



December 17, 2015

Chair Felicia Marcus and Board Members  
c/o Jeanine Townsend, Clerk to the Board  
State Water Resources Control Board  
1001 I Street, 24<sup>th</sup> Floor  
Sacramento, CA 95814



Sent via electronic mail to: [commentletters@waterboards.ca.gov](mailto:commentletters@waterboards.ca.gov)

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

Dear Chair Marcus and Board Members:

California Coastkeeper Alliance (“CCKA”) is a network of twelve Waterkeeper organizations working to protect and enhance clean and abundant waters throughout the state, for the benefit of Californians and California ecosystems. We appreciate the opportunity to provide comments to the State Water Resources Control Board (“State Water Board”) on the Emergency Regulation for Measuring and Reporting the Diversion of Water (“Emergency Diversion Regulation”). CCKA and our network of California Waterkeepers are actively involved in developing solutions and strategies to improve how the state measures, reports and manages its water resources throughout the state.

Authorized by Senate Bill 88, the Emergency Diversion Regulation provides a long overdue opportunity for the state to move forward critically-needed reforms for the better management of the state’s water resources. The development and adoption of regulations that provide accurate data on diversions of more than 10 acre feet a year (“AFY”) of water will provide long-term benefits for diverters, and more broadly, to protect beneficial uses.

CCKA supports many provisions of the State Board’s proposed Emergency Diversion Regulation. As drafted, the Emergency Diversion Regulation will provide a framework for the timely submission of needed diversion data, while imposing reasonable costs on diverters in exchange for benefits. The Emergency Diversion Regulation will build a foundation for real time reporting on water diversions in the state. Specifically, we strongly support the State Water Board’s provisions that:

- Require a frequency of diversion measurement of no less than monthly intervals;
- Place tiered measuring device requirements on diverters of more than 10 AFY, 100 AFY and 10,000 AFY;
- Propose a tiered compliance schedule that provides smaller diverters with time to implement the required monitoring and diversion regulations;
- Require the measurement of water diverted for storage; and
- Clarify what will be considered under alternative compliance.

The State Water Board should also ensure that the Emergency Diversion Regulation requires adequate monitoring and management of diversions in small streams and coastal watersheds. Minor diversions in small streams and coastal watersheds can have large cumulative impacts that can significantly impair

beneficial uses. Cumulative diversions that threaten beneficial uses often occur on an individual level at a scale of less than 10 AFY. As described below, CCKA strongly encourages the State Water Board to revise the Emergency Diversion Regulation to:

- Ensure the evaluation of potential impacts to beneficial uses includes consultations with the California Department of Fish and Wildlife before the 10 AFY measurement and reporting threshold is raised;
- Make financial assistance available in cases of cost infeasibility rather than grant exemptions to compliance with the Regulation;
- Require diverters of more than 100 AFY in small streams and coastal watersheds to provide real time telemetered diversion data by January 1, 2020; and
- Utilize the public trust doctrine to require measuring and reporting of diverters down to 1 AFY when necessary to protect beneficial uses.

#### **A. THE STATE WATER BOARD SHOULD RETAIN DIVERSION MEASURING AND REPORTING REQUIREMENTS.**

We support the majority of the State Board’s proposed measures for the Emergency Diversion Regulation. The retention of these provisions will play a critical role in developing a system of diversion monitoring and reporting that will allow the state to better manage its water resources throughout years of varying conditions. The proposed provisions will build a foundation for eventual real time data measurements and reporting on water diversions, allowing California to add a degree of predictability as the state faces a drier, less predictable climate.

##### *1. The State Water Board should retain monthly diversion measurements.*

California’s water resource agencies lack the data necessary to inform water management decisions. It is recognized that “there is a growing information gap regarding water in the state”.<sup>1</sup> The California Water Plan acknowledges this information gap and the need “to improve water resources information and analysis”.<sup>2</sup> Collecting adequate data is critical in California given the exceptionally high degree of variability across seasons, years and geographic locations. Therefore, it is essential that the State Water Board require water diverters to provide accurate and robust data to inform water management decisions.

Furthermore, the reporting of monthly measurement data is essential to account for how diversions might be impacting beneficial resources during months of the year when river and stream flows are at their lowest points, or in instances when diversions are occurring within a narrow timeframe. Therefore, the State Water Board should continue requiring diverters to report at least monthly diversion measurements.

##### *2. The State Water Board should retain tiered measuring for diverters, but combine the telemetered measuring device requirements for diverters of 1000 AFY and 10,000 AFY.*

The Emergency Diversion Regulation contains tiered requirements in order to alleviate potential financial hardships that may be incurred. Tiered requirements allow diverters with less than 1000 AFY to avoid burdensome costs. Tiered provisions also ensure that diverters with resource constraints avoid undue financial hardships in meeting the Emergency Diversion Regulation.

