

What the Drought Emergency Declaration Means for Your Business

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By Executive Order B-29-15, signed on April 1, 2015, Governor Brown declared a state of drought emergency “to exist throughout the State of California” Among other things, the recitals state:

WHEREAS a distinct possibility exists that the current drought will stretch into a fifth straight year in 2016 and beyond; ...

So the time has come to take the current climate conditions as a possible portent of worse to come.

The Executive Order directs suspension of certain laws and regulations that might impede a strong response and directs state agencies and utility providers as to what that response should entail. It contains 31 specific directives, the great majority of which are orders to other governmental agencies to do what the Governor thinks ought to be done. As a practical matter, most of these specific steps lie outside the Governor’s specific authority but his voice should powerfully motivate those who have that mandate.

What is the real significance of this Order in practical terms for farmers, real estate owners, heavy manufacturers who use water in their processes and homeowners? The most important point: the Order rests on the premise that we Californians waste a lot of water in various ways, such as propagating landscape that the water environment can no longer support, and generally being inattentive to wastage. The order also recognizes that we can’t make new water. We can only make better use of the water we have, that we receive at the whim of an erratic Universe.

It is long past time to recognize that periodic droughts of varying severity are a natural artifact of this region. In mustering the cold respect that such an unpleasant fact demands, we have to deal with a practical reality in practical terms. That perspective informs the balance of this alert.

Paragraphs 9 through 16 of the Order are more directory, as opposed to expressing a hope that some other state office or agency will act in a certain way. Those paragraphs appear under the heading “*Increase Enforcement Against Water Waste.*” The provisions mandate more intensified inspection and reporting of water usage. Paragraph 15 of the Order underscores the requirements of the “California Statewide

Groundwater Elevation Monitoring Program,” a program that attempts to respond to the overdraft condition of many of our most important aquifers.

These provisions clearly portend intensified enforcement of the prohibition against wasteful use, Article 10, Section 2 of the State Constitution. At some point in the not-too-distant future, these prohibitions could take shape in restrictions against certain crops that are water intensive and manufacturing practices that are critical to some important enterprises. As the restrictions would be crafted to carry out the Constitutional mandate of “reasonable and beneficial use,” a court might hold that they are limits inherent in vested water rights, thus nullifying them. We may not be there yet, but those types of contentions will almost certainly be considered by water regulators, whether the drought continues or abates.

We believe that landowners who rely on significant water supplies should assume the likelihood of a more vigorous enforcement effort to make sure that no waste is allowed in that usage. Irrigation practices should be reevaluated to make sure that water is being applied judiciously. In addition, landowners should anticipate a request from state “water cops” seeking to inspect how their water is being used, and perhaps levy penalties if they find that it is not being used appropriately. In short, landowners should anticipate the possibility of inspections followed by notices of violation that could initiate expensive enforcement procedures.

In this legal environment, it is critically important that affected parties muster the best evidence available to them to establish the beneficial use that their water management practices support and counter any claims that their practices waste water. This could be particularly important for heavy manufacturers who use substantial water resources in their processes.

As regulation and enforcement tightens, legal expertise on these and related issues will become more and more valuable, taking on existential importance in many settings. We look forward to serving clients who need help dealing with a more intrusive governmental presence in the management of their lands and water supplies, in complying with the regulations that have been and will be promulgated under the pressures of the drought.



History teaches that regulations adopted to deal with a crisis usually survive that crisis, becoming a permanent part of the regulatory environment. Thus, the Governor's decree calls for vigilance that transcends the issues he has addressed to make sure that the response does not morph into a legal crowbar that overturns the entire water rights regime in our state.



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