
State Water Resources Control Board

**NOTICE OF PROPOSED EMERGENCY RULEMAKING
February 8, 2017**

Prohibition of Activities and Mandatory Actions during Declared Drought Emergency

Required Notice of Proposed Emergency Action

Government Code section 11346.1, subdivision (a)(2) requires that, at least five working days prior to submission of a proposed emergency regulation to the Office of Administrative Law (OAL), the adopting agency must provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After the submission of the proposed emergency action to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. This document and the accompanying information provide the required notice.

Proposed Emergency Action

On January 17, 2014, Governor Edmund G. Brown, Jr. declared a drought state of emergency. On April 25, 2014 the Governor signed an Executive Order calling on the State to redouble state drought actions. Among other things, the Executive Order directed the State Water Board to adopt emergency regulations as it deems necessary, pursuant to Water Code section 1058.5, to ensure that Urban Water Suppliers implement drought response plans to limit outdoor irrigation and other wasteful water practices.

Water Code section 1058.5 grants the State Water Resources Control Board (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 15, 2014, the State Water Board adopted Resolution No. 2014-0038, which adopted an emergency regulation for water conservation that added new sections to title 23 of the California Code of Regulations. That emergency regulation became effective on July 28, 2014, upon approval by the Office of Administrative Law and filing with the Secretary of State. On March 17, 2015, the State Water Board amended and readopted the emergency regulation through adoption of Resolution No. 2015-0013, and the amended and readopted regulation took effect on March 27, 2015, upon approval by the Office of Administrative Law and filing with the Secretary of State.

On April 1, 2015, Governor Brown signed Executive Order B-29-15, directing the State Water Board to impose restrictions to achieve a statewide 25 percent reduction in potable urban water usage through February 2016, as compared to the amount used in 2013. The Governor instructed the State Water Board to consider the relative per capita water usage of each

supplier's service area and to require those areas with high per capita use to achieve proportionally greater reductions than those with low use. The order mandates that the Governor's January 17, 2014 Proclamation, April 25, 2014 Proclamation, Executive Order B-26-14, and Executive Order B-28-14 remain in full force and effect except as modified. On May 5, 2015 the State Water Board adopted a revised emergency regulation to address the actions called for in Executive Order B-29-15.

On November 13, 2015, Governor Brown issued Executive Order B-36-15 (EO B-36-15) calling for an extension of urban water use restrictions until October 31, 2016, should drought conditions persist through January 2016. Accordingly, on February 2, 2016, the State Water Board adopted [Resolution No. 2016-0007](#) to extend the requirements of the May 2015 Emergency Regulation. The [February 2016 Emergency Regulation](#) offered modest adjustments in supplier conservation standards to help respond to concerns about differences in climate across the state; growth experienced by urban areas; and significant investments that have been made to create new, local, drought-resilient sources of potable water supply. It added penalties for homeowners' associations or community service organizations that impede homeowners from reducing or eliminating the watering of vegetation or lawns during a declared drought emergency. And the February 2016 Emergency Regulation continued a prohibition on certain irrigation practices, including: an order that all urban water suppliers, as defined, reduce their total potable water production by a defined percentage; an order that other distributors of public water supply, as defined, reduce potable water consumption; an order for all self-supplied commercial, industrial, institutional water users to reduce potable water usage; and reporting requirements and enforcement tools to ensure compliance.

On May 9, 2016, Governor Brown issued Executive Order B-37-16 directing actions aimed at using water wisely, reducing water waste, and improving water use efficiency. The Executive Order, in part, directs the State Water Board to adjust emergency water conservation regulations through the end of January 2017, and make adjustments in recognition of the differing water supply conditions across the state.

