

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2016-0012**

TO UPDATE AND READOPT A DROUGHT-RELATED EMERGENCY REGULATION
REQUIRING ADDITIONAL WATER USER INFORMATION FOR THE PROTECTION OF
SPECIFIC FISHERIES IN TRIBUTARIES TO THE RUSSIAN RIVER

WHEREAS:

1. On April 25, 2014, Governor Edmund G. Brown Jr. issued a Proclamation of a Continued State of Emergency ([April 2014 Proclamation](#)) 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 April 2014 Proclamation finds that the continuous severe drought conditions present urgent challenges across the state including water shortages in communities and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue into 2015. The April 2014 Proclamation also suspends the environmental review required by the California Environmental Quality Act to allow drought emergency regulations and other actions to take place as quickly as possible;
2. The April 2014 Proclamation refers to the Governor's Proclamation No. 1-17-2014, issued on January 17, 2014, declaring a drought State of Emergency ([January 2014 Proclamation](#)) to exist in California due to severe drought conditions. The January Proclamation finds that dry conditions and lack of precipitation present urgent problems to drinking water supplies and cultivation of crops, which put farmers' long-term investments at risk. The conditions also threaten the survival of animals and plants that rely on California's rivers, including many species in danger of extinction. The January 2014 Proclamation also calls on all Californians to reduce their water usage by 20 percent;
3. On December 22, 2014, in light of the continued lack of rain, Governor Brown issued [Executive Order B-28-14](#), which extends the California Environmental Quality Act suspension through May 31, 2016 for issuance of drought emergency regulations, among other actions;
4. On April 1, 2015, Governor Brown issued [Executive Order B-29-15](#) (April 2015 Order) that recognizes the possibility that the current drought will stretch into a fifth straight year in 2016 and beyond, and that severe drought conditions have degraded habitat for many fish and wildlife species. The April 2015 Order also directs the State Water Board, amongst other things, to impose restrictions to achieve a statewide 25 percent reduction in potable urban water usage through February 2016, to increase enforcement of waste and unreasonable use violations, and to collect increased information from water users;
5. On November 13, 2015, Governor Brown issued [Executive Order B-36-15](#), which extends the terms of previous drought declarations in light of the continuing drought, and the threat of continuance of the drought. Executive Order B-36-15 recognizes that the ongoing drought continues to stress California's fish and wildlife;

6. On June