The requirement to adopt telemetered measuring devices should be lowered from the current 10,000 AFY threshold to those diverting 1,000 AFY. Diversions of 1,000 AFY or more represent significant operations. For example, 1,000 AFY is sufficient to irrigate a 300 acre almond orchard, or 2,000 acres of

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<sup>1</sup> Hanak, Ellen. Managing California's water: from conflict to reconciliation. Public Policy Instit. of CA, 2011. 131.

<sup>2</sup> California Water Plan, Update 2013, Chapter 6 –Integrated Data and Analysis. October 30, 2014. p 6-18; available at [http://www.waterplan.water.ca.gov/docs/cwpu2013/Final/07\\_Vol1\\_Ch06\\_Integrated\\_Data\\_Analysis.pdf](http://www.waterplan.water.ca.gov/docs/cwpu2013/Final/07_Vol1_Ch06_Integrated_Data_Analysis.pdf).

vineyard.<sup>3</sup> Requiring diverters of 1,000 AFY or more to install telemetered measuring devices by January 1, 2020, in most instances would not impose an undue financial burden. A five-year timeframe should be sufficient for diverters of 1,000 AFY or more to install telemeter capable measuring devices.

Few watersheds in the state support multiple diversions of 10,000 AFY or more; such a high threshold for telemetered devices will fail to provide the state with the data necessary to make water management decisions based on real time data. Requiring a greater percentage of water diverters to make real-time water diversion data available will benefit all diverters over time in a given watershed, as the state will be able to stretch limited supplies in a more arid, less predictable future.

The State Water Board should retain the tiered requirements for measuring devices at thresholds of 10 AFY and 100 AFY, and consolidate the measuring device requirements of the 1,000 AFY and 10,000 AFY thresholds, including the provision requiring telemetered capable devices by January 1, 2020.

3. *The State Water Board should retain the proposed phased Emergency Diversion Regulation compliance schedule based on 10 AFY, 100 AFY and 1,000 AFY tiers.*

Acknowledging potential resource constraints, phasing in deadlines is an appropriate strategy to ensure that diverters of less than 1,000 AFY have adequate time to come into compliance with the Regulation. A timeline of January 1, 2018, for example, should provide both the State Water Board and diverters with time to identify means of financial assistance as necessary to meet all measuring device installation and certification requirements. This can be done without granting exemptions. The State Water Board should retain the proposed phased compliance schedule based on 10 AFY, 100 AFY and 1,000 AFY tiers to ensure that adequate resources can be secured to allow all diverters to meet compliance deadlines.

4. *The State Water Board should retain the provisions requiring measurement and reporting requirements for storage diversions.*

Diversions for storage should be measured. Diversions for storage can represent significant quantities of water, especially when accounting for demands to refill storage due to seepage and evaporation. Taken cumulatively across a watershed, these diversions for storage can add up to significant total amounts of surface water diversion. This is critical in small streams and coastal watersheds, where significant amounts of water are known to be diverted for stock ponds, marijuana cultivation, and other uses associated with storage.<sup>4</sup> Therefore, the State Water Board should retain the provisions for measurement and reporting requirements for storage diversions.

5. *The State Water Board should clarify what constitutes “unreasonably expensive” in the Emergency Diversion Regulation.*

The Emergency Diversion Regulation states that alternative compliance for measuring devices or measurement methods may be authorized by the Deputy Director when meeting the stipulated requirements would be “unreasonably expensive.” The State Water Board needs to explain what considerations will be given in determining what is “unreasonably expensive,” including the criteria by which such determinations will be made.

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<sup>3</sup> Water Use in Wineries & Vineyards, Northern California. University of Colorado, 2014. Available at [http://www.colorado.edu/geography/class\\_homepages/geog\\_4501\\_sum14/Presentations/StExample-NCal%20Spr11.pdf](http://www.colorado.edu/geography/class_homepages/geog_4501_sum14/Presentations/StExample-NCal%20Spr11.pdf).

<sup>4</sup> Bauer, Scott, Jennifer Olson, Adam Cockrill, Michael van Hattem, Linda Miller, Margaret Tauzer, and Gordon Leppig. "Impacts of surface water diversions for marijuana cultivation on aquatic habitat in four northwestern California watersheds." PLoS one 10, no. 3 (2015): e0120016.