On May 18, 2016, the State Water Board adopted [Resolution No. 2016-0029](#) to amend and re-adopt the February 2016 Emergency Regulation. The amendments primarily focused on replacing the state-developed, demand-driven standards with locally developed conservation standards based upon each agency's specific water supply reliability conditions (see Fact Sheet: [Staff Proposal for Extended Emergency Regulation for Urban Water Conservation, May 9, 2016](#)). The regulation requires individual urban water suppliers to self-certify the level of available water supplies they have assuming three additional dry years, and the level of conservation necessary to assure adequate supply over that time. Under the regulation, urban water suppliers are required to reduce potable water use by a percentage equal to their projected shortfall in the event of three more dry years.

Governor Brown's January 2014 drought declaration remains in effect. Barring readoption, the current regulation will expire automatically on February 28, 2017. Since 2011, California has undergone more than five years of extreme drought with several of those years being the worst on record, including a snowpack in 2015 that was the smallest in 500 years. The State Water Board is proposing to continue the existing prudent and appropriate drought restrictions until the Governor determines the state's readiness to leave drought conditions.

Proposed Text of Emergency Regulations

See the attached proposed text of the regulation.

Finding of Emergency (Gov. Code, § 11346.1, subd. (b))

The State Water Board finds that an emergency exists due to regional drought conditions in parts of the state and uncertainty regarding future conditions following five years of historic drought, and that adoption of the proposed emergency regulation is necessary to address the existing emergency and extend current restrictions in response to current conditions.

California has been dealing with the effects of an unprecedented drought for the last five years. So far this winter, California has experienced significant snow and rainfall, causing many of the state's reservoirs to shift to flood-control operations; however, some reservoirs remain critically low and groundwater storage remains depleted in many areas due to the continued impact of prolonged drought. Precipitation cannot be counted on to continue, and snowpack levels, while above average for the current time of year, are subject to rapid reductions as seen in 2016 and before. The full picture of the state's hydrologic water conditions for 2016/2017 remains unclear and subject to a number of variables at least through the end of the spring.

On January 17, 2014, Governor Brown declared a drought state of emergency. On April 25, 2014 the Governor signed an Executive Order (April 2014 Proclamation) stating, among things, "*...that severe drought conditions continue to present urgent challenges: water shortages in communities across the state, greatly increased wildfire activity, diminished water for agricultural production, degraded habitat for many fish and wildlife species, threat of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Bay Delta, and additional water scarcity if drought conditions continue into 2015.*"

Due to these concerns, the April 2014 Proclamation directs the State Water Board to adopt emergency regulations as it deems necessary, pursuant to Water Code section 1058.5, to ensure that urban water suppliers implement drought response plans to limit outdoor irrigation and other wasteful water practices. The April 2014 Proclamation suspended the requirement for review under the California Environmental Quality Act (CEQA) for certain activities, including adoption of emergency regulations by the Board pursuant to Water Code section 1058.5.

On December 22, 2014, Governor Brown issued Executive Order B-28-14, which extended the suspension of the CEQA for certain activities contained in the January 2014 and April 2014 Proclamations, including Board adoption of emergency regulations pursuant to Water Code section 1058.5, through May 31, 2016. Executive Order B-36-15 further extended the CEQA suspension for activities identified in that Order.

The State Water Board is unable to address the situation through non-emergency regulations because the standard rulemaking process cannot timely address the current drought emergency that is the focus of these regulations. Furthermore, as noted above, the Governor's April 1, 2015 Executive Order and the Governor's May 9, 2016 Executive Order directs the State Water Board to adopt emergency regulations pursuant to Water Code section 1058.5 to address the issues that are the focus of this proposed regulation. The State Water Board will reassess water supply conditions, as well as the need for continued urban water conservation regulations, in the spring of 2017.

Authority and Reference (Gov. Code, § 11346.5, subd. (a)(2))

Water Code sections 1058 and 1058.5 provide authority for the emergency regulation. The proposed updated emergency regulation implements, interprets, or makes specific California Constitution Article, X, section 2; Civil Code, §§ 4080, 4100, 4110, 4150, 4185, and 4735; Government Code, § 8627.7; Water Code, §§ 100, 102, 104, 105, 174, 186, 187, 275, 350,

1051, 1122, 1123, 1825, 1846, 10617, and 10632; and *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463.

