

KEY PROVISIONS OF THE EMERGENCY REGULATION FOR MEASURING AND REPORTING THE DIVERSION OF WATER

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Regional water shortages during the recent drought demonstrated the inadequacy of current water diversion data in the state of California. On June 24, 2015, Senate Bill 88 was signed into law, authorizing the State Water Board (SWB) to adopt new measurement and reporting requirements affecting thousands of water rights holders, claimants and diverters, as well as California water attorneys assisting with environmental compliance. Senate Bill 88 further authorized the SWB to adopt an initial emergency regulation that would be exempt from California Environmental Quality Act requirements.

After holding a number of meetings and workshops for feedback from affected members of the regulated community, on January 19, 2016, the SWB adopted an Emergency Regulation for Measuring and Reporting Water Diversions, which was then submitted to the Office of Administrative Law for review. On March 21, 2016, the Office of Administrative Law approved the emergency regulation.

The new measurement and reporting requirements implemented by Senate Bill 88 and the Emergency Regulation are intended to improve the accuracy and timeliness of water diversion data so that upstream rights holders can better plan for their own beneficial uses while ensuring that adequate flows remain instream, especially in drought periods.

Key Provisions

Changes to water use reporting

As per the new regulation, all water rights holders (registration, certificate, permit and license holders) must annually report on their water diversion and use. These annual reports must be filed by April 1 for water diversions and use during the previous calendar year.

Supplemental statements of water diversion and use must be filed by July 1.

All reports must include information on the purpose of the diversion, and if available, the maximum rate of diversion achieved at any time during each month.

Annual reports are the new regulatory floor – not the ceiling. Under Title 23, section 917(a) of the California Code of Regulation, the Deputy Director for the Division of Water Rights may require water diverters in a given watershed or sub-watershed to submit monthly or more frequent reports of water diversion when the current flows (or projected available water supplies) are insufficient to support all projected diversion demand.

New standards for measurement device accuracy and monitoring frequency

The Emergency Regulation implements the new measurement and monitoring standards contemplated by Senate Bill 88, wherein large-scale water diverters are subject to stricter standards for measurement and monitoring. See table below for details.

Diversion Rights	Accuracy of Device	Monitoring Frequency
10 acre-feet per year	15 percent by volume	Weekly
100 acre-feet per year	10 percent by volume	Daily
1,000 acre-feet per year	10 percent by volume	Hourly

Similarly, larger-scale water diverters are required to comply with these new measurement and monitoring standards earlier than smaller-scale diverters. A certified measurement device must be installed by January 1, 2017 for a minimum 1,000 acre-feet per year diverter, July 1, 2017 for a minimum 100 acre-feet per year diverter, and January 1, 2018 for a minimum 10 acre-feet per year diverter.

The water measurement devices must be certified every five years – once after the device has been installed (by the time the first annual water diversion and use report has been filed), and every five years thereafter.

Compliance flexibility

Diverters are given a degree of flexibility to comply with implementation of a certified measuring device. Under the Emergency Regulation, a diverter may propose and implement an alternative protocol for measuring water diversion and use so long as the alternative protocol reasonably achieves accuracy standards comparable to those of a certified measuring device.

When compliance with the standards set by the Regulation cannot be reasonably obtained (e.g., compliance is infeasible, unreasonably expensive or would result in the waste or unreasonable use of water), a diverter may submit an alternative compliance plan to the Division of Water Rights substantiating their need. If an alternative plan is initiated, it remains in effect for a five-year period (subject to renewal)