
State Water Resources Control Board

NOTICE OF PROPOSED EMERGENCY RULEMAKING

Curtailment of Diversions due to Insufficient Flow for Specific Fisheries

Update and Readoption of Article 24, Adding Sections 877; 878; 878.1, Subdivisions (b) through (f); 878.2; 879, subdivisions (a) and (b); 879.1 and 879.2, to Chapter 2, Division 3 of Title 23 of the California Code of Regulations

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 action 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 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 provides the required notice.

Proposed Emergency Action

On January 17, 2014, Governor Brown declared a drought state of emergency (January 2014 Proclamation). On March 1, 2014, Governor Brown signed a drought relief package, Senate Bill 104 (Statutes 2014, Chapter 3, Committee on Budget and Fiscal Review), 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 April 25, 2014, the Governor issued a Proclamation of a Continued State of Emergency (April 2014 Proclamation) 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. As part of the April 2014 Proclamation, the Governor directed the State Water Board to adopt and implement emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right. The Governor's April 2014 Proclamation also suspended environmental review under the California Environmental Quality Act for certain activities, including adoption of emergency regulations by the State Water 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 California Environmental Quality Act for certain activities identified in the January 2014 and April 2014 Proclamations through May 31, 2016.

On January 23, 2015, the State Water 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 will 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. Due to the dry hydrologic conditions, the State Water Board issued Water Diversion Curtailment Notices in 2014 and may issue Water Diversion Curtailment Notices in 2015 to water right holders within some critically dry watersheds if the dry trend continues.

On May 21, 2014, the State Water Board approved [Resolution No. 2014-0023](#), adding article 24 sections 877 to 879.2, to title 23, division 3, chapter 2 of the California Code of Regulations (2014 emergency regulation). The 2014 emergency regulation went into effect on June 2, 2014 and expired on February 28, 2015 (effective for 270 days).

In general, the 2014 emergency regulation provided the State Water Board with a more streamlined process to curtail diversions of water to prevent unreasonable diversion or use of water such that appropriate minimum amounts of water are available for: (1) minimum flows for migration of state- and federally-listed anadromous fish in Mill Creek, Deer Creek and Antelope Creek; (2) senior water rights; and (3) minimum health and safety needs. Under the 2014 emergency regulation, the State Water Board would curtail water diversions on a water right priority basis except when water is needed for minimum health and safety needs, or other critical health and safety needs as determined on a case-by-case basis. The emergency regulation allowed for local cooperative solutions as an alternative means of reducing water diversions to meet the minimum instream flow requirements or otherwise protect the identified fishery resources.

As part of this proposed rulemaking, the State Water Board proposes to update and readopt the 2014 emergency regulation with minimum flow requirements similar to those adopted in 2014, as well as clarifications and modifications to the 2014 emergency regulation. Updates to the minimum flow and duration requirements are proposed based on an assessment of last year's implementation of the regulation and recommendations from the National Marine Fisheries Service and the California Department of Fish and Wildlife. In summary, the minimum flow requirements on Mill and Deer Creeks remain unchanged, and the proposed minimum baseflow requirements for juvenile Spring-run Chinook salmon and steelhead decrease for Antelope Creek. Except in one case, the flow periods required under the proposed regulation are shorter than the flow periods required in the 2014 emergency regulation. The one case when the flow period was extended, rather than shortened, in the proposed regulation is for the initiation of the juvenile Spring-run Chinook and steelhead minimum baseflow in Mill and Deer Creeks, which is proposed to begin on October 15, rather than November 1 as under the 2014 emergency regulation.

The State Water Board is scheduled to consider a proposed resolution to update and readopt: sections 877; 878; 878.1, subdivisions (b) through (f); 878.2; 879, subdivisions (a) and (b); 879.1 and 879.2 of division 3, chapter 2, article 24 of the California Code of Regulations at its March 17, 2015 meeting.

Proposed Text of Emergency Regulations

See the attached proposed text of the emergency regulation.