Informative Digest (Gov. Code, § 11346.5, subd. (a)(3))

Absent the existing emergency regulation, there is no statewide prohibition on specific water uses to promote conservation. There is also no law or regulation requiring urban water suppliers to make specific potable water use reductions or report the amount of water they produce to the state without considerable time delay. The State Water Board's May 2015 emergency regulation constituted the first statewide directive to urban water users to undertake specific actions to respond to the drought emergency and the first statewide directive that set enforceable conservation performance standards for urban water suppliers; consequently, the proposed emergency regulation is consistent and compatible with existing regulations on this subject. The State Water Board has extended and amended the regulation since May 2015 to respond to updated conditions as appropriate. The proposed regulation neither differs from nor conflicts with an existing comparable federal statute or regulation.

The proposed Emergency Regulation would amend and extend the existing May 2016 Emergency Regulation. On May 9, 2016, Governor Brown issued Executive Order B-37-16 calling for the State Water Board to adjust emergency water conservation regulations through the end of January 2017, in recognition of the differing water supply conditions across the state. To implement the Executive Order, the State Water Board adopted Resolution No. 2016-0029, which revised regulations to allow individual suppliers to self-certify that they would have no supply shortfall assuming three additional dry years. The self-certification "stress test" allowed many suppliers to self-certify that there would be no supply shortfall, even after three additional drought years. The Executive Order also called on the Board to develop a proposal to achieve a mandatory reduction in potable urban water usage that builds off of the mandatory 25 percent reduction called for in Executive Order B-29-15 and lessons learned through 2016. The current emergency regulation became effective on May 31, 2016 upon approval by OAL and remains in effect until February 28, 2017.

The proposed emergency regulation amends and extends the May 2016 Emergency Regulation and maintains a number of the same requirements that apply currently, except as noted below. The proposed emergency regulation:

- Prohibits any city, county, or city and county from imposing fines prohibited by section 8627.7 of the Government Code.
- Allows an urban water supplier to resubmit its water reliability assessment (stress test) by March 15, 2017, if that supplier experienced a change to its baseline water supply conditions.
- Allows an urban water supplier to submit a water reliability stress test by March 15, 2017, if it did not do so before.
- Does not require additional small supplier reporting. Small suppliers are encouraged to maintain conservation measures and report leaks.

The proposed emergency regulation would continue these prohibitions: irrigating with potable water of ornamental turf on public street medians; irrigating with potable water outside of newly-constructed homes and buildings not in accordance with emergency regulations or other requirements established in the California Building Standards Code; using potable water to wash sidewalks and driveways; allowing runoff when irrigating with potable water; using hoses with no shutoff nozzles to wash cars; using potable water in decorative water features that do

not recirculate the water; and irrigating outdoors during and within 48 hours following measureable rainfall.

The proposed emergency regulation retains penalties for homeowners' associations or community service organizations impeding homeowners from reducing or eliminating the watering of vegetation or lawns during a declared drought emergency, and maintains reporting requirements and enforcement tools to ensure compliance with the provisions of the regulation.

All of these requirements are intended to safeguard urban water supplies in the event of continued drought, minimize the potential for waste and unreasonable use of water, and achieve a statewide potable water usage reduction ordered by Governor Brown. It is both reasonable and prudent to amend and extend the mandatory conservation standards in recognition of the fact that that some parts of the state have sufficient water to meet current demand, while other regions do not and still need to maintain higher levels of conservation. For all regions it is necessary to promote appropriate conservation practices and works towards making conservation a California way of life. All changes are being made in response to current hydrologic conditions in California, the Governor's Executive Order B-37-16 and prior Executive Orders, and stakeholder input. Additional details are discussed in the State Water Board's attached *Emergency Regulations Digest*.

