

**Restore the Delta's Annotated Guide
to the Governor's Drought Proclamation of April 1, 2015
(with special attention to drought barriers planned for the Delta)**

The Governor's April 1, 2015, drought proclamation contained several passages that directly affect the Delta, but his press release does not call them out as affecting the Delta. Instead his message to the media merely calls for "streamlined government response" including for "emergency drought salinity barriers" without mentioning that the Delta is where these barriers would be placed.

Here is an annotated Restore the Delta guide to points 20, 21, and 26 through 31 that Governor Brown included in his proclamation April 1st:

20. The Department shall take actions required to plan and, if necessary, implement Emergency Drought Salinity Barriers in coordination and consultation with the Water Board and the Department of Fish and Wildlife at locations within the Sacramento -San Joaquin delta estuary. These barriers will be designed to conserve water for use later in the year to meet state and federal Endangered Species Act requirements, preserve to the extent possible water quality in the Delta, and retain water supply for essential human health and safety uses in 2015 and in the future.

RTD Analysis: The Department of Water Resources has (since January 2015 as well as in previous years) planned which barriers to install and operate in Delta channels. The barriers were announced as part of "last resort" options in DWR and the Bureau of Reclamation's "[Drought Contingency Plan](#)" submitted to the Water Board in mid-January. They informed the Board in February and again in March that the barriers could be coming if rain and snow did not improve Central Valley Project and State Water Project reservoir storage levels. The Governor proclaims nothing new here.

21. The Water Board and the Department of Fish and Wildlife shall immediately consider any necessary regulatory approvals for the purpose of installation of the Emergency Drought Salinity Barriers.

RTD Analysis: As of the afternoon of April 1, the State Water Board continues posting its April 7-8 meeting agenda which contains no consideration of DWR's proposed drought barriers. However, the Board's next agenda for April 21-22 has not yet been announced. A search of the Department of Fish and Wildlife's (DFW) web site reveals no reference to "drought barriers" at this time. However, DFW is the state agency which oversees issuance of permits to alter streambeds or other water ways under the Fish and Game Code.

26. For purposes of carrying out directives 2-9, 11, 16-17, 20-23, and 25, Division 13 (commencing with section 21000) of the Public Resources Code and regulations adopted pursuant to that Division are hereby suspended. This suspension applies to any actions taken by state agencies, and for actions taken by local agencies where the state agency with primary responsibility for implementing the directive concurs that local action is required, as well as for any necessary permits or approvals required to complete these actions. This suspension, and those specified in paragraph 9 of the January 17, 2014 Proclamation, paragraph 19 of the April 25, 2014 proclamation, and paragraph 4 of Executive Order B-26-14, shall remain in effect until May 31, 2016. Drought relief actions taken pursuant to these paragraphs that are started prior to May 31, 2016, but not completed, shall not be subject to Division 13 (commencing with section 21000) of the Public Resources Code for the time required to complete them.

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RTD Analysis: The Governor suspends the California Environmental Quality Act alleging a drought emergency as the basis for the suspension, yet again. In 2009, then-Governor Schwarzenegger's administration used an emergency declaration to suspend CEQA in reviewing water transfers during a drought "emergency," an action that was litigated in Alameda County Superior Court, and which the state of California and the Governor lost. The Court found that the Governor possessed no such power to suspend CEQA under an emergency. The decision can be viewed at <http://www.cwin.org/sites/default/files/OR010%20Order%20and%20Decision%20on%20Petition%20for%20Writ.pdf>.

27. For purposes of carrying out directives 20 and 21, section 13247 and Chapter 3 of Part 3 (commencing with section 85225) of the Water Code are suspended.

RTD Analysis: Here the Governor suspends a provision of the Porter-Cologne Water Quality Control Act that requires a project like the drought barriers to conform and comply with the Bay-Delta estuary's existing water quality control plan. That plan currently allows no barriers to be built in the Delta. This action threatens a major regulatory train wreck for the State Water Board because DWR's proposal to the Corps of Engineers (see below).

The Governor is also suspending the authority of the Delta Stewardship Council to regulate the drought barriers in the Delta as a "covered action." Thus, as much as possible, the Governor is removing any accountability of DWR to state regulators and the California public as much as possible when it comes to installing and operating the drought barriers - what DWR characterized in public in February 2015 as a "last resort."

