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Will 'emergency' water rules remain?

By Jeremy Jungreis and Travis Van Ligten

California's record-breaking drought has been a game changer. Reservoir levels throughout the state are at record lows, and groundwater basins are experiencing extensive overdraft. In response, the governor issued an executive order mandating a 25 percent reduction in potable water use statewide and imposed numerous emergency mandates to curtail water use on both water suppliers and end users. The State Water Resources Control Board adopted emergency regulations to implement the order, which went into effect June 1. Without further regulatory action, the regulations will expire Feb. 1, 2016.

Due to the pending expiration, California is likely to see legislation (or other regulatory action) making at least some of the current restrictions permanent. At minimum, the mandate that new construction comply with the most recent revision of the California Department of Water Resources Model Water Efficient Landscape Ordinance will remain in effect after Feb. 1, 2016. Adherence to the ordinance's efficiency standards — or the development of a city-specific conservation ordinance that is equally effective — is now the subject of binding regulations applicable to all California land use permitting authorities. If drought conditions persist, the current regulations will likely be extended in current form.

Conversely, if this winter is the rainy event that many predict, the board may need additional statutory authorization to extend the regulations. Indeed, the current statutory basis cited in the governor's executive order does not apply unless there is a bona fide emergency. Thus, any effort to extend the current "emergency" regulations would be subject to legal challenge.

On that note, the city of Riverside is already litigating this issue. Riverside filed a lawsuit arguing that the governor exceeded his authority, and acted arbitrarily and capriciously since Riverside has adequate local water supplies on hand for an additional four years of water service within the city. Thus, Riverside argues, there is no justification for governor's use of his emergency powers within the city of Riverside.

As evidenced by the brown lawns that now cover much of the Golden State, water agencies have largely complied with the regulations, and the state is on track to meet the target of a total reduction of 25 percent in potable water use compared to a 2013 baseline.

Suppliers that missed their mandated conservation target by a larger amount recently received "Conservation Orders" directing them to hire new conservation staff, conduct audits, redo budgets, and evaluate the feasibility of conservation based rate structures and penalties that incentivize greater conservation. However, as discussed later in the article, some of these requirements may be subject to future legal challenge.

Brown Lawns and Medians: Some have suggested that California has seen the end of green lawns and medians. New legislation from last year will permanently preclude homeowners' associations from demanding the use of turf and other water intensive vegetation on residential properties. It also limits the enforcement powers of HOAs with regard to brown lawns during times of declared drought. The regulations similarly ban the use of potable water on publicly owned medians for as long as they are in effect. Irrigation of such areas with recycled water, greywater or groundwater from currently underutilized basins may be a long term solution for some water users — though the regulatory permitting associated with such projects can be cost prohibitive.

Comprehensive Groundwater Regulation: As a result of the Sustainable Groundwater Management Act of 2014, governments throughout the state must form groundwater sustainability agencies that will have new powers to force private groundwater pumpers to stop pumping, and to report all of the water use of the pumpers to the agency. Such powers may run afoul of claimed "senior" water rights. We will likely see an increase in litigation over groundwater resources, and over which agency gets to act as the groundwater sustainability agency, in many groundwater basins around the state.

Furthermore, this month, the Legislature passed major reform for how groundwater adjudications will be conducted in the future. If enacted, it will be immediately significant in light of authorized curtailments of historical pumping that are likely to be required in many basins, and the resulting conflicts between newly formed groundwater sustainability agencies and water users over the allocation of water rights. The net result of the Sustainable Groundwater Management Act and the new groundwater adjudication streamlining bills, in the short term, is likely less groundwater availability for consumptive uses and more litigation over groundwater. The long-term result is better-managed and sustainable groundwater basins.

Search for "New Water": The drought has brought many cities and water districts to the conclusion that imported water from the Colorado River and additional Northern California sources is too unreliable. They are now seeking to develop new sources. Recent efforts include attempts to develop ocean desalination, brackish desalination, use of recycled water for potable supply, and remediating groundwater currently considered too contaminated for potable use. All of these efforts are underway in Southern California, and all have major regulatory obstacles prior to implementation. A conference discussing the efforts to develop "New Water" supplies in California will take place in Anaheim on Oct. 5 and 6.

Proposition 218 and the San Juan Decision: In *Capistrano Taxpayers Ass'n v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493 (2015), the Court of Appeal held that imposing water rates that increase as a particular user consumes more water violates Prop. 218 (and potentially Prop. 26) where the higher tiers fail to correspond to actual higher costs of providing the water service at higher volumes. This has frustrated the efforts of some cities seeking to use more aggressive rate based tools to meet state conservation mandates. It has also created potential liability for refunds for some water suppliers. Despite the apparent threat from taxpayer advocacy organizations, the state water board has continued to demand that cities consider developing exactly the sort of rate structure put into question by the *San Juan* decision. Practitioners may see an effort in the Legislature next session to significantly narrow the scope of Prop. 218. Any amendment of Prop. 218 to overturn *San Juan* would presumably require voter approval as an amendment to the California Constitution. However, for now, the imposition of rates designed to obtain more efficient water use via pricing is an approach that will require careful coordination with counsel experienced in the nuances of Prop. 218 and rate-setting.

Stormwater Regulation: New permits issued by regional water quality control boards are extremely stringent and may cost billions of dollars to implement while still leaving local governments out of compliance and subject to citizen lawsuits under the Federal Clean Water Act. On June 16, the state water board handed down its long awaited order governing regulation of municipal separate storm sewer systems in Los Angeles County. This detailed and deliberate order is noteworthy because it imposes strict liability on cities and other stormwater agencies that do not meet the strict numeric targets assigned in regional water quality control plans.

The costs of meeting the now strictly enforced numeric limit targets in the Los Angeles River Watershed exceeds $6 billion, and similar efforts are also likely to cost billions. Given the possibility of strict liability for noncompliance, coupled with the fact that compliance is either prohibitively expensive or technically impossible, municipal stormwater regulation appears destined to be a fertile area for litigation for years to come.

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