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Re: ***Comments to Department of Water Resources Emergency Regulations Related to Agricultural Water Measurements***

To Whom It May Concern:

These comments are submitted on behalf of Richvale Irrigation District and Biggs-West Gridley Water District to the Department of Water Resources' proposed emergency agricultural water measurement regulations (Cal. Code Regs. [hereinafter "CCR"], Tit. 23, §§ 597, 597.1, 597.2, 597.3, 597.4). In short, the proposed regulations fail to satisfy the requirements of the Administrative Procedure Act; accordingly, the proposed regulatory action should be disapproved.

Background

Richvale Irrigation District ("Richvale") and Biggs-West Gridley Water District ("Biggs") are local public agencies formed and operating under Divisions 11 and 13, respectively, of the California Water Code. Under the proposed regulations, Richvale and Biggs are "agricultural water suppliers" as that phrase is defined in 23 CCR § 597.2, subdivision (a)(2). Thus, Richvale and Biggs will be required to implement the mandates of the proposed regulations, including measuring surface water that they delivery to *each* customer at a specified accuracy level.

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Discussion

1. Necessity/Defective Initial Statement of Reasons

The adoption, amendment or repeal of an emergency regulation is not subject to the procedure for adoption of regulations except as provided in sections 11346.1, 11349.5 and 11349.6 of the Government Code. Subdivision (b) of section 11349.6 states that the “office shall disapprove the emergency regulations...if it determines that the regulation fails to meet the standards set forth in section 11349.1...” Subdivision (a) of section 11349.1 provides that the office shall review all regulations under six standards: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) nonduplication.

The necessity standard is defined by Government Code section 11349, subdivision (a), and 1 CCR section 10, subdivision (b). Generally, the agency must demonstrate “why” a regulation is needed and “how” this regulation fills that need. (*Ibid.*). The initial statement of reasons is the form whereby the agency attempts to satisfy the necessity standard.

Here, no initial statement of reasons was submitted with the proposed regulatory action. Nor does any of the supporting documentation satisfy the necessity standard. There is no explanation of the need for each new provision in the text made available to the public with the notice of publication. For this reason, the proposed emergency regulation violates the APA and should be disapproved.

2. Incorrect Procedure/Poor Clarity

The Department of Water Resources prepared an economic and fiscal impact statement (STD. 399) in support of the proposed emergency regulation. To assist in the completion of STD. 399, the Department of Finance has developed and requires regulatory agencies to comply with the State Administrative Manual (“SAM”) and particularly Chapter 6600, commencing with section 6601. The Department of Water Resources has failed to comply with the SAM in completing STD. 399.

SAM section 6601, subdivision (2), requires an estimate of the cost or savings to any state agency or local government. “Cost” includes direct and indirect costs. (SAM § 6602; Gov. Code § 11346.5, subd. (a)(6)). The costs imposed on local agencies must be identified and estimated when the imposition results in a reimbursable state mandate (SAM § 6606) and non-reimbursable local costs (SAM § 6608).

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As already noted, Richvale and Biggs are local public agencies that are also “agricultural water suppliers” subject to the mandates of the proposed emergency regulation. The definition of “agricultural water supplier” contemplates suppliers, like Richvale and Biggs, that are “publicly...owned”. (23 CCR § 597.2, subd. (a)(2)). Inexplicably, however, STD. 399 states “No fiscal impact exists because this regulation does not affect any local entity or program.”

“A regulation shall be presumed not to comply with the ‘clarity’ standard if any of the following conditions exists: ... the language of the regulation conflicts with the agency’s description of the effect of the regulation...” (1 CCR § 16, subd. (a)(2)). Here, the language of 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”.

The regulation clearly has an impact on local public agencies like Richvale and Biggs and, as such, must give a detailed summary and description of the fiscal effect on local government. Because the proposed regulatory action will have a cost impact on local government, STD. 399 is required to be submitted to the Department of Finance for concurrence in the cost estimate. (SAM § 6615). Finance’s concurrence must be obtained *before* submitting the record to OAL.

3. Incorrect Procedure/Consistency

“‘Consistency’ means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code § 11349, subd. (d)). In the section entitled Estimate of Costs or Savings of the Notice of Proposed Emergency Rulemaking, the Department of Water Resources states that “Costs to agricultural water suppliers associated with complying with the regulation will be passed on to their customers (i.e., farmers).”

However, local public agencies like Richvale and Biggs are subject to Proposition 218 (Cal. Const., Art. XIII D). Proposition 218 divests local public agencies of authority to impose or increase general taxes, assessments and fees without voter approval. Richvale, Biggs and other local public agencies that are agricultural water suppliers cannot pass through costs associated with complying with the regulation through to their customers without complying with Proposition 218. It is important to note that Richvale and Biggs’ customers could reject an assessment or increased fee, yet Richvale and Biggs will still be subject to the regulation’s mandates.

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The Notice of Proposed Rulemaking must be consistent with applicable law, including Proposition 218. 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. The regulation should be disapproved for being inconsistent and in conflict with existing provisions of law.

Conclusion

For the reasons set forth above, OAL should disapprove the Department of Water Resources' proposed regulatory action.

Very truly yours,

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