
State Water Resources Control Board

**NOTICE OF PROPOSED EMERGENCY RULEMAKING
May 12, 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 No. 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 No. 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 a revised 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 would have expired February 13, 2016 without extension.

On February 2, 2016, the State Water Board adopted [Resolution No. 2016-0007](#) to extend the requirements of the May 2015 Emergency Regulation that was set to expire. The [February 2016 Emergency Regulation](#) offered modest adjustments in supplier conservation standards to help respond to concerns about differences in climate across the state; growth experienced by urban areas; and significant investments that have been made to create new, local, drought-resilient sources of potable water supply. It added penalties for homeowners' associations or community service organizations that impede homeowners from reducing or eliminating the watering of vegetation or lawns during a declared drought emergency. And the February 2016 Emergency Regulation continued a prohibition on certain irrigation practices, including: 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; an order for all self-supplied commercial, industrial, institutional water users to reduce potable water usage; and reporting requirements and enforcement tools to ensure compliance. The State Water Board made a commitment to revisit the February 2016 Emergency Regulation in April when water supply conditions for this year are known and propose changes, if needed.

On May 9, 2016, Governor Brown issued Executive Order B-37-16 directing actions aimed at using water wisely, reducing water waste, and improving water use efficiency. The Executive Order, in part, directs the State Water Board to adjust emergency water conservation regulations through the end of January 2017, and make adjustment in recognition of the differing water supply conditions across the state.

Proposed changes to the February 2016 Emergency Regulation (see Fact Sheet: [Staff Proposal for Extended Emergency Regulation for Urban Water Conservation, May 9, 2016](#)) primarily focus on replacing the state-developed, demand-driven standards with locally developed conservation standards based upon each agency's specific water supply reliability conditions. The proposed regulation would require individual urban water suppliers to self-certify the level of available water supplies they have assuming three additional dry years, and the level of conservation necessary to assure adequate supply over that time. Per the proposal, urban water suppliers will be required to reduce potable water use by a percentage equal to their projected shortfall in the event of three more dry years. Additionally, certain statewide requirements on small suppliers and businesses would be lifted.

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 regional drought conditions in much of the state and that adoption of the proposed emergency regulation is necessary to address the emergency and adjust current restrictions in response to current conditions. California continues to face significant drought and large portions of the state continue to face water supply impacts, especially if this winter was a short reprieve in a longer drought.

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. Executive Order B-36-15 further extended the CEQA suspension for activities identified in that Order.

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; and *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 modifies the February 2016 emergency regulation, which extended the May 2015 emergency regulation. The May 2015 emergency regulation 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 modify the existing February 2016 Emergency Regulation (see Fact Sheet: [Staff Proposal for Extended Emergency Regulation for Urban Water Conservation](#), May 9, 2016) to allow suppliers to define an individualized conservation standard based on their unique water supply and demand conditions. Each water supplier would be required to evaluate its supply portfolio and self-certify the accuracy of its information; the State Water Board would assign each supplier a mandatory conservation standard equal to the percentage deficiency the supplier identifies in its supply under certain specified assumptions. Suppliers that do not submit a water reliability certification and supporting information would retain their current (March 2016) conservation standard in almost all cases. Under the proposed regulation certain prior statewide requirements on small suppliers and businesses would be lifted. The new conservation standards would take effect for June 2016 and remain in effect until the end of January 2017. The proposed Emergency Regulation would allow each supplier to base a new, mandatory conservation standard on its water supply reliability under a set of supply and demand assumptions over the next three years. Suppliers that would face a shortage after a third dry year would be assigned a conservation standard equal to the amount of their shortage. Water supply reliability after the 2018-19 winter would be calculated as follows:

- The supply projection for the next three years would be based on current supply conditions plus an assumed three-year hydrology mirroring the 2012-13, 2013-14, and 2014-15 water years. (A water year runs from October 1 through the following September 30).
- Demand over the same period would be based on each supplier's average total potable water production for 2013 and 2014.
- Suppliers would factor into their calculations all of their water sources that are capable of being treated to potable standard during the three-year projected period.
- Suppliers' conservation standards would be calculated as a percentage and rounded to the nearest whole percentage point.
- Suppliers would self-certify the accuracy of their conditions and provide their analysis and supporting data. The State Water Board would post information provided by suppliers on its website and assign each supplier, as a mandatory conservation standard, reductions equal to the supplier's projected percentage deficiency in supply at the end of the third dry year.
- Wholesale water suppliers would be required to make projections about how much water they would deliver to retail water suppliers under the three-dry-years scenario.

The proposed emergency regulation modifies the February 2016 Emergency Regulation (see [fact sheet on February 2016 Emergency Regulation](#)) and maintains a number of the same requirements that apply currently, except as noted below. The proposed emergency regulation:

- Lifts the prior conservation requirements for small suppliers but maintains the current one-time report. However, reporting now occurs in December 2016 instead of this September. Small suppliers are encouraged to maintain conservation measures.

- Lifts the prior statewide requirements for commercial properties pertaining to drinking water and laundered towels and linens. Eating and drinking establishments and the hospitality industry are encouraged to maintain conservation measures.
- Requires self-supplied commercial, institutional, and industrial entities to target conservation at a level equal to the conservation standard required of the nearest urban water supplier.

The proposed emergency regulation would continue these prohibitions: irrigating with potable water of ornamental turf on public street medians; irrigating with potable water outside of newly-constructed homes and buildings not in accordance with emergency regulations or other requirements established in the California Building Standards Code; using potable water to wash sidewalks and driveways; allowing runoff when irrigating with potable water; using hoses with no shutoff nozzles to wash cars; using potable water in decorative water features that do not recirculate the water; and irrigating outdoors during and within 48 hours following measureable rainfall.

The proposed emergency regulation retains penalties for homeowners' associations or community service organizations impeding homeowners from reducing or eliminate the watering of vegetation or lawns during a declared drought emergency, and maintains reporting requirements and enforcement tools to ensure compliance with the provisions of the regulation.

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 modify the underlying basis for the mandatory conservation standards in recognition that some parts of the state have sufficient water to meet current demand, while other regions do not and still need to maintain higher levels of conservation. For all regions it is necessary to maintain urban water supplies to the maximum extent feasible and to provide local agencies with the necessary flexibility to meet the health and safety needs of Californians during the drought emergency. All changes are being made in response to current hydrologic conditions in California, the Governor's Executive Order B-37-16 and prior Executive Orders, and stakeholder input. Additional details are discussed in the State Water Board's attached *Emergency Regulations Digest*.

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 inconsistent with regulations or other requirements established by the California Building Standards Commission and the Department of Housing and Community Development. This section lifts the prior 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 to target conservation at a level equal to the conservation standard set for the nearest urban water supplier; these entities no longer 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 maintains 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 864.5

Proposed section 864.5 allows urban water suppliers to base a new, mandatory conservation standard on their own water supply reliability situation under a set of supply and demand assumptions over the next three years. Suppliers that would face a shortage after a third dry year would be assigned a conservation standard equal to the amount of their shortage, expressed as a percentage. Suppliers that do not submit a water reliability certification and supporting information would retain their current conservation standard in almost all cases.

Proposed Emergency Regulation Section 865

Proposed section 865 maintains the existing conservation standards, along with changes that may have resulted from the February 2016 Emergency Regulation, for those suppliers that do not develop a self-certified conservation standard in compliance with the regulation. Consequently, the section directs urban water suppliers to meet specified conservation standards and to report specific information to the State Water Board.

Proposed Section 865 continues conservation standards for urban water suppliers that do not comply with proposed section 864.5, to be initially allocated across eight tiers of increasing levels of R-GPCD water use, with adjustments for certain localized conditions. 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 are assigned a base 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.

Proposed Section 865 continues credits and adjustments to urban water suppliers' conservation standards that consider regional climate differences; urban growth; and investments made toward creating new, local, drought-resilient sources of potable water supply. These adjustments and credits are already in place for many water suppliers as of March 1, 2016.

Proposed section 865 no longer continues the reserved four percent conservation standard, which was based on certain areas of the state not experiencing drought conditions, as the new structure proposed in section 864.5 addresses local supply conditions more directly.

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.

Finally, proposed section 865 eliminates the current conservation requirement for smaller urban water suppliers, defined as any distributor of a public water supply, whether publicly or privately owned and including a mutual water company. However, smaller urban water suppliers continue to submit a one-time report. The due date of the report is now December 15, 2016 and the report includes total potable water production, by month, and any actions taken by the supplier to encourage or require its customers to conserve water.

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 with self-certified conservation standards, or with existing conservation standards for those suppliers that do not comply with proposed section 864.5, using suppliers' monthly reported data. Each month, State Water Board staff will reassess compliance based on the supplier's water savings. For suppliers that do not receive a new conservation standard pursuant to proposed section 864.5, compliance will be measured on a cumulative basis; the supplier's 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. The State Water Board will continue to work with water suppliers along the way that are not meeting their targets to implement actions to get them back on track. The State Water Board will continue to use informational orders to request information from suppliers not meeting their conservation standards and, as appropriate, conservation orders that direct specific actions to correct non-compliance. 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 modifies current restrictions to help prevent the waste and unreasonable use of water and promote water conservation 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 based on the continuation of current 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 sections 864.5, 865 and 866 do not impose a new mandate on local agencies or school districts, because the local agencies affected by the sections 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. 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 between \$283 million and \$594 million, which are the sum of the low end and high end, respectively, potential 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. There are not anticipated to be any other nondiscretionary costs or savings imposed on state or local agencies besides the costs and revenue losses identified in this document.

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