



SENT VIA ELECTRONIC TRANSMISSION

November 18, 2011

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
Post Office Box 100
Sacramento CA 95812
commentletters@waterboards.ca.gov

Re: **Comment Letter – Water Measurement**

Dear Ms. Townsend,

The San Joaquin River Group Authority (“SJRG”) has reviewed the Delta Watermaster’s report entitled “Statements of Water Diversions and Use: Providing a Better Picture of Water Use in the Delta” (“Report”) and the attached DRAFT Notice of Guidance for complying with water diversion measurement requirements for statement holders (“Draft Guidance”). The SJRG has concerns with the Report and the Draft Guidance, and requests that each be revised to be compliant with the Delta Reform Act.

Watermaster’s Report

Delay of Reporting Requirements:

In the Report, the Watermaster suggests requesting the legislature delay the reporting requirements until 2013. (Report, at 9.) This suggestion contradicts the Report’s previous sections which praise the reporting requirements for providing “an accurate picture of the number and types of Delta diversions” for the “first time.” (Report, at 7.)

The suggestion is also contrary to the statutory duties of the Watermaster. The Watermaster is tasked with obtaining timely monitoring, reporting, and enforcement of diversions in the Delta. Delaying the reporting requirements is not consistent with and will frustrate achieving the duties the Watermaster is statutorily required to undertake.

The suggestion is also inappropriate. As the Report notes, many Delta diverters rely on unverified pre-1914 and riparian rights and, until recently, have not been required to measure or report such use. The lack of reporting and accountability has no doubt allowed illegal diversions in the Delta to continue unfettered. Further, the lack of information regarding in-

Delta diversions make it impossible for the State Water Resources Control Board to properly allocate water resources throughout the state.

Finally, Delta diverters have had sufficient time to prepare for the impending measurement and reporting requirements. The requirements were adopted in 2009 and will not become effective until 2012. Three years is more than sufficient time to prepare and install such measuring devices.

For the reasons above, the Watermaster should amend his report to remove the suggestion that the requirements for measuring and reporting Delta diversions should be delayed.

Speculation Regarding Local Cost Effectiveness:

The Report speculates metering devices may not be locally cost effective for smaller or older diversions. Such speculation is unsupported and goes beyond the authority of the Watermaster. Specifically, the Report states that “non-metering options would be considered where appropriate, since for many smaller and older diversions, it may not be locally cost-effective to retrofit existing infrastructure to install a metering device.” (Report, at 8.) The Report provides no evidence to support this overly general and speculative statement. Further, the offer to consider non-metering options is beyond the authority of the Watermaster; the Delta Reform Act specifically delegated the determination of local cost effectiveness to the State Water Resources Control Board (“State Board”) – not the Watermaster. (Water Code, § 5103(e).) For this reason, the Report should be revised to remove speculative statements as to which measuring devices will be determined to be cost effective by the State Board.

Draft Notice of Guidance

Focus Should be on Best Available Technology:

The Draft Guidance is overly focused on whether technologies are locally cost effective and fails to provide sufficient guidance on which technologies are the best available. The Draft Guidance provides a website with a helpful list of the various types of water measurement devices. However, the Draft Guidance fails to provide guidance on which of the various listed methods represent the best available technology; without this information, water users may not have a clear understanding of which measurement devices represents the best available technology. The guidance should be revised to include an analysis of which technologies are the best available and a ranked list of technologies from best to worst. This will provide water users with clear information regarding which water measurement devices they are required to install.

Self-Determination of Locally Cost Effective:

The Draft Guidance includes a revised DRAFT Supplemental Statement (“Draft Supplemental Statement”) which provides Statement holders the option to check a box if they have “determined” that the use of a measuring device is not locally cost effective. (Draft Guidance, at 1; Draft Supplemental Statement, at 1.) The Draft Guidance and Draft Supplemental Statement are premised on the incorrect assumption that statement holders are allowed to determine whether the installation of measuring devices are locally cost effective. Statement holders may

not “determine” whether measuring technologies are locally cost effective. Instead, the Delta Reform Act provides the State Board with the authority to make such a determination. The Delta Reform Act states:

“Nothing in this paragraph shall be construed to require the implementation of technologies or practices by a person who provides to the [State] Board documentation demonstrating that the implementation of those practices is not locally cost effective.” (Water Code, § 5103(e).)

Therefore, it is the State Board - not the statement holder - that determines whether the use of specific technology is cost effective or not. For this reason, the Draft Guidance and the Draft Supplemental Statement must be revised to make clear statement holders may not self-determine whether a technology or practice is cost effective. Instead, if statement holders allege such practices or technologies are not cost effective, they must provide the State Board evidence such of ineffectiveness and receive a determination from the State Board that such evidence has demonstrated as much.

The Draft Guidance and the Draft Supplemental Statement should be revised to provide guidance to statement holders regarding the types of evidence that should be provided to the State Board in support allegation that technologies are not locally cost effective. The references that insinuate statement holders may self-determine whether technologies are cost effective must be removed.

Impact of a “Not Locally Cost Effective” Determination:

The Draft Guidance should be revised to make clear that a State Board determination which holds that best technologies are not cost-effective is not the same as a determination that diversions need not be measured. As reflected by the options for measurement in the Draft Supplemental Statement, if no other method is cost effective, diversions may be estimated with a bucket and stopwatch. Therefore, the Draft Guidance must be revised to indicate that the measurement of diversions is required and that a determination that some technologies are not locally cost effective will not excuse or otherwise exempt a statement holder from measuring and reporting diversions.

The SJRGA appreciates the opportunity to comment and looks forward to reviewing revised documentation and guidance regarding Delta water measurement requirements.

Very truly yours,

O’LAUGHLIN & PARIS LLP



VALERIE C. KINCAID

VCK/tlb

cc: Craig Wilson

Attachment