## **B. THE STATE WATER BOARD SHOULD ENSURE ADEQUATE MEASURING AND REPORTING REQUIREMENTS IN SMALL STREAMS AND COASTAL WATERSHEDS.**

We recommend several changes to the Emergency Diversion Regulation in order to ensure that adequate information is provided to fully manage and protect small streams and coastal watersheds. These changes will ensure that minor diversions, when considered cumulatively across all diversions in a given watershed, are not adversely impacting beneficial uses.

1. *The State Water Board should consult with the California Department of Fish and Wildlife before raising the 10 AFY measurement and reporting threshold.*

In small streams and coastal watersheds, diversions of 10 AFY can represent significant portions of a waterbody's total flow. Such scenarios can be especially pronounced when 10 AFY diversions occur simultaneously in a concentrated time period coinciding with seasonably low flow periods. For example, Mark West Creek, a tributary of the Russian River, is on the brink of losing its fish spawning beneficial use when concentrated diversions occur across specific periods of the viticultural season. Even relatively small annual diversions of 1 AFY, have significant cumulative impacts on Mark West Creek and the retention of beneficial uses. Similar circumstances throughout the coast, from the San Luis Rey River in San Diego to the Van Duzen River in Humboldt County, demonstrate the need to monitor all diversions down to 10 AFY in small streams and coastal watersheds for the successful protection of beneficial uses.

When assessing whether the 10 AFY measuring and reporting threshold should be raised, the State Water Board should undertake a comprehensive evaluation of how an individual 10 AFY diversion, and cumulative 10 AFY diversions across the watershed, impact beneficial uses. Such an evaluation should include close consultations with the California Department of Fish and Wildlife (CDFW) and when applicable, staff from the CDFW's Coastal Watershed Planning & Assessment Program.

2. *The State Water Board should provide financial assistance for instances of cost infeasibility rather than exemptions.*

The Emergency Diversion Regulation states that the 10 AFY measurement threshold may only be raised when the Executive Director makes the determination that "the benefits of the additional reporting information...are substantially outweighed by the cost of installing measuring devices..."<sup>5</sup> Given the substantial long term benefits of measuring and reporting diversions, instances when the 10 AFY threshold are raised should be rare. In those instances, the State Water Board should offer financial assistance to the diverter to ensure compliance; rather than exempting them from the Emergency Diversion Regulation. When State Water Board funding is not directly available, alternative sources of financial assistance with outside agencies should be explored. Two examples of potential alternative financial assistance are natural resource conservation districts, and funds that may be available through the State Water Board's participation in the California Financing Coordinating Committee.

3. *The State Water Board should require diverters of more than 100 AFY in small streams and coastal watersheds to provide telemetered diversion data by January 1, 2020.*

The measurement and reporting provision that requires diverters of more than 10,000 AFY to install telemetry compatible devices by January 1, 2020 should also apply to those diverting more than 100 AFY in coastal watersheds and small streams. Telemetered measuring devices down to a threshold of 100 AFY in small streams and coastal watersheds would prove critical real time diversion data to protect ecosystems and species during drought conditions. Furthermore, real time diversion data from diverters of small streams and coastal watersheds would assist all water rights holders to better manage limited water

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<sup>5</sup> Proposed Emergency Regulation for Measuring and Reporting December 7, 2015 Agency Draft For Public Comment, p.12. Available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/measurement\\_regulation/docs/dec7\\_draft\\_measure\\_reg.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/measurement_regulation/docs/dec7_draft_measure_reg.pdf).

supplies. In small streams and coastal watersheds, a threshold of telemetered capable devices at 10,000 AFY, or even 1,000 AFY, would capture information from few diverters, and provide insufficient real time data for responsible water resource management decisions.

Generally, the cost of installing telemetered capable measuring devices for diverters of more than 100 AFY in small streams and costal watersheds would provide substantial benefits that would far outweigh costs. In addition, a deadline of January 1, 2020 provides a reasonable timeframe for compliance, and in the case of cost infeasibility, allow diverters of more than 100 AFY suitable time to work with the State Water Board to explore avenues of financial assistance.

4. *The State Water Board can utilize the public trust doctrine to require measuring and reporting of diverters down to 1 AFY.*

The State Water Board can protect coastal watersheds from diversions of 1 AFY by requiring monitoring and reporting. The California Constitution declares that the general welfare of the state requires that the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that the right to the use of water does not extend to the waste or unreasonable use, method of use, or method of diversion of water. Existing law requires the State Board to take all appropriate proceedings or actions to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state. Existing law reflects the intent of the Legislature that the state take vigorous action to enforce the terms and conditions of permits, licenses, certifications and registrations to appropriate water, to enforce state board orders and decisions and to prevent the unlawful diversion of water. Given the State Water Board's broad authority to prevent the unreasonable method of diversion, the Emergency Diversion Regulation should require all diverters of 1 AFY or more to measure and report diversions.

