

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2016-0045**

**TO RE-ADOPT 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. In addition, the drought declaration suspended California Environmental Quality Act (CEQA) review for the state's response to drought. 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, in light of the continued lack of rain, Governor Brown issued Executive Order B-28-14, which extended the CEQA suspension through May 31, 2016 for Water Code section 13247¹ and certain activities identified in the January 2014 and April 2014 Proclamations.

On November 13, 2015, the Governor issued Executive Order B-36-15 which continues the orders and provisions contained in the January 17, 2014 and April 25, 2014 Proclamations and Executive Orders B-26-14, B-28-14, and B-29-15.

2. California has experienced four consecutive years of drought, from 2012 through 2015. Water year 2015 had the lowest snowpack on record, and many areas of the State experienced exceptionally dry conditions. Severe drought conditions persist in many areas of the state despite recent winter precipitation, with limited drinking water supplies in some communities, diminished water for agricultural production and environmental habitat, and severely depleted groundwater basins. Drought conditions may persist in some parts of the state into 2017 and beyond, as warmer winter temperatures driven by climate change reduce water supply held in mountain snowpack and result in drier soil conditions.
3. As of November, 2015, the State Water Board issued Notifications of Water Shortages to over 9,000 water right holders, diverters or users. The notifications informed diverters that due to dry hydrologic conditions there was insufficient surface flow to divert under their priority of right. Diversions under such conditions are unauthorized.

¹ Section 13247 of the Water Code states, "State offices, departments, and boards, in carrying out activities which may affect water quality, shall comply with water quality control plans approved or adopted by the state board [State Water Board] unless otherwise directed or authorized by statute, in which case they shall indicate to the regional boards [Regional Water Quality Control Boards] in writing their authority for not complying with such plans."

4. As previously adopted, California Code of Regulations, section 879, subdivision (c), authorized the Deputy Director for Water Rights to issue informational orders: (a) in response to complaints that staff determines to merit investigation alleging interference with a water right by a 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 in response 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; (d) upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversion of water by any water right holder, diverter or user; or (e) water right holders, diverters or users that fail to respond to an investigation, curtailment order or any notice of curtailment, or respond 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.
5. In order to effectively administer the State's water right system, the State Water Board needs to be able to effectively account for 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 un-asserted 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 2015, the State Water Board conducted roughly 1,200 field inspections to determine compliance with the lack of available water supply to serve specific water right priorities. A similar program was conducted in 2014. The field inspection programs of 2014 and 2015 found that many persons who received notification that there was inadequate water supply for their post-1914 right claimed a riparian or pre-1914 right for continued diversions. In addition, many persons with a pre-1914 right who were notified that there was insufficient water supply for such right claimed a riparian right as an alternate basis for diversion. 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 suggest 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. The Division will also use informational orders for persons that are diverting and are non-responsive to requests for information.

7. Similarly, some diverters have responded to drought year inspections or notices of water shortage 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 affect 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."
9. The State Water Board is 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 [re-adopts 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;

5. The authority to issue Informational Order is re-delegated to the Assistant Deputy Directors for the Division of Water Rights.

CERTIFICATION

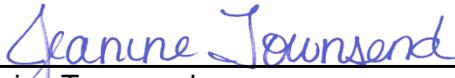
The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 16, 2016.

AYE: Chair Felicia Marcus
Vice Chair Frances Spivy-Weber
Board Member Tam M. Doduc
Board Member Steven Moore
Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

**Informational Order
Emergency Regulations Digest**

August 16, 2016

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Title 23, Division 3, Chapter 2, Article 24, re-adopt 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 that staff determines to merit investigation 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 fails to respond to an investigation, curtailment order or any notice of curtailment, or responds 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 holder, diverter or user.

(2) The Deputy Director may issue an order under this article requiring a water right holder, 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; basis or right and amount of water transfer 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.

(6) The Deputy Director may delegate the authorities under this subdivision to an Assistant Deputy Director for the Division of Water Rights.

Authority: Sections 1058 and 1058.5, Water Code.

Reference: Sections 100, 183, 186, 187, 275, 348, 1050, 1051, 1058.5 and 1846 Water Code.