

**STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD**

DIVISION OF WATER RIGHTS

ORDER WR 2015 –0035-DWR

ORDER FOR ADDITIONAL INFORMATION

In the Matter of Diversion of Water for

CHINA CREEK

SOURCE: China Creek thence Redwood Creek thence South Fork Eel River

COUNTY: Humboldt

BACKGROUND

1. On January 17, 2014, Governor Edmund G. Brown Jr. issued Proclamation No. 1-17-2014, declaring a State of Emergency to exist in California due to severe drought conditions.
2. On April 25, 2014, Governor Brown issued a Proclamation of a Continued State of Emergency due to drought conditions, to strengthen the state's ability to manage water and habitat effectively in drought conditions.
3. On March 17, 2015, the State Water Resources Control Board (State Water Board) amended and re-adopted emergency regulations regarding Informational Order authority during drought (California Code of Regulations, title 23, amending section 879, subdivision (c)). The regulations were reviewed by the Office of Administrative Law and went into effect on March 27, 2015. The regulations establish requirements for water right holders to provide information in specific circumstances.
4. On April 1, 2015, Governor Brown issued Executive Order B-29-15 (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 ongoing severe drought conditions present urgent challenges across the state including water shortages for municipal use and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions persist. The Executive Order confirms that the orders and provisions in the Governor's previous drought proclamations and orders, the January 17, 2014, Proclamation, April 25, 2014, Proclamation, and Executive Orders B-26-14 and B-28-14, remain in full force and effect.
5. The Executive Order, at Paragraph 10, provides in part that "[t]he Water Board shall require frequent reporting of water diversion and use by water right holders, conduct inspections to determine whether illegal diversions or wasteful and unreasonable use of water are occurring, and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water."
6. The State Water Board has a duty to protect the state's public trust resources, including fisheries, to the extent reasonable (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419). In addition to extreme drought conditions, the diversion of water can lead to extensive dewatering of stream channels and loss of gravel and woody debris that is critical for fisheries and their habitat.

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7. The State Water Board has the authority to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State (Article X, Section 2 of the California Constitution; Water Code (WC) §100). Further, WC §275 directs the State Water Board to “take all appropriate proceedings or actions before executive, legislative, or judicial agencies...” to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion.

INVESTIGATION

8. On November 21, 2012, the State Water Board’s Division of Water Rights (Division) was notified by the U.S. Environmental Protection Agency of an alleged fish kill that occurred in October 2012 as a result of low flow conditions in China Creek. China Creek is federally designated as critical habitat for coho salmon, Chinook salmon, and Northern California Coast steelhead. The Federal government has listed all these species as threatened, and the State of California has listed coho salmon as an endangered species.
9. Due to the threat of impacts to anadromous fish in China Creek, the Division is currently conducting an investigation in the north fork of China Creek watershed to protect the fishery resources by ensuring that all water diversions are operating legally and in a manner that is not unreasonably impacting fisheries and their habitat. During this investigation the State Water Board has been working collaboratively with California Department of Fish and Wildlife, National Oceanic Atmospheric Administration and local landowners to address ongoing conditions. Most local landowners have filed Statements of Water Diversion and Use (Statements) and reported their diversion amounts for 2013. Based upon Division staff’s estimates of average seasonal unimpaired flow for north fork of China Creek, the estimated consumption rates for this watershed exceed the available flows during the summer months 1). The estimated consumption rates are based upon the reported rates of diversion from the local landowner’s Statements filed with the State Water Board within the north fork of China Creek watershed.
10. The China Creek watershed is experiencing extremely low water levels and the north fork of China Creek has stopped flowing altogether. The recent mortality of juvenile coho salmon has been observed in the China Creek watershed for the fourth consecutive year since 2012. The remaining pools of water in the north fork of China Creek are disconnected from one another, prohibiting fish passage through the creek which greatly reduces their food availability and increases their vulnerability to predators. Reduced depths in isolated pools often result in increased water temperatures and low dissolved oxygen concentrations which can be lethal to fish. Furthermore, the water temperatures in some of the pools have reached temperatures of 67°F, a temperature that places juvenile salmon at high risk of disease.
11. The Division has identified that the north fork of China Creek is the source of one or more of your water diversions. Any diversion currently taking place is contributing to the critical water levels of the north fork of China Creek.

LEGAL AUTHORITY

12. Water Code section 183 authorizes the State Water Board, among other things, to conduct any investigations in any part of the state necessary to carry out the Board’s powers.
13. Water Code section 1051 authorizes the State Water Board, among other things, to investigate all streams, stream systems, portions of stream systems, lakes, or other bodies of water to determine whether water is being appropriated in accordance with the laws of the State.