Senate Bill 88 does not preclude the State Water Board from including 1 AFY diverters into the Emergency Diversion Regulation. While we recognize that Senate Bill 88 only requires 10 AFY and up diverters to measure and report, that does not limit the State Water Board's state constitutional authority and responsibility to prevent all unreasonable methods of diversion. Senate Bill 88, Section (3), contains two general provisions. First, Section (3) includes a direct mandate to:

“Require a *person* who diverts 10 acre-feet of water per year or more under a permit or license to install and maintain a device or employ a method capable of measuring the rate of direct diversion...”

This requirement is a specific command directed at any individual – not the State Water Board. In *California Trout, Inc. v. State Water Resources Control Board (California Trout)*,<sup>6</sup> the court ruled that while the Legislature has the authority to fashion rules concerning reasonableness, likening Legislative rules of reasonableness to negligence per se.<sup>7</sup> However, *California Trout* went further to hold that the Legislature has the power to enact general rules governing the reasonable use of water, the State Water Board has a similar regulatory authority.<sup>8</sup> The Water Code authorizes the State Water Board, in carrying out its statutory duty to administer the state's water resources, to “exercise the adjudicatory and regulatory functions of the state.”<sup>9</sup> In that role, the State Water Board is granted “any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law”.<sup>10</sup> Given the State Water Board's statutory charge to “prevent waste, unreasonable use, unreasonable method of use, or unreasonable

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<sup>6</sup> *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585 (*California Trout*).

<sup>7</sup> *Id.* at p. 624.

<sup>8</sup> *Light v. State Water Board*, First Appellate District, pg. 16 (June 16, 2014).

<sup>9</sup> California Water Code § 174.

<sup>10</sup> California Water Code § 186, subd. (a).

method of diversion of water in this state”<sup>11</sup> and the recognized power of the Legislature to pass legislation regulating reasonable uses of water, the State Water Board’s mandate to “exercise the . . . regulatory functions of the state”<sup>12</sup> necessarily includes the power to enact regulations governing the reasonable use and diversion of water. Therefore, while the Legislature may have created its own per se rule for requiring 10 AFY diverters to measure and report, *California Trout* holds that the State Water Board has broader authority to regulate the rules governing reasonable use – including the authority to require diverters of less than 10 AFY to measure and report diversions.

The Reasonable Use Doctrine and the Public Trust Doctrine dictates that the State Water Board has an affirmative duty to protect all public trust resources. Water use by both riparian users and appropriators is constrained by the rule of reasonableness, which has been preserved in the state Constitution since 1928.<sup>13</sup> Existing alongside the rule of reasonableness is a second doctrine imposing at least a potential limit on private uses of water. As the Supreme Court has explained that doctrine, the state holds the navigable waterways in “public trust” for the benefit of state residents.<sup>14</sup>

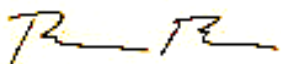
In defining the role of the public trust doctrine in water rights policy, *Audubon Society* recognized that “the public trust doctrine and the appropriative water rights system administered by the Water Board developed independently of each other. In bringing the two together, the court held that the doctrine (1) prevents any party from acquiring a vested right to appropriated water in a manner harmful to the interests protected by the public trust; and (3) “[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible.”<sup>15</sup> Measuring and reporting water diversions is a fundamental principle for “planning and allocation of water resources.” Therefore, the State Water Board has an affirmative duty to require measuring and reporting of small streams and coastal waterways to ensure public trust resources are protected. Thus, the State Water Board should require all 1 AFY diverters in coastal watersheds to measure and report diversions as part of the Emergency Diversion Regulation.

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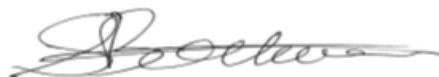
Drought conditions have underscored the fact that California is in urgent need of better data on water use, from all sectors, to allow for better management of water resources. We thank State Water Board staff and Members for work to develop Emergency Diversion Regulations to place California on a path of better informed water resource management decisions, for the protection and profit of all beneficial uses in the state.

We look forward to continued work together to ensure clean, abundant water for California.

Sincerely,



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California Coastkeeper Alliance



Sean Bothwell  
Policy Director  
California Coastkeeper Alliance

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<sup>11</sup> California Water Code § 275.

<sup>12</sup> California Water Code § 174.

<sup>13</sup> Cal. Const., art. X, § 2; hereafter Article X, Section 2.

<sup>14</sup> *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 434, 437 (*Audubon Society*).

<sup>15</sup> *Audubon Society*, at pp. 445–446, fn. omitted.