

HOW CALIFORNIA'S DROUGHT AND THE EXECUTIVE ORDER CAN AFFECT YOUR BUSINESS

How do Governor Brown's new water restrictions affect me or my business?" That may be the question that many senior water rights holders and business owners, including farmers, commercial real estate owners, commercial tenants and contractors, are asking themselves as a result of Governor Brown's Executive Order B-29-15, issued on April 1, 2015.

The Executive Order itself contains 31 specific directives, making it somewhat overwhelming to ascertain its practical impact. However, this article distills the most important aspects of the Executive Order and discusses its real significance below.

Saving Water

The Executive Order directs the State Water Resources Control Board (the "Water Board") to "impose restrictions to achieve a statewide 25% reduction in potable urban water usage through February 28, 2016." "Potable water" means water that is "safe to drink." These restrictions will require California municipal water suppliers in cities and counties to reduce potable water usage compared to the amount used in 2013. In order to achieve this reduction, Governor Brown's order:

- directs the Department of Water Resources (the "Department") to lead a statewide initiative, in partnership with local agencies, to collectively replace 50 million square feet of lawn and ornamental turf with drought tolerant landscaping;
- directs the Water Board to impose restrictions to require commercial, industrial, and institutional properties, such as corporate campuses, golf courses, and cemeteries, to immediately implement water efficiency measures to reduce potable water usage by the 25% target; and
- directs the Water Board to direct urban water suppliers to develop rate structures and other pricing mechanisms, including but not limited to surcharge, fees, and penalties, to maximize water conservation consistent with statewide water restrictions.

If you are a commercial property owner, the likelihood of being pressured by the Department, the Water Board, and/or municipal agencies to reduce water usage is absolutely certain. As a result of the new requirements, commercial property owners will need to develop plans immediately relating to the reduction of potable water usage. Landscape water usage will surely be one of the areas that will be within the realm of such plans. Beautifully landscaped lawns and elegant fountains on corporate campuses are examples of wasteful outdoor features that will either need to be done away with completely or converted into drought tolerant features. One possible solution is for owners to convert such fountains into planter beds with drip irrigation and drought tolerant plants. At some of the larger corporate campuses and commercial properties in the Bay Area that have already adopted similar measures, the estimated savings are approximately 1 million gallons of water a year.

Due to higher “rate structures and other pricing mechanisms” used by urban water suppliers to deter high water usage, hard construction costs and commercial rents (for leases that include water as part of the utilities) will also rise since such costs are generally passed onto the client or tenant on a direct basis. It will ultimately be up to commercial contractors, their clients and commercial landlords and tenants on how to deal with increased water costs in their customized construction contracts and lease agreements.

Increasing Enforcement

Governor Brown’s Executive Order also called for more extreme inspection and reporting of water usage. In particular, the Executive Order:

- *directs the Water Board to require frequent reporting of water diversion and use by water rights holders, to conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and to bring enforcement actions against illegal diverters and those engaging in the “wasteful and unreasonable” use of water.*

Although agricultural users are exempt from the 25% urban guideline discussed above, landowners, farmers and ranchers will still need to supply more frequent water use information to the Water Board to show that they are not illegally diverting water or committing “waste or unreasonable use” under these directives. New paperwork and reporting requirements will be surely implemented and farmers and landowners should also assume the heightened likelihood of more vigorous inspections from state and municipal water authorities.

Most importantly, it is vital that such parties are prepared for these intrusive inspections carried out by these state and municipal water authorities. Affected parties should gather any and all evidence available to show that they are not wasting water and should reevaluate whether or not their irrigation practices are using water prudently.

The Future

The provisions of Governor Brown’s Executive Order surely amount to a dramatic new chapter in the State’s response to the drought. However, some of the language in the Executive Order itself is not new. The provisions pertaining to more intensified inspection and reporting requirements are essentially narrow enforcement mechanisms for Article 10, Section 2 of California’s Constitution. Article 10, Section 2, states in pertinent part:

...the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare...

If the drought continues in the years ahead, it will be interesting to see whether these new prohibitions will shape restrictions against certain manufacturing practices that utilize large amount of water, or even ban the farming of certain crops (alfalfa) or livestock (i.e. beef) with large water footprints. Tension between urban Californians and agricultural interests will climb (as disputes arise involving senior water rights) and environmental laws may even become weaker. For example, the suspension of the California Environmental Quality Act (“CEQA”), which forces the California Energy Commission to examine in detail the environmental costs of taking water from “other sources,” has already been discussed to help alleviate the conditions brought on by the drought.

Moreover, California courts could, in the not-so-distant future, hold that the “reasonable” and “beneficial use” objectives in the State’s Constitution are limits inherent in vested water rights, therefore shaping many business practices and weakening the rights of those holding even the most senior water rights in the years to come.

How Hoge Fenton Can Help

Under the new and additional restrictions likely to come in the future, farmers, commercial real estate owners, contractors and water rights holders will need legal expertise and assistance when navigating the pressures promulgated by such prohibitions and regulations. If you have any questions about this article or would like guidance concerning these additional restrictions, please contact the experience attorneys of Hoge Fenton’s Real Estate Group.

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