Proposed Emergency Regulation Section 863

Proposed section 863 sets forth the State Water Board's findings of drought emergency, noting the Governor's adoption of multiple emergency proclamations pertaining to drought conditions, the drought conditions that formed the basis of the Governor's emergency proclamations continue to exist in portions of the state, and the fact that snowpack and reservoir conditions for the end of the water year remain subject to significant change.

Proposed Emergency Regulation Section 864

Proposed section 864 maintains the current prohibitions on several activities, except where necessary to address an immediate health and safety need or to comply with a term or condition in a permit issued by a state or federal agency, to promote conservation. The section maintains prohibitions on: the application of water to outdoor landscapes in a manner that causes visible runoff; the use of a hose to wash an automobile except where the hose is equipped with a shut-off nozzle; the application of water to hardscapes; the use of potable water in non-recirculating ornamental fountains; the application of potable water to outdoor landscapes during or within 48-hours after measurable rainfall; the irrigation of ornamental turf on public street medians with potable water; the irrigation with potable water outside of newly constructed homes and buildings that is inconsistent with regulations or other requirements established by the California Building Standards Commission and the Department of Housing and Community Development; and serving drinking water other than upon request in eating or drinking establishments. Proposed section 864 would also continue the requirement that operators of hotels and motels provide guests with the option of choosing not to have towels and linens laundered daily and that they prominently display notice of this option. Under this section, commercial, industrial and institutional users not served by either type of water supplier regulated by section 864.5 or 865 are directed to continue to target conservation at a level equal to the conservation standard set for the nearest urban water supplier. This section, as proposed, maintains penalties for homeowners' associations or community service organizations impeding homeowners from reducing or eliminating the watering of vegetation or lawns during a declared drought emergency, as described in existing Civil Code provisions. Finally, proposed section 864

prohibits any city, county or city and county from imposing fines as prohibited by section 8627.7 of Government Code for a failure to water a lawn or for having a brown lawn.

Proposed Emergency Regulation Section 864.5

Proposed section 864.5 allows urban water suppliers to base a mandatory conservation standard on their own water supply reliability situation under a set of supply and demand assumptions over the next three years through a supply reliability assessment (stress test). Suppliers would be (or continue to be) assigned a conservation standard equal to the amount of their shortage, if any, after a third dry year, expressed as a percentage. Suppliers that did not submit a water reliability certification and supporting information retain their demand-based conservation standard in almost all cases. The proposed regulation allows suppliers that did not previously submit a stress test the opportunity to do so. It also allows an urban water supplier to resubmit its stress test if there has been a change in its baseline water supply condition. If an urban water supplier chooses to submit a new stress test, it must be submitted to the State Water Board by March 15, 2017.

Proposed Emergency Regulation Section 865

Proposed section 865 maintains the existing conservation standards, along with changes that may have resulted from the February 2016 Emergency Regulation, for those suppliers that do not develop a self-certified conservation standard in compliance with the regulation. Consequently, the section directs urban water suppliers to meet specified conservation standards and to report specific information to the State Water Board.

Proposed Section 865 identifies conservation standards for urban water suppliers that do not comply with proposed section 864.5, to be initially allocated across eight tiers of increasing levels of R-GPCD water use, with adjustments for certain localized conditions. This approach considers the relative per capita water usage of each water suppliers' service area and requires that those areas with high per capita use achieve proportionally greater reductions than those with low use, while lessening the disparities in reduction requirements between agencies that have similar levels of water consumption but fall on different sides of dividing lines between tiers. Suppliers are assigned a base conservation standard that ranges between eight percent and 36 percent based on their R-GPCD for the months of July-September, 2014. These three months reflect the amount of water used for summer outdoor irrigation, which provides the greatest opportunity for conservation savings.

Proposed Section 865 continues credits and adjustments to urban water suppliers' conservation standards that consider regional climate differences; urban growth; and investments made toward creating new, local, drought-resilient sources of potable water supply. These adjustments and credits are already in place for many water suppliers as of March 1, 2016.

Proposed section 865 continues to provide a compliance relief mechanism for the handful of urban water suppliers with significant commercial agricultural operations in their service area.

