

**STATE WATER RESOURCES CONTROL BOARD  
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS  
DECEMBER 1, 2015**

**ITEM 8**

**SUBJECT**

CONSIDERATION OF A PROPOSED RESOLUTION AMENDING AND READOPTING A DROUGHT EMERGENCY REGULATION REGARDING INFORMATIONAL ORDERS

**DISCUSSION**

On January 17, 2014, Governor Brown declared a [drought state of emergency](#). On March 1, 2014, Governor Brown signed a [drought relief package](#), Senate Bill 104 (Statutes 2014; Chapter 3; Committee on Budget and Fiscal Review), to, among other things: provide funding to improve conservation and emergency supplies; reduce fire risk and increase fire-fighting capabilities; and expand the State Water Resources Control Board's (State Water Board or Board) authority under Water Code section 1058.5 and increase penalties for unauthorized diversion of water.

On April 1, 2015, Governor Brown issued [Executive Order B-29-15](#) (Executive Order) to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The Executive Order finds that the on-going severe drought conditions present urgent challenges across the state including water shortages for municipal use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions persist. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014 Proclamation, [April 25, 2014 Proclamation](#), and Executive Orders [B-26-14](#) and [B-28-14](#), remain in full force and effect.

In 2014 and 2015, the State Water Board determined that water demands exceeded available water supply in specific critically dry watersheds. Water right holders, diverters and users were advised to stop diversion pursuant to certain classes of rights because there was insufficient natural flow to support diversions under some priorities of right. Diversion under such circumstances may be an unauthorized diversion and use of water, subject to enforcement action.

Water Code section 1058.5 grants the State Water Board the authority to adopt emergency regulations in certain drought years in order to: "prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports."

On July 2, 2014, the State Water Board adopted an emergency regulation for Curtailment of Water Diversions to Protect Senior Water Rights (California Code of Regulations, title 23, adding section 875 and 878.3 and amending Section 878.1 and 879<sup>1</sup>) (Regulations). The Regulations were reviewed by the Office of Administrative Law (OAL) and went into effect on July 16, 2014. Regulation section 879, subdivision (c) establishes requirements for riparian and pre-1914 rights holders to provide additional information in specific circumstances.

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<sup>1</sup> All references to Regulations are to California Code of Regulations, title 23.

On March 17, 2015, the State Water Board amended and re-adopted emergency regulations regarding Informational Order authority during drought (Regulation amending section 879, subdivision (c)). The regulation was reviewed by OAL and went into effect on March 27, 2015. The regulation establishes requirements for water right holders to provide information in specific circumstances. The 270-day period for the emergency regulations ends on December 12, 2015.

The proposed action amends and readopts Regulations section 879, subdivision (c). As written, the subdivision allows the State Water Board to request information from any water right holder under certain circumstances, including: (a) in response to a complaint; (b) where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment; (c) where a water right holder, diverter or user responds to an investigation, curtailment order or any notice of water shortage by asserting a right to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record has been filed with the Board; and (d) upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversion. The proposed change clarifies that an informational order may be issued in response to a water right holder, diverter or user's failure to respond to an investigation, curtailment order, or any notice of curtailment.

### **POLICY ISSUE**

Should the State Water Board adopt the proposed resolution?

### **FISCAL IMPACT**

This activity is budgeted within existing resources, and no additional fiscal demands will occur as a result of approving this item.

### **REGIONAL BOARD IMPACT**

None.

### **STAFF RECOMMENDATION**

Staff recommends that the State Water Board adopt the proposed resolution amending and re-adopting the emergency regulation.

State Water Board action on this item will assist the Water Boards in reaching Goals 3 and 6 of the Strategic Plan Update: 2008-2012. Goal 3 is to increase sustainable local water supplies available for meeting existing and future beneficial uses by 1,725,000 acre-feet per year, in excess of 2002 levels, by 2015, and ensure adequate flows for fish and wildlife habitat. Goal 6 is to enhance consistency across the Water Boards, on an ongoing basis, to ensure our processes are effective, efficient, and predictable, and to promote fair and equitable application of laws, regulations, policies and procedures.

