division of Water Rights is a violation subject to civil liability of up to \$500 per day pursuant to Water Code section 1846. Authority: Sections 348, subdivision (a), 1058, 1840, and 1841 Water Code. Reference: Sections 348, subdivision (a), 1846, 5101, 5103 and 5104, Water Code

LAND is concerned that section 917 may be used to justify Board orders that are not fully supported by the best available and most reliable data regarding demands and water availability. LAND supports the language suggestions provided in the December 16, 2015 comments of the Central Delta Water Agency.

* * *

Jeanine Townsend
State Water Resources Control Board
December 16, 2015
Page 7 of 7

Thank you for considering these comments. We look forward to working with Board staff to ensure the Monitoring Regs. work for farmers as well as meet the informational needs of the Board.

Very Truly Yours,

By: 
Osha R. Meserve