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State Water Resources Control Board

**NOTICE OF PROPOSED EMERGENCY RULEMAKING**  
**January 22, 2016**

**Prohibition of Activities and Mandatory Actions during 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 Brown 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 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 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 the State Water Board adopted the existing 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. The urban water use restrictions in effect as of May 18, 2015 expires February 13, 2016, without this extension. Additionally, this Executive Order also directs the State Water Board to consider modifying the restrictions to address uses of potable and non-potable water, as well as to incorporate insights gained from the existing restrictions.

While the state has experienced some much-needed snow and rainfall in December and January, surface storage remains at or near historic lows, precipitation has been inconsistent, and snowpack is about average as of January 15, 2016.

On February 2, 2016, the State Water Board will consider a resolution to extend the existing May 2015 Emergency Regulation and maintain many of the same requirements that apply currently. Continuing requirements cover: a prohibition on certain irrigation practices; 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; and an order for all self-supplied commercial, industrial, institutional water users to reduce potable water usage; and reporting requirements and tools to ensure compliance.

Proposed changes to the May 2015 Emergency Regulation (see [Fact Sheet: Extending the Emergency Water Conservation Regulation, January 15, 2016](#)) primarily focus on:

- Credits and adjustments to urban water suppliers' conservation standards that consider the differences in climate affecting different parts of the state; growth experienced by urban areas; and significant investments that have been made by some suppliers toward creating new, local, drought-resilient sources of potable water supply.
- 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.
- Further defining what agricultural uses may be subtracted from a supplier's potable water production total.
- Updates to compliance and reporting timelines.

### **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 Resources Control Board (State Water Board or Board) finds that an emergency exists due to severe drought conditions and that adoption of the proposed emergency regulation is necessary to address the emergency and extend and adjust current restrictions until rain and snowfall put the State in the position where the existing restrictions are

no longer necessary, or could be further tempered. California continues to face significant drought resulting in severe impacts to California's water supplies and its ability to meet all of the demands for water in the State.

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 (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.

While the state has experienced some much-needed snow and rainfall in December and January, surface storage remains at or near historic lows, precipitation has been inconsistent, and snowpack is about average as of January 15, 2016.

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, as noted above, the Governor's April 1, 2015 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

**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; Water Code sections 100, 102, 104, 105, 174, 186, 187, 275, 350, 1051, 1122, 1123, 1825, 1846, 10617, and 10632; *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. The proposed emergency regulation extends the May 2015 emergency regulation that 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 proposed regulation neither differs from nor conflicts with an existing comparable federal statute or regulation.

The proposed Emergency Regulation would essentially extend the existing May 2015 Emergency Regulation and maintain many of the same requirements that apply currently. Continuing requirements cover: a prohibition on certain irrigation practices; 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; and an order for all self-supplied commercial, industrial, institutional water users to reduce potable water usage; and reporting requirements and tools to ensure compliance.

Proposed changes to the May 2015 Emergency Regulation (see [Fact Sheet: Extending the Emergency Water Conservation Regulation, January 15, 2016](#)) primarily focus on:

- Credits and adjustments to urban water suppliers' conservation standards that consider the differences in climate affecting different parts of the state; growth experienced by urban areas; and significant investments that have been made by some suppliers toward creating new, local, drought-resilient sources of potable water supply.
- 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.
- Further defining what agricultural uses may be subtracted from a supplier's potable water production total.
- Updates to compliance and reporting timelines.

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 maintain urban water supplies to the maximum extent feasible to provide local agencies with the necessary flexibility to meet the health and safety needs of Californians during the drought emergency, and provide for reasonable modest equity adjustments in response to insights gained in response to stakeholder input. All of this is discussed in detail in the State Water Board's *Emergency Regulations Digest*, which is attached.

#### 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 persistence of drought conditions, the dry nature of the preceding four years, and the likelihood that drought conditions will continue, even with increased precipitation in 2015-16, given the severe water deficit of the preceding years.

#### 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; and the irrigation with potable water outside of newly constructed homes and buildings that is not delivered by drip or microspray systems. This section also extends the prohibition on serving water except when requested in restaurants and bars and requires the operators of hotels and motels to offer patrons the option of not having their towels and linens washed daily. Under this section, commercial, industrial and institutional users not served by either type of water supplier regulated by section 865 must either limit the number of days they water outdoor turf and ornamental landscapes to no more than two days per week or reduce their total potable water production by 25 percent as compared to 2013. Finally, this section proposes 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.

#### Proposed Emergency Regulation Section 865

Proposed section 865, like existing section 865, directs urban water suppliers to meet specified conservation standards and to report specific information to the State Water Board. Section 865 continues conservation standards for all urban water suppliers to be allocated across nine tiers of increasing levels of R-GPCD water use. 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 have been assigned a 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. The proposed Emergency Regulation continues the reserved four percent conservation tier for those suppliers meeting specific criteria relating to not experiencing drought conditions.

Proposed section 865, unlike existing section 865, allows urban water suppliers to update their conservation standards under certain situations: qualifying urban water suppliers are allowed a climate adjustment that can reduce their conservation standard by up to four percentage points for those water suppliers located in the warmer regions of the State; a growth adjustment provides a mechanism to adjust urban water supplier conservation standards to account for water efficient growth since 2013; and a credit for new local drought resilient supply provides a mechanism to adjust qualifying urban water suppliers' conservation standards between four and eight percentage points.

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. It also defines what agricultural uses may be subtracted from a supplier's potable water production total.

Finally, this section also requires smaller urban water suppliers, defined as any distributor of a public water supply, whether publicly or privately owned and including a mutual water company, but not meeting the definition of urban water suppliers in water code section 10617, to either limit the number of days that outdoor watering of turf and ornamental landscapes is allowed to no more than two days per week or to reduce their total potable water production by 25 percent as compared to 2013. Similar to the May 2015 emergency regulation, small suppliers must submit a one-time report.

#### 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 on a cumulative basis, using suppliers' monthly reported data. Each month, State Water Board staff will reassess compliance based on the supplier's cumulative savings since June 2015. Cumulative tracking means that 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. A conservation order would remain an enforceable order by the Board requiring the recipient to take specified actions immediately. An informational order issued by the Board would continue to require the recipient to submit additional information relating to water production, water use or water conservation. 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 extends and adjusts current restrictions to help prevent the waste and unreasonable use of water and promote water conservation, in a more equitable manner, 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 drought conditions.

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

The State Water Board has determined that adoption of proposed sections 863 and 864 does not impose a new mandate on local agencies or school districts. The sections are generally applicable law.

The State Water Board has further determined that adoption of proposed section 865 does not impose a new mandate on local agencies or school districts, because the local agencies affected by the section 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 or distributors of a public water supply. 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 \$572,000,000, which is the sum of 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 two PYs) to conduct activities related to the emergency regulation.

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