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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2014-

TO ADOPT AN EMERGENCY REGULATION FOR STATEWIDE DROUGHT-RELATED CURTAILMENT OF WATER DIVERSIONS TO PROTECT SENIOR WATER RIGHTS

WHEREAS:

1. On April 25, 2014, Governor Edmund G. Brown Jr. issued an executive order to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The executive order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages in communities and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue into 2015;
2. The executive order refers to the [Governor's Proclamation No. 1-17-2014](#), issued on January 17, 2014, declaring a drought State of Emergency to exist in California due to severe drought conditions. The January Proclamation notes that the state is experiencing record dry conditions, with 2014 projected to become the driest year on record. Since January, state water officials indicate that reservoirs, rainfall totals and the snowpack remain critically low. This follows two other dry or below average years, leaving reservoir storage at alarmingly low levels. The January Proclamation finds that dry conditions and lack of precipitation present urgent problems to drinking water supplies and cultivation of crops, which put farmer's long-term investments at risk. The conditions also threaten the survival of animals and plants that rely on California's rivers, including many species in danger of extinction. The January Proclamation also calls on all Californians to reduce their water usage by 20 percent;
3. The executive order directs the State Water Resources Control Board (State Water Board) to "adopt and implement emergency regulations pursuant to Water Code section 1058.5, as it deems necessary ... to require curtailment of diversions when water is not available under the diverter's priority of right." This directive explicitly reinforces authority granted to the State Water Board as part of the drought relief legislation signed into law by Governor Brown on March 1, 2014, to adopt emergency regulations "to require curtailment of diversions when water is not available under the diverter's priority of right, or ... to require reporting of diversion or use or the preparation of monitoring reports ... during a period for which the Governor has issued a proclamation of a state of emergency." (Wat. Code, § 1058.5, subd (a).);
4. 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";

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5. On the same day as the Governor's Proclamation, January 17, 2014, 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 of the requirement to limit or stop diversions of water under their water rights, based on water right priority;
6. Due to extreme drought conditions, there is not enough water for all users or uses in most streams, and diversions under junior water rights will need to be curtailed to preserve flows for senior water right holders. 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;
7. Pursuant to the State's water right priority system, the State Water Board needs to curtail water diversions when sufficient flows in a watershed are not available for 1) a water user's needs, based on their priority of right, because available flows are instead needed to satisfy senior rights or to provide a correlative share to equally senior rights (i.e. riparian rights); or 2) when water in the stream is from water imports or previously stored water released for downstream delivery or use, including meeting public trust and water quality requirements, to which certain diverters do not have any right;
8. The State's current system for curtailing diversions and enforcing those curtailments will not provide for timely and effective implementation of the State's water right system during the current drought when numerous water diversions require curtailment and enforcement in a short period of time. The emergency regulation improves the State Water Board's abilities to quickly and effectively implement and enforce those curtailments during the current drought to ensure that the State's water right priority system is effectively implemented;
9. The emergency regulation is needed to greatly increase timely compliance with and effective enforcement of the reporting requirements and water diversion curtailments issued by the State Water Board during the drought to ensure that senior water rights are protected. While the State Water Board has existing authority to issue curtailment notices for junior water users, and to initiate enforcement action, it is likely that there will be a high degree of noncompliance during the drought that will impact senior water right holders because water will not be available for their diversions due to unauthorized diversions and failure to report;
10. Due to the severity of the drought, large numbers of junior water rights will have to cease diverting statewide to protect senior water rights. Many of those water right holders that do not have alternative water supplies, or only have costly alternate supplies, are likely to continue diverting after receiving a curtailment notice under the Board's current authorities. This situation is exacerbated because existing penalties, and the lengthy process to impose them, do not provide an adequate deterrent to noncompliance when weighed against the potential benefits of continued noncompliance. In addition, if a large percent of water right holders simply fail to respond to curtailment notices issued by the Board under its current authorities because of the lack of prompt and meaningful repercussions under the State Water Board's existing authorities, identification of unauthorized diversions is difficult and slow. The State Water Board currently requests that recipients of a curtailment notice submit information regarding, among other things, their curtailment or reason for continued diversion. However, if many water right holders fail to respond to the request for reporting information under the curtailment notices issued under the current authorities, it will be exceedingly difficult for the State Water

