



The Water Board will Consider Changes to its Emergency Drought Regulation for 2016

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El Niño is upon California. Yet, despite the ample rain and snow expected this winter, the State Water Resources Control Board (Water Board) is almost certain to extend its emergency drought regulation into 2016. The proposed Emergency Regulation leaves the existing emergency drought regulation primarily intact, but includes several important opportunities for urban water suppliers to achieve reductions in the conservation mandates applicable to them under the current Emergency Regulation.

BACKGROUND ON THE EMERGENCY DROUGHT REGULATION

In July 15, 2014, following Governor Brown's Proclamation declaring a drought State of Emergency in California and his Executive Order regarding the severe drought conditions and urging Californians to conserve, the Water Board adopted an Emergency Regulation to support water conservation, Resolution No. 2014-0038. Resolution No. 2014-0038 added regulations that, among other things, set forth four prohibited uses of potable water and monthly reporting requirements for urban water suppliers.

The drought continued in 2015 and, on April 1, 2015, Governor Brown issued an Executive Order directing the Water Board to impose restrictions on urban water suppliers to achieve a statewide 25 percent reduction in potable urban water usage through February 2016.

Following issuance of that order, the Water Board adopted Resolution No. 2015-0032, which adopted a more stringent Emergency Regulation intended to achieve the mandated 25 percent statewide reduction in potable urban water use between June 2015 and February 2016. To reach that statewide goal, the Water Board's Emergency Regulation imposed conservation tiers for each urban water supplier in the State, ranging from 4 percent to 36 percent based on per capita water use.

PROPOSED CHANGES TO THE EMERGENCY DROUGHT REGULATION

On November 13, 2015, the Governor issued another Executive Order, calling for an extension of the Emergency Regulation until October 31, 2016, should drought conditions persist through January 2016. Subsequently, the Water Board held workshops and solicited input from stakeholders regarding modifications that should be made to the Emergency Regulation based on factors including temperature, growth, and use of drought resilient supplies. Today, the Water Board promulgated a Notice of Proposed Emergency Regulation, which if adopted, would make the following changes to the existing conservation tiers.

- Climate Adjustment – The proposed regulation permits a climate adjustment, based on a water service area's evapotranspiration rate relative to a statewide average, that would reduce the conservation requirement by up to four percentage points for urban water suppliers located in the warmest portions of California.
- Growth Adjustment – The proposed regulation provides a means for urban water suppliers to account for water-efficient growth since 2013. The adjustment decreases the percentage conservation requirement based on the number of new permanent residents added since 2013, the area of new residential landscaped area, and the number of new commercial, industrial, and institutional connections added since 2013.
- Drought-Resilient Sources of Supply – The proposed regulation provides a four to eight percentage point reduction to the conservation requirement for urban water suppliers that are using new, local drought-resilient water supplies. This credit would be equal to the actual percentage of total potable water production stemming from the new source. The urban water supplier must certify that the new supply does not reduce the water available to another legal user of water or the environment and that the water supplier developed the source after 2013.

Importantly, the proposed Emergency Regulation imposes a cap on credits from all of the above factors of eight percentage points and provides that an urban water supplier may not drop below the eight percent conservation tier because of such credits.

Also of interest are the changes that do not appear in the proposed regulation, which include:

- Reconsideration After April Snow Report – Many parties have proposed that the Water Board commit to revisit the Emergency Regulation in April, after the state issues its final snowpack report for the year, but the Emergency Regulation does not include such a commitment.
- Non-Potable Recycled Water Use Credit – The proposed regulation does not provide an additional credit for non-potable recycled water use. In recommending against such a credit, Water Board staff reasoned that suppliers already have realized the benefit of providing recycled water because such water was not counted as part of their total 2013 production to which conservation mandate was applied.
- Groundwater Credits – The proposed regulations do not provide credits for groundwater management or augmentation. Water Board staff recommended against such credits, stating that the effect of such credits is not well-defined and they would be inconsistent with the State's goal to conserve both surface and groundwater supplies. Staff asserted that groundwater augmentation with surface water is materially different from the creation of a new drought-resilient source of water supply, because groundwater augmentation uses water that was already part of existing freshwater resources.
- Regional Compliance Approach – The proposed regulations do not provide for a regional compliance approach, apparently based on Water Board staff's contention that such an approach would impede enforcement efforts.
- Regions without Drought Conditions – The proposed regulations do not provide an exception for regions without drought conditions (ironically, the southeast desert area).

NEXT STEPS

Once approved by the Water Board and the Office of Administrative Law and filed with the Secretary of State, the Emergency Regulation would be effective until October 31, 2016. Importantly, there is no express provision in the proposed extended regulations for the Water Board to revisit the regulations in spring after the State receives its winter rainfall.

Interested parties are invited to submit comments on the proposed regulation by 12:00 p.m. on Thursday, January 28, 2016. Nossaman LLP is happy to assist you with submitting comments on the Notice of Proposed Emergency Regulation and/or with other questions you may have regarding the emergency drought regulation.