
State Water Resources Control Board

NOTICE OF PROPOSED EMERGENCY RULEMAKING

Information Order

**Amendment of Article 24, Section 879, subdivision (c), in 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. 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 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 but 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 through May 31, 2016, including for the adoption of emergency regulations pursuant to Water Code section 1058.5.

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 is planning to issue Water Diversion Curtailment Notices in 2015 to water right holders within the some critically dry watersheds if the dry trend continues.

On July 2, 2014, the State Water Board approved Resolution No. 2014-0031, adding sections 875 and 878.3 and amending section 878.1 and 879 in title 23, division 3, chapter 2, article 24 of the California Code of Regulations (2014 emergency regulation). The 2014 emergency regulation went into effect on July 16, 2014 and would expire automatically on April 14, 2015 (effective for 270 days).

In general, the 2014 emergency regulation provides the State Water Board with a more streamlined process to curtail diversions of water to prevent unreasonable diversion or use of water when water is not available under the diverter's priority of right and to require reporting relative to the curtailments. Under the 2014 emergency regulation, the State Water Board can require water users to report certain information to inform curtailment and enforcement actions by the State Water Board.

As part of this proposed rulemaking, the State Water Board proposes to update and readopt only section 879, subdivision (c). The updates to subdivision (c) in the proposed emergency regulation would provide the Board with a more enforceable mechanism to investigate drought-related water right matters, including (1) complaints of interference with water rights by other water right holders, diverters or users; (2) claims of previously unasserted riparian or pre-1914 right in response to curtailment notices or investigations; (3) claims of a right to divert under a contract or water transfer not previously approved by or filed with the Board; and (4) receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversions.

The State Water Board is scheduled to consider a proposed resolution to update and readopt California Code of Regulations, title 23, section 879, subdivision (c) 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 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. Specifically, immediate action is needed to effectively and efficiently administer and enforce the state's water rights system in light of significant reductions in water availability due to the current drought.

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 timely 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 sections 100, 186, 187, 275, 348, 1050, 1051, 1058 and 1058.5 of the Water Code.

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

Water Code section 1058.5 specifically recognizes the need for the State Water Board to timely access information regarding water diversions and their validity during the drought emergency.

The proposed update and readoption of section 879, subdivision (c) authorizes the State Water Board to issue an informational order in response to (1) complaints allege interference with a water right by a water right holder, diverter or user (not just pre-1914 or riparian claimants); (2) parties claiming previously unasserted senior rights in response to an investigation, curtailment order or curtailment notice; (3) parties claiming unverified and previously unnoticed water transfers or contract purchases; or (4) threats of waste, unreasonable use, unreasonable method of diversion, unlawful diversion of water by any water right holder, diverter or user. Under the proposed regulation, the State Water Board could issue an informational order requiring the water right holder, diverter or user to provide additional information related to a diversion or use, including: (1) the claim of right; (2) property patent date; (3) date of initial appropriation; (4) diversions made or anticipated during the current drought year; (5) compliance with transfer law if the transfer diversion was not subject to approval of the board or the Department of Water Resources; or (5) any other information relevant to authenticating the right or forecasting use and supplies in the current drought year.

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))

The only fiscal effect of the proposed regulation relevant to Government Code section 11346.5, subdivision (a)(6) is the cost that would be incurred by state and local government agencies to complete and submit the information requested in any Informational Order issued under section 879, subdivision (c).

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 state and local agencies and governments to complete and submit the online Informational Order form and provide the supporting documentation will be approximately \$561,958. The proposed regulation is not anticipated to have a fiscal impact on 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/emergency_regulations.shtml