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14. Pursuant to California Code of Regulations, title 23, section 879, subdivision (c):

- (1) *The Deputy Director may issue an informational order, as provided in paragraph (2), in any of the following circumstances:*
 - (A) *Upon receipt of a complaint that staff determines to merit investigation alleging interference with a water right by a water right holder, diverter or user;*
 - (B) *Where a water right holder, diverter or user asserts a right to divert under a pre-1914 or riparian right in response to an investigation, curtailment order or any notice of curtailment, and no Statement of Water Diversion and Use for such right was on file with the Board as of January 17, 2014;*
 - (C) *Where a water right holder, diverter or user responds to an investigation, curtailment order or any notice of curtailment by asserting a right to divert under a contract or water transfer for which the Board has not approved a change petition and for which no record had been previously filed with the Board; or*
 - (D) *Upon receipt of information that indicates actual or threatened waste, unreasonable use, unreasonable method of diversion, or unlawful diversions of water by any water right holder, diverter or user.*
- (2) *The Deputy Director may issue an order under this article requiring a water right holder, diverter or user to provide additional information related to a diversion or use described in (c)(1), including the claim of right; property patent date; the date of initial appropriation; diversions made or anticipated during the current drought year; basis of right and amount of a water transfer not subject to approval of the Board or Department of Water Resources; or any other information relevant to authenticating the right or forecasting use and supplies in the current drought year.*
- (3) *Any party receiving an order under this subdivision shall provide the requested information within thirty (30) days. The Deputy Director may grant additional time for submission of information supporting the claim of right upon substantial compliance with the 30-day deadline and a showing of good cause.*
- (4) *The failure to provide the information requested within 30 days or any additional time extension granted is a violation subject to civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.*
- (5) *Orders issued under previous versions of this subdivision shall remain in effect and shall be enforceable as if adopted under this version. The provisions of Article 12 of this Chapter (commencing with section 768) shall govern petitions for reconsideration of orders issued under this subdivision.*

15. Section 879, subdivision (c), and the Executive Order supplement the State Water Board's general investigatory authority under Water Code sections 183 and 1051.

16. Section 879, subdivision (c)(1)(D) authorizes the Deputy Director to issue orders requiring additional information in various circumstances, including upon receipt of information that indicates waste, unreasonable use, or unreasonable method of diversion by any water right holder.

17. As of October 16, 2015, the authority of the Deputy Director of the Division of Water Rights to issue an Informational Order as provided in Title 23, Division 3, Chapter 2, Article 24, Amend Section 879, subdivision (c) has been delegated to the Assistant Deputy Director of the Division of Water Rights.

18. The circumstances described above indicate that you are diverting, or are threatening to divert, water from north fork of China Creek in a manner that indicates actual or threatened waste, unreasonable use, or an unreasonable method of diversion.

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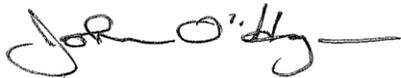
19. To determine whether instream flows can be maintained for the protection of existing water rights and instream uses in following years, the State Water Board needs supporting documentation regarding your water consumption.
20. Recipients of information orders issued pursuant to Section 879(c) may petition the State Water Board for reconsideration (Water Code § 1122; 23 CCR §§ 768 et seq., 879(c)(5)).

IT IS HEREBY ORDERED:

21. This Order is issued on the date shown below. All submittal requirements are based on the effective date of this Order.
22. Using the online Informational Order Form, water diverters of the north fork of China Creek and its tributaries are subject to this Order for additional information pursuant to section 879, subdivision (c). Each recipient of this Order shall provide the following information for water diversions that are conducted under a basis of right no later than 30 days from the effective date below. All of this information shall be filed electronically using the Online Informational Order Form at:
http://www.waterboards.ca.gov/waterrights/water_issues/programs/drought/docs/china_creek_form.pdf
 - a. Identify the basis of right you are claiming for your diversions.
 - b. Report your monthly amounts of water diverted for each month in 2014, January 2015 through the date of this Order, and the anticipated monthly amount of water to be diverted for the remaining months in 2015 and 2016. For direct diversion, the diversion information shall include the total amount of water diverted each month and the maximum rate of diversion in each month. For storage, the diversion information shall include the quantity collected to storage each month.
23. Failure to comply with this Order subjects the party to enforcement action including, but not limited to, civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.

Reservation of Enforcement Authority and Discretion: Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including, but not limited to, the authority to bring enforcement against diverters for unauthorized diversion or use in violation of Water Code section 1052.

STATE WATER RESOURCES CONTROL BOARD



*John O'Hagan, Assistant Deputy Director
Division of Water Rights*

Dated: October 20, 2015