

**STATE WATER RESOURCES CONTROL BOARD
BOARD MEETING SESSION – DIVISION OF WATER RIGHTS
MARCH 17, 2015**

ITEM 9

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 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, Governor Brown issued [Executive Order B-28-14](#), which extended the California Environmental Quality Act suspension through May 31, 2016 for Water Code section 13247¹ and certain activities identified in the January 2014 and April 2014 Proclamations.

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 critically dry watersheds if the dry trend continues.

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."

The proposed action amends and readopts California Code of Regulations, section 879, subdivision (c). As previously adopted, the subdivision allows the State Water Board to request information from riparian and pre-1914 water rights holders who were exempt from the curtailment orders under section 875, adopted in the same rulemaking package, and the corresponding reporting requirements of section 879, subdivisions (a) and (b). The State Water Board is not proposing to readopt section 875 and these updates to section 879, subdivision (c) will ensure that the Board has access to necessary information from all classes of diverters.

First, the updates allow the Board to request the specified information from any water right holder in response to a complaint, recognizing that many junior diverters may not be subject to section 879 subdivisions (a) and (b). The changes further allow the Board to request information from a water right holder, diverter or user asserting a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment. Similarly, it would allow the Board to gather information from persons 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, in response to an investigation, curtailment order or any notice of curtailment. Information on the claimed right may also be sought upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversion.

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 readopting the emergency regulation.

<p>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.</p>

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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2015-

AMENDING AND READOPTING 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. 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. In addition, the drought declaration suspended California Environmental Quality Act (CEQA) review for many of the state's response to drought, including the issuance of drought emergency regulations under Water Code section 1058.5. 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.
2. California is currently in the fourth year of a drought. Water year 2012 was categorized as below normal, calendar year 2013 was the driest year in recorded history for many parts of California, water year 2014 was the third driest year in the 119 years of record, and water year 2015 has begun on a similar dry trend, with precipitation below average, snowpack water content far below average, and many key reservoirs in the state at far below normal capacity.
3. 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 critically dry watersheds if the dry trend continues.
4. As previously adopted, California Code of Regulations, section 879, subdivision (c), authorized the Deputy Director for Water Rights to issue informational orders in response to complaints alleging interference with a water right by a riparian or a pre-1914 appropriative water right holder, or where the Division receives information that indicates unlawful diversion of stored water by riparian or pre-1914 appropriative water rights holders. The Deputy Director issued two such orders to known claimants of pre-1914 and riparian rights in response to allegations of interference with water rights and unauthorized diversions of stored water. Order [WR 2014-0030-DWR](#) affects approximately 23 claimants along the

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San Joaquin River immediately below Friant Dam, and Order [WR 2015-0002-DWR](#) affects approximately 450 right claimants in the Sacramento, San Joaquin and Delta watersheds. The emergency regulation would extend the Deputy Director's authority to enforce the existing orders and authorize the Deputy Director to issue additional orders in response to similar complaints or information.

5. In order to effectively administer the State's water right system, the State Water Board needs to be able to effectively account for all 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 diverters. The emergency regulation would authorize the Deputy Director to issue informational orders against any water right holder, diverter or user in response to complaints, assertions of previously unasserted claims of right, contract or transfer, and where information indicates actual or threatened waste, unreasonable use or method of diversion, or unlawful diversions by any water right holder, diverter or user.
6. In 2014, the State Water Board conducted nearly 950 field inspections to determine compliance with curtailment notices. The field inspection program, and the submittal of responses to curtailment notices, found that many persons who received curtailment notices for a post-1914 right claimed a riparian or pre-1914 right for continued diversions. 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 suggests 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 curtailment inspections or 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.
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."

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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 March 17, 2015.

Jeanine Townsend
Clerk to the Board

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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 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 responds 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 method of diversion, or unlawful diversions of water by any water right holders, diverter or user.

(2) The Deputy Director may issue an order under this article requiring a water right holders, 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; compliance with transfer law if the transfer diversion was 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.