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## STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2015-

### TO AMEND AND RE-ADOPT A DROUGHT EMERGENCY REGULATION REGARDING INFORMATIONAL ORDERS

#### WHEREAS:

1. On January 17, 2014, Governor Brown declared a [drought state of emergency](#). On March 1, 2014, Governor Brown signed a [drought relief package](#), Senate Bill 104 (Statutes 2014; Chapter 3; Committee on Budget and Fiscal Review), to, among other things: provide funding to improve conservation and emergency supplies; reduce fire risk and increase fire-fighting capabilities; and expand the State Water Resources Control Board's (State Water Board or Board) authority under Water Code section 1058.5 and increase penalties for unauthorized diversion of water. In addition, the drought declaration suspended California Environmental Quality Act (CEQA) review for many of the state's responses to the drought. On April 25, 2014, the Governor issued a [Proclamation of a Continued State of Emergency](#) to strengthen the state's ability to manage water and habitat effectively in drought conditions. The April 2014 Proclamation ordered that the provisions of the January 2014 Proclamation remain in full force and also added several new provisions. On December 22, 2014, in light of the continued lack of rain, Governor Brown issued Executive Order [B-28-14](#), which extended the CEQA suspension for drought emergency regulations through May 31, 2016.

On November 13, 2015, the Governor issued [Executive Order B-36-15](#) which continues the orders and provisions contained in the January 17, 2014 and April 25, 2014 Proclamations and Executive Orders [B-26-14](#), B-28-14, and [B-29-15](#), with amendments.

2. California has experienced four consecutive years of drought, from 2012 through 2015. Water year 2015 had the lowest snowpack on record, and many areas of the State experienced exceptionally dry conditions.
3. As of November, 2015, the State Water Board had sent Notices of Surface Water Shortage and Potential for Curtailment of Water Right Diversions to over 9,000 water right holders, diverters or users. The notifications informed diverters that due to dry hydrologic conditions there was insufficient surface flow to divert under their priority of right. Diversions under such conditions are unauthorized.
4. As previously adopted, California Code of Regulations, section 879, subdivision (c), authorized the Deputy Director for Water Rights (Deputy Director) to issue informational orders under certain circumstances, including: (a) in response to complaints that staff determines merit investigation alleging interference with a water right by a right holder, diverter or user; (b) where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment, and no Statement of Water Diversion and Use for such right was on file with the Board as of January 17, 2014; (c) where a water right holder, diverter or user in response to an investigation, curtailment order or any notice of curtailment by asserting a right to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record has been filed with the Board; or (d) upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable

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method of diversion, or unlawful diversion of water by any water right holder, diverter or user.

The authority under item (c) is clarified to make it more clear that the Deputy Director may issue an informational order when a water right holder, diverter or user fails to respond to an investigation, curtailment order or any notice of curtailment.

5. In order to effectively administer the State's water right system, the State Water Board needs to be able to effectively account for diversions, project water availability, and ensure that water is used solely by persons holding valid rights and without waste or unreasonable use or unreasonable method of diversion. Riparian and pre-1914 rights are among the most senior water rights, and have a large impact on the availability of water in drought years. However, diversions under any claim of right, or under claim of contract purchase or water transfer, may also impact water availability during drought years. The State Water Board has little information regarding many of these diversions, their relative priorities, and their validity. During the ongoing drought, there is insufficient supply and diversion by persons lacking valid rights injures other right holders. The emergency regulation authorizes the Deputy Director to issue informational orders against any water right holder, diverter or user in response to any of the circumstances described in paragraph 4, above.
6. In 2015, the State Water Board conducted roughly 1,200 field inspections to determine compliance with the State's water rights system during this severe drought emergency. A similar program was conducted in 2014. The field inspection programs of 2014 and 2015 found that many persons who received notification that there was inadequate water supply available to serve their post-1914 appropriative right claimed a riparian or pre-1914 right for continued diversions. In addition, many persons with a pre-1914 appropriative right who were notified that there was insufficient water supply available to serve such right claimed a riparian right as an alternate basis for diversion. In many instances, the claimed right had never been reported to the Division even though riparian and pre-1914 diversions must typically be reported under Water Code section 5100 et seq. Because a diversion made by the holder of more than one right is made first under any applicable senior right, with diversion occurring under a more junior right only after the senior right has been satisfied, the large number of such claims suggest accounting problems, failure to file claims, and/or falsification. The Division will use informational orders, authorized under the emergency regulation, to obtain information on previously unclaimed rights and also regarding certain known claims. This information will include diversion amounts and the basis and extent of claims.
7. Similarly, some diverters have responded to drought year inspections or notices of water unavailability (often referred to as curtailment notices) by asserting the right to divert under the rights of another. The Division will use informational orders to obtain information on claims to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record has been filed with the Board. Such transfers must neither effect a new water right nor injure other legal users of water, and compliance with these requirements can be difficult to ensure, particularly in drought hydrology. The current extreme drought warrants provision of further information regarding such claims made in response to inquiries for compliance with these rules.

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8. Water Code section 1058.5 grants the State Water Board the authority to adopt emergency regulations in certain drought years in order to: "prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports."
9. The State Water Board is amending and re-adopting the emergency regulation because of emergency drought conditions and the need for prompt action.
10. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to 270 days.
11. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director and to the Division of Water Rights Deputy Director. The State Water Board has delegated authority to the Executive Director and to the Deputy Director for the Division of Water Rights; and

## THEREFORE BE IT RESOLVED THAT:

1. The State Water Board amends California Code of Regulations, title 23, section 879, as appended to this resolution as an emergency regulation;
2. The State Water Board staff will submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director, the Deputy Director for the Division of Water Rights or their designees may make such changes;
4. This regulation shall remain in effect for 270 days after filing with the Secretary of State unless the State Water Board determines that it is no longer necessary due to changed conditions, or unless the State Water Board renews the regulations due to continued drought conditions as described in Water Code section 1058.5;

## CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on December 1, 2015.

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Jeanine Townsend  
Clerk to the Board

In California Code of Regulations, Title 23, Division 3, Chapter 2, Article 24, re-adopt and amend Section 879, subdivision (c) to read:

**§ 879. Reporting**

(c)(1) The Deputy Director may issue an informational order, as provided in paragraph (2), in any of the following circumstances:

(A) Upon receipt of a complaint that staff determines to merit investigation alleging interference with a water right by a water right holder, diverter or user;

(B) Where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment, and no Statement of Water Diversion and Use for such right was on file with the Board as of January 17, 2014;

(C) Where a water right holder, diverter or user fails to respond ~~responds~~ to an investigation, curtailment order or any notice of curtailment, or responds by asserting a right to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record has been filed with the Board; or

(D) Upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversions of water by any water right holder, diverter or user.

(2) The Deputy Director may issue an order under this article requiring a water right holder, diverter or user to provide additional information related to a diversion or use described in (c)(1), including the claim of right; property patent date; the date of initial appropriation; diversions made or anticipated during the current drought year; basis or right and amount of water transfer not subject to approval of the Board or Department of Water Resources; or any other information relevant to authenticating the right or forecasting use and supplies in the current drought year.

(3) Any party receiving an order under this subdivision shall provide the requested information within thirty (30) days. The Deputy Director may grant additional time for submission of information supporting the claim of right upon substantial compliance with the 30-day deadline and a showing of good cause.

(4) The failure to provide the information requested within 30 days or any additional time extension granted is a violation subject to civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.

(5) Orders issued under previous versions of this subdivision shall remain in effect and shall be enforceable as if adopted under this version. The provisions of Article 12 of this Chapter (commencing with section 768) shall govern petitions for reconsideration of orders issued under this subdivision.

(6) The Deputy Director may delegate the authorities under this subdivision to an Assistant Deputy Director for the Division of Water Rights.

Authority: Sections 1058 and 1058.5, Water Code.

Reference: Sections 100, 183, 186, 187, 275, 348, 1050, 1051, 1058.5 and 1846 Water Code.