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Board to focus curtailment investigations and refine future curtailment analyses to reflect actual hydrologic conditions and actual legal water use;

11. The emergency regulation solves both the curtailment and reporting compliance issues identified above by: 1) providing greater assurance that curtailed water rights holders will cease diverting water; and 2) providing greater assurance that curtailed water rights holders will report information regarding continued exercise of their senior rights that will assist the Board to refine curtailments. As opposed to the process required by the State Water Board's existing authorities, which requires case-by-case investigations, issuance of a draft cease and desist order (CDO) or proposed administrative civil liability (ACL), or both, and the opportunity for an evidentiary hearing, a violation of the emergency regulation is itself immediately enforceable by administrative civil liability. This would be in addition to any ACL for violation of a CDO pursuant to Water Code section 1845 or for unlawful diversion in violation of Water Code section 1052. Due to the potential for more timely and serious enforcement, the emergency regulation is expected to yield much greater compliance, and compliance promptly enough to prevent injury to senior water rights holders;
12. Proposed California Code of Regulations, title 23, section 875 provides that the Deputy Director for the Division of Water Rights may issue curtailment orders, and identifies sources of sufficiently reliable information upon which to base a decision to issue those orders. It additionally provides clarification that curtailment orders will be initially issued by mail, and establishes an electronic notice procedure for changes to curtailment orders. Finally, it clarifies that, unlike curtailment notices, curtailment orders issued pursuant to that section are subject to the State Water Board's petition for reconsideration process;
13. The Board recently added, by emergency regulation, article 24 to division 3, chapter 2 of California Code of Regulations, title 23. Article 24 contains section 878.1, which identifies certain limited minimum health and safety needs that may be authorized notwithstanding the need for curtailment, and declaring use under even more senior water rights to be a waste and unreasonable use when those minimum health and safety needs cannot be met. Currently, section 878.1 only applies to curtailment orders issued pursuant to section 877 of that article, which addresses minimum flows in Deer, Mill and Antelope Creeks. The proposed emergency regulation for statewide drought-related curtailment of water diversions to protect senior water rights would amend section 878.1 so that the health and safety section would not apply to curtailment orders issued due to lack of water availability pursuant to section 875;
14. The State Water Board recognizes that strict application of the priority system can have harsh consequences for many water users that depend on diversions for water uses that are important on a personal, local, regional and state-wide level, and that many water users are working together to find mutually acceptable solutions to the water shortage. Section 878.3 would establish a methodology for water users to propose alternatives to curtailment orders based on priority under section 875, and would allow the Executive Director to approve such agreements, provided that the agreements do not injure other legal users of water and do not unreasonably harm fish and wildlife as compared to the curtailment methods described in section 875;
15. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to 270 days.

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16. On June 20 and 21, 2014, the State Water Board issued public notice that the State Water Board would consider the adoption of the regulation at the Board's regularly-scheduled July 1, 2014 public meeting, in accordance with applicable State laws and regulations. The State Water Board also distributed for public review and comment a Finding of Emergency that complies with State laws and regulations;
17. On April 25, 2014, the Governor suspended the review required by the California Environmental Quality Act to allow the State Water Board to adopt 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;
18. As discussed above, the State Water Board is adopting the emergency regulation because of emergency drought conditions, the need for prompt action, and current limitations in the existing enforcement process;
19. 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 adopts California Code of Regulations, title 23, sections 875 and 878.3, and amends sections 878.1 and 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; and
4. These regulations 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.

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 July 1, 2014.

Jeanine Townsend
Clerk to the Board