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 prevent the waste and unreasonable use of water in priority water bodies for threatened and endangered species in light of limited water availability during the drought. The State Water Board will need to curtail water diversions when natural flows decrease so that water is available for: (1) senior water right users; (2) minimum flows for migration of state- and federally-listed fish in three Sacramento River tributaries, Mill Creek, Deer Creek and Antelope Creek; and (3) minimum health and safety needs.

The State Water Board is unable to address the situation through non-emergency regulations because the need for this regulation has arisen due to the current drought emergency and would not be appropriately addressed by non-emergency regulations. Furthermore, as noted above, the Governor's April 2014 Proclamation directs the State Water Board to adopt and implement emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right.

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 regulation implements, interprets, or makes specific Cal. Const., Art., X § 2; Sections 100, 100.5, 104, 105, 106.3, 109, 187, 275, 348, 1010, 1011, 1011.5, 1051, 1051.5, 1052, 1055, 1058.5, 1253, 1825, 1831, 12201, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *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; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463.

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

Under existing law, the State Water Board may initiate administrative proceedings to prevent the waste or unreasonable use of water. (Wat. Code, § 275.) The State Water Board lacks authority, however, to take direct enforcement action against the waste or unreasonable use of water. The State Water Board must first determine whether a given diversion or use is unreasonable, either in a State Water Board order or decision or by regulation, and direct the diverter or user to cease the unreasonable diversion or use. In the event that the State Water Board has issued an order or decision, the State Water Board may issue a cease and desist order to enforce the order or decision. (Wat. Code, § 1831, subd. (d)(3)). If the cease and desist order is violated, the State Water Board may impose administrative civil liability. (Wat. Code, § 1845, subd. (b)(1).) In the event that the State Water Board has adopted a regulation under section 1058.5, the State Water Board may issue a cease and desist order and simultaneously impose administrative civil liability in response to violations of the regulation. (Wat. Code, §§ 1058.5, subd. (d), 1846, subd. (a)(2).)

The proposed update and readoption of California Code of Regulations sections 877; 878; 878.1, subdivisions (b) through (f); 878.2; 879, subdivisions (a) and (b); 879.1 and 879.2 will set drought emergency minimum flows necessary to maintain fish passage in three priority tributaries for protection of threatened and endangered Chinook salmon and steelhead. Under

the proposed regulation, the State Water Board would curtail diverters in these watersheds in the order of water right priority as necessary to maintain a reasonable assurance of meeting the drought emergency minimum flows, and the needs of senior users. The requirement to curtail when water in excess of drought emergency minimum flows is unavailable would constitute both a regulatory requirement and a condition of all permits and licenses in the affected watersheds. The proposed regulation also establishes procedures for important exceptions to priority-based curtailments in order to protect public health and safety.

The State Water Board recognizes that the drought emergency minimum flows described in the proposed update and readoption of California Code of Regulations sections 877; 878; 878.1, subdivisions (b) through (f); 878.2; 879, subdivisions (a) and (b); 879.1 and 879.2 do not represent optimal passage conditions for Chinook salmon and steelhead under these drought conditions and these minimum passage flows will result in stressful passage conditions for salmonids. The State Water Board has identified the need for these emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet the emergency water supply conditions that exist during this drought period. All water users should take measures this year and in future years to develop alternative water supplies, since it is likely more protective and appropriate minimum flows for future water shortage conditions will be established in the future.

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 regulation would be updated and readopted 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. The proposed updated 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 regulation does not impose a mandate on local agencies or school districts because it does 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))

Based on information prepared by economists at the University of California, Davis, and using assumptions that show a higher projection of the potential range of costs, the State Water Board estimates that the cost to local agencies and governments will be approximately \$1.8 million, including lost revenue in water sales, replacement water costs, and projected tax losses. The proposed regulation is not anticipated to have a financial impact on state agencies or school districts or to result in costs or savings in federal funding to the State.

All of the above are explained in greater detail in the State Water Board's Emergency Regulation Digest, which is available at:

http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/mill_deer_antelope_creeks.shtml.