
State Water Resources Control Board

NOTICE OF PROPOSED EMERGENCY RULEMAKING
June 20, 2014

Curtailment of Diversions due to Insufficient Flow for Senior Water Rights

Addition of Sections 875 and 878.3, to Article 24, Division 3 of Title 23 of the California Code of Regulations, and Amendment of Sections 878.1 and 879

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 Brown declared a drought state of emergency. On that same day, the State Water Resources Control Board (State Water Board or Board) issued a Notice of Surface Water Shortage and Potential for Curtailment of Water Right Diversions. The notice advised that if dry weather conditions persist, the State Water Board would notify water right holders in critically dry watersheds of the requirement to limit or stop diversions of water under their water right, based on their priority. On March 1, 2014, Governor Brown signed a drought relief package, SB 104, which, among other things, expanded the State Water Board's authority under Water Code section 1058.5.

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 1, 2014, the State Water Board will consider a proposed resolution adding new sections 875 and 878.3 to title 23, division 3, chapter 2, article 24 of the California Code of Regulations and amending sections 878.1 and 879. In general, the emergency regulations would provide the State Water Board with a more streamlined and effective process to curtail diversions of water when water is not available under the diverter's priority of right and to require reporting relative to the curtailments. Under the proposed emergency regulations, the State Water Board would curtail water diversions on a water right priority basis to protect the rights of senior water

right holders and would require water users to report relative to the curtailments to inform curtailment and enforcement actions by the State Water Board. The emergency regulations allow for alternative water sharing agreements in lieu of State Water Board curtailments as an alternative means of protecting senior water rights. The proposed emergency regulations also indicate that the exceptions to curtailments for minimum health and safety needs included in section 878.1 do not apply to the curtailments under section 875. The Board has specifically requested public comment on this issue.

Proposed Text of Emergency Regulations

See the attached proposed text of the emergency regulations.

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

The State Water Board finds that an emergency exists due to severe drought conditions, as identified in the Governor's drought emergency proclamations. Immediate action is needed to effectively curtail diversions when water is not available under the diverter's priority of right in light of limited water availability during the drought. The State Water Board will need to curtail water diversions when natural flows decrease in order to make that water available for senior water right users.

The State Water Board is unable to address the situation through non-emergency regulations because the standard rulemaking process cannot timely address the current severe drought emergency that is the focus of these regulations. Furthermore, the Governor's April 25, 2014 Executive Order orders the State Water Board to adopt emergency regulations pursuant to Water Code section 1058.5 to address the issues that are the focus of these regulations.

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

Water Code sections 1058 and 1058.5 provide authority for the emergency regulations. The revised emergency regulations implement, interpret, or make specific Cal. Const., Art., X § 2; Sections 100, 100.5, 104, 105, 106.3, 109, 187, 275, 348, 1011, 1011.5, 1051, 1051.5, 1052, 1055, 1058.5, 1825, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.

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

Under existing law, the State Water Board may initiate administrative proceedings to curtail diversions in order to protect senior water rights. (Wat. Code, §§ 1052, 1831.) Board enforcement action cannot, however, timely ensure water is actually made available to senior water rights holders who should have access to it. The Board must first determine whether water is available to a diverter and send a notice of curtailment. If the diverter does not curtail diversions at that time, and the Board has individualized information to that effect, the Board may issue a draft cease and desist order to the diverter. The Board must then hold a hearing, if requested, before it may issue a final, enforceable cease and desist order. If the cease and desist order is violated, the Board may impose administrative civil liability. (Wat. Code, § 1845, subd. (b)(1).) In the event that the Board has adopted a regulation under section 1058.5, the Board may immediately issue an enforceable curtailment order based on lack of water availability rather than individualized evidence of unlawful diversion, instead of a notice that water is unavailable, and may immediately issue a draft cease and desist order and simultaneously issue an administrative civil liability complaint in response to violations of the regulation. (Wat. Code, §§ 1058.5, subd. (d), 1845, subd. (d)(4), 1846.) Penalties for violations under the regulations would carry an additional penalty over those for unlawful diversion absent the regulations. (Wat. Code §§ 1845, 1846.) Water users would still have an opportunity to request a hearing before finalization of the cease and desist order and adoption of an

administrative civil liability order, but the scope of the hearing issues could be narrowed substantially due to the regulation.

The adoption of the proposed emergency regulations will improve the State Water Board's abilities to protect senior water right holders by providing the Board with the ability to more quickly and effectively ensure curtailment of unauthorized diversions and reporting of both curtailed and continued diversions. The improved enforceability of the regulations will increase the likelihood of compliance and enforcement, and remediation of noncompliance. At the same time, the increased return rate of reporting and compliance information will provide better information that will improve the State Water Board's abilities to effectively and efficiently enforce curtailments and make adjustments as necessary. Under the proposed regulations, the State Water Board would curtail diverters in water short watersheds in order of water right priority when water is not available under the diverter's priority of right, based on information identified in the regulation, so as to protect the rights of senior water right holders. The requirement to curtail diversions upon receipt of a curtailment order would constitute both a regulatory requirement and a condition of all water right permits, licenses, certificates and registrations, and would thus be more enforceable.

There is no comparable federal statute or regulation. The proposed regulation is not inconsistent or incompatible with existing state regulations.

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

The proposed emergency regulations would be adopted to require curtailment of diversions when water is not available under the diverter's priority of right, and to require reporting of diversion or use, or curtailment of diversion, after receipt of a curtailment order. The proposed emergency regulation would be adopted in response to conditions which exist, or are threatened, in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions.

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

The proposed emergency regulations do not impose a mandate on local agencies or school districts because they do not mandate a new program or a higher level of service of an existing program. The regulation is generally applicable to public and private entities, and is not unique to local government. No state reimbursement is required by part 7 (commencing with section 17500) of division 4 of the Government Code.

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

Because the State Water Board already has the authority to curtail diversions, the only additional cost to state and local governments due to the regulation would be the costs associated with the additional reporting required by the regulation. The State Water Board estimates that the cost to state and local agencies and governments will be approximately \$318,000 for completion of the mandatory certification forms.

If the Board chooses to make the curtailment exceptions for health and safety needs described in section 878.1 applicable to curtailments under proposed section 875, there would be additional costs to water users that must curtail to make water available for health and safety purposes who would not otherwise have been curtailed. There would also be a benefit to water users that are not curtailed due to the health and safety exception included in section 878.1 who

would have otherwise been curtailed. The fiscal effect on state and local government that will result from additional curtailments that result from allowing more junior health and safety diversions to continue, and thereby affecting more senior water rights is decreased revenue and increased costs totaling \$19.1 million. This consists of reduction in agricultural and municipal water agency revenues from lost water sales of \$7.9 million and a corresponding reduction in state and local tax revenues of \$0.8 million. There will be additional loss in state and local tax revenue of \$3.6 million associated with reduced agricultural production resulting from curtailed agricultural supply. Agricultural and municipal water agencies will also incur water replacement costs of \$6.8 million. The fiscal effect on state and local government that will result from these government agencies being able to continue to divert a quantity of water by relying upon a health and safety exemption is a net benefit of \$102.9 million. This consists of: 1) \$93.5 million reduction in decreases of water agency revenue; and 2) a \$9.4 million reduction in the corresponding decrease in state and local tax revenues. These are reductions in costs that state and local governments would otherwise incur absent the health and safety exemption. The proposed regulations are not anticipated to affect federal funding to the State.

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