28. For actions called for in this proclamation in directive 20, the Department shall exercise any authority vested in the Central Valley Flood Protection Board, as codified in Water Code section 8521, et seq., that is necessary to enable these urgent actions to be taken more quickly than otherwise possible. The Director of the Department of Water Resources is specifically authorized, on behalf of the State of California, to request that the Secretary of the Army, on the recommendation of the Chief of Engineers of the Army Corps of Engineers, grant any permission required pursuant to section 14 of the Rivers and Harbors Act of 1899 and codified in section 48 of title 33 of the United States Code.

RTD Analysis: What the Governor also fails to mention about the drought barriers is that the state is seeking a permit from the Corps of Engineers to last 10 years, during which DWR would receive permission to install, operate and remove the barriers in *any three out of those 10 years*. Salmon have three-year life cycles. Delta smelt has a one-year life-cycle. Longfin smelt has a two-year life cycle. All of these fish are vulnerable, listed species. If 2015 through 2017 are terrible drought years, all three of these species (and at least two entire salmon runs, winter and spring) could go extinct with the barriers put in place, if DWR is allowed to install and operate the barriers in those years consecutively. In this part of the Governor's proclamation, he authorizes DWR to ask and/or beg the US Army Corps of Engineers to speed up its review of DWR's "program permit" application, now that the comment period on the application has closed. You can view [Restore the Delta's comments on the barriers application here](#).

29. The Department is directed to enter into agreements with landowners for the purposes of planning and installation of the Emergency Drought Barriers in 2015 to the extent necessary to accommodate access to barrier locations, land-side and water-side

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construction, and materials staging in proximity to barrier locations. Where the Department is unable to reach an agreement with landowners, the Department may exercise the full authority of Government Code section 8572.

RTD Analysis: Government Code section 8572 says simply that in declared emergencies, the Governor is authorized “to commandeer or utilize any private property or personnel deemed by him necessary in carrying out” his order. For example, if Delta landowners adjacent to levees where the drought barriers would be installed choose not to give DWR permission to enter their lands to construct the barriers, DWR now has gubernatorial authority to take over their land—that is, to ignore the landowner. This same section of the code says that “the state shall pay the reasonable value” of commandeered property. This will be critical, since the state’s need for the barriers is stated to last for at least 10 years.

We find this a harsh, heavy-handed, and probably unnecessary measure since [DWR's CEQA document](#) on the drought barriers says that the vast majority of construction and delivery of materials will occur within Delta channels using cranes, barges and other heavy aquatic equipment.

30. For purposes of this Executive Order, chapter 3.5 (commencing with section 11340) of part 1 of division 3 of the Government Code and chapter 5 (commencing with section 25400) of division 15 of the Public Resources Code are suspended for the development and adoption of regulations or guidelines needed to carry out the provisions in this Order. Any entity issuing regulations or guidelines pursuant to this directive shall conduct a public . meeting on the regulations and guidelines prior to adopting them.

RTD Analysis: Here the Governor is suspending the usual due process procedures used by state government to develop and vet regulations with the public. The regulatory process described in the Public Resources Code relates directly to “energy resources conservation” and appears to be aimed at #25 of the Governor’s Proclamation and does not seem to directly affect the Delta.

But Restore the Delta is very concerned that the Governor’s suspension of the Government code rule-making procedures is intended to illegally streamline Proposition 1 implementation. Is the Governor attempting to circumvent the will of the people (who voted approval of Proposition 1 last November) to require that the California Water Commission develop new regulations to guide the allocation of bond funds to storage projects only to the extent they provide “public benefits”? The storage section of the water bond is the only one required to develop regulations in public.

To what new regulations does the Governor envision this suspension applying, besides (for example) State Water Board water conservation regulations?

31. In order to ensure that equipment and services necessary for drought response can be procured quickly, the provisions of the Government Code and the Public Contract Code applicable to state contracts, including, but not limited to, advertising and competitive bidding requirements, are hereby suspended for directives 17, 20, and 24. Approval by the Department of Finance is required prior to the execution of any contract entered into pursuant to these directives.

RTD Analysis: This part of the Governor’s proclamation is intended to streamline DWR’s drought barriers access to labor, expertise, and matériel. It appears this probably enables DWR to employ

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sole-source contracting methods, eliminating any equal opportunity provisions and requirements that might otherwise be required of DWR. In short, sweetheart deals may become possible in the service of "streamlined" governmental drought response.