Finally, proposed section 865 eliminates additional drought reporting by smaller urban water suppliers, defined as any distributor of a public water supply, whether publicly or privately owned and including a mutual water company. Annual reporting by small suppliers already occurs through the other State Water Board programs. Small suppliers are encouraged to maintain conservation measures and report leaks.

Proposed Emergency Regulation Section 866

Proposed section 866 provides the State Water Board with continued emergency enforcement tools to ensure that water suppliers and users are on track to achieve their required savings throughout the effective period of the regulation. The State Water Board would continue to assess compliance with self-certified conservation standards, or with conservation standards imposed pursuant to proposed section 865 for those suppliers that do not comply with proposed section 864.5, using suppliers' monthly reported data. Each month, State Water Board staff will reassess compliance based on the supplier's water savings. For suppliers that do not receive a conservation standard pursuant to proposed section 864.5, compliance will be measured on a cumulative basis; the supplier's conservation savings will be added together from one month to the next and compared to the amount of water used during the same months in 2013. The State Water Board will continue to work with water suppliers along the way that are not meeting their targets to implement actions to get them back on track. The State Water Board will continue to use informational orders to request information from suppliers not meeting their conservation standards and, as appropriate, conservation orders that direct specific actions to correct non-compliance. Both conservation orders and informational orders issued by the Board would remain subject to reconsideration by the Board. Violations would be subject to enforcement pursuant to Water Code section 1846. Either of these types of orders issued under a prior version of the regulation, along with any cease and desist orders and administrative civil liabilities issued or initiated under a prior version of the regulation, would continue to remain valid and enforceable.

Other Matters Prescribed by Statute (Gov. Code, § 11346.5, subd. (a)(4))

The proposed Emergency Regulation modifies current restrictions to help prevent the waste and unreasonable use of water and promote water conservation during a period when the Governor has issued a proclamation of emergency based upon drought conditions under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on based on the continuation of current drought conditions.

Local Mandate (Gov. Code, § 11346.5, subd. (a)(5))

The State Water Board has determined that adoption of proposed section 863 does not impose a new mandate on local agencies or school districts. The section is generally applicable law.

The State Water Board has further determined that adoption of proposed sections 864, 864.5, 865 and 866 do not impose a new mandate on local agencies or school districts, because the local agencies affected by the sections have the authority to levy service charges, fees, or assessments sufficient to pay for the mandate program or increased level of service. (See Gov. Code, § 17556, subd. (d); *Connell v. Sup. Ct.* (1997) 59 Cal.App.4th 382.)

Estimate of Cost or Savings (Gov. Code, § 11346.5, subd. (a)(6))

Increased urban water conservation will result in reduced water use, which in turn will result in reduced water sales and lost revenue for urban water suppliers. Fiscal impacts are comprised of net revenue losses and compliance costs. The net revenue loss is equal to the product of the amount of required water savings and the water price less variable cost. Compliance costs cover added expenses incurred from implementation and administration of conservation programs, including reporting and enforcement; that would not have occurred without the proposed regulation. The State Water Board estimates fiscal impacts to local government to be between \$489 million and \$651 million, which are the sum of the low end and high end, respectively, potential estimated lost revenues and the estimated compliance costs for public water agencies. This analysis conservatively assumes that even though those costs likely can be recouped by those agencies through rates, they will not be recouped during the effective

period of the regulation and are considered costs to the supplier, but not a local mandate as the costs are ultimately recoverable.

Implementation of the proposed emergency regulation will result in additional workload for the State Water Board and possibly for the Department of Water Resources. At present this work is accomplished through redirection of resources within existing agency budgets. However, the State Water Board anticipates the need for additional resources (up to one PY) to conduct activities related to the emergency regulation. There are not anticipated to be any other nondiscretionary costs or savings imposed on state or local agencies besides the costs and revenue losses identified in this document.

The above summary information is explained in greater detail in the State Water Board's *Emergency Regulations Digest*, which is attached.