

California Adopts Emergency Water Curtailment Regulations

It is now clear that the present drought requires that there be curtailment of the exercise of some existing water rights due to the lack of sufficient surface water. On January 17, 2014—the same day as the Governor's Proclamation of a drought state of emergency—the State Water Resources Control Board issued a "Notice of Surface Water Shortage and Potential of Curtailment of Water Right Diversions." The notice advised that if dry weather conditions persisted, the Board will notify water right holders of the requirement to limit or stop diversions of water under their water rights, based on water right priority.

On March 1, 2014, Governor Brown signed legislation to assist drought-affected communities and provide funding for better managed local water supplies. As part of that drought relief package, the Legislature expanded the Board's existing emergency regulation authority under Water Code section 1058.5 and made statutory changes streamlining the authority to enforce water rights and increasing penalties for illegally diverting water during drought conditions. *See* SB 104 (adopted March 1, 2104).

Water Code section 1058.5, as amended, grants to the 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."

Any emergency regulation adopted pursuant to this section may remain in effect for up to 270 days and is deemed repealed immediately upon a finding by the Board that due to changed conditions, it is no longer necessary.

On April 25, 2014, Governor Brown issued a Proclamation of Continued State of Emergency related to the drought. The Proclamation affirms provisions of the January 17, 2014 Proclamation and added new provisions related to water conservation, water transfers, fishery protection, water recycling, groundwater overdraft protection, water supply shortage and fire response. Additionally, the Proclamation suspended CEQA requirements for certain activities, including the adoption of emergency regulations under Water Code section 1058.5.

Under the state water right priority system, the Board must curtail water diversions when sufficient flows in a watershed are not available because the water is needed to satisfy senior rights or provide a correlative share of equally senior rights (i.e., riparian rights), or is needed to meet public trust and water quality requirements.

On May 20, 2014, the Board adopted emergency regulations. *See* Cal. Code Regs., tit. 23, §§ 877-879.2 (found at article 24, title 23, division 3, chapter 2 of the California Code of Regulations, §§ 877-879.2). Under these regulations, the Board—based upon an extensive factual record—curtailed diversions of water on a priority basis in three watersheds on the ground that public trust needs required minimum flows for federally-listed anadromous fish. The authority to issue the curtailment order was given to the Deputy Director and provision was made for exclusion from the curtailment for diversions necessary for minimum health and safety needs. All water users issued a curtailment order were required to respond and provide the requested information. The regulations also provided for an alternative to curtailment, which permitted diverters to propose and enter into

agreements that would accomplish the same purpose.

Under these regulations, violations can be subject to an administrative civil liability under the Water Code or referred to the Attorney General. Administrative cease and desist orders and court injunctions are also available. An administrative civil liability for an unauthorized diversion could be up to \$1000 per day, plus \$25,000 per acre-foot of water illegally diverted.

The process followed in issuing the curtailment orders with respect to the three watersheds involved in the May 2014 curtailment was time consuming, cumbersome and ineffective. As a result, it was determined that additional emergency regulations were necessary to improve the Board's ability to quickly and effectively implement and enforce curtailments during the current drought and to ensure that the State's water right priority system is effectively implemented. The Board found that while it has existing authority to issue curtailment notices to junior water users and to initiate enforcement actions, it is likely that there will be a high degree of non-compliance during the drought that will impact senior water rights holders. Thus, it proposed new regulations that it concluded would solve curtailment and reporting compliance problems. The Board concluded that (1) the proposed regulations will provide greater assurance that curtailed water rights holders will cease diverting water; and (2) provide greater assurance that curtailed water rights holders will report information regarding continued exercise of their senior water rights. As opposed to the process required under the Board's existing authorities, as exemplified by the May 20, 2014 regulations—which required a case-by-case investigation, issuance of a draft cease and desist order or proposed administrative civil liability, and the opportunity for an evidentiary hearing—a violation of the new proposed emergency regulation would be immediately effective and enforceable by administrative penalty.

The emergency regulations, were adopted on July 2, 2014 and are found in Title 23 of the California Code of Regulations, Article 24, division 3, chapter 2, sections 875, 878.1, 878.3 and 879. They are effective statewide and are subject to the same 270-day sunset provision as the May 20, 2014 regulations.

Section 875 authorizes the Deputy Director for the Division of Water Rights to issue curtailment orders to post-1914 appropriative right holders in order of water right priority, requiring the curtailment of water diversions and use (except as provided in sections 878 and 878.1). Section 878.1 provides for certain minimal diversions for domestic and municipal uses. Section 878.3 provides for regional alternatives to curtailment through agreement (with approval of the Deputy).

As originally proposed, the regulations adopted on July 2, 2014, applied to all diverters, including pre-1914 and riparians. That version of the regulations also contained a provision excusing minimal health and safety needs from the curtailment. However, the final version—following numerous comments—excluded pre-1914 appropriators and riparians from the curtailment provisions and also eliminated the health and safety need exclusion on the ground that it could be accomplished by other provisions.

The essence of the emergency regulations adopted July 2, 2014, is contained in section 875. It provides that:

- The Deputy Director may issue curtailment orders to post-1914 appropriative water rights holders in order of water right priority requiring curtailment of water diversions; no hearing is required;
- The Deputy Director can rely upon the information listed in the regulations in making the determination of whether water is available under a diverter's priority and to issue or suspend curtailment orders;
- Any order is to be accompanied by the Deputy Director's determination of the quantity of water and other facts concerning the availability of water and the assumptions employed in issuing the curtailment;
- A notice of the curtailment specifying the method of curtailment must be given;
- The provision that all curtailment orders are subject to reconsideration under Water Code sections 1122, et seq.; however, other than through the reconsideration process, no hearing is provided for prior to curtailment.

Section 879 provides for reporting by diverters subject to curtailment and certification that diversion has ceased.

The new regulation, as presently worded, does not prioritize for the Deputy Director any types of use that are to be given preference over others. Presumably, the decision is within the discretion of the Deputy Director who, under existing law, must consider public trust uses. Although pre-1914 and riparian users are not currently subject to the new curtailment procedure, there is nothing suggesting that they could not be subjected to such a procedure under regulations that could be adopted later.

The new regulations are, in large part, a response to the ineffectiveness of prior efforts at curtailment. For example, with the onset of the drought, thousands of notices of curtailment were sent to various junior water rights diverters with a minimal response in terms of cessation of diversion, reporting and other requirements. There was also a lack of enforcement ability short of going to court. It is hoped that has been remedied by the new regulations.

On July 15, 2014, the Board took further action in light of the drought emergency. It adopted additional emergency regulations prohibiting:

- The application of water to outdoor landscapes in a manner that causes runoff such that water flows onto adjacent property, non-irrigated areas, private and public walkways, roadways, parking lots or structures;
- The use of a hose to wash an automobile, except where the hose is fitted with a shutoff nozzle;
- The application of water to any hard surface; and
- The use of potable water in a fountain or other decorative water feature.

The taking of any such prohibited actions could subject the violator to a fine of up to \$500/day. An additional regulation was adopted applicable to water suppliers requiring them to implement requirements that impose mandatory restrictions on outdoor irrigation and implement other mandatory conservation measures. Urban water suppliers are required to submit monitoring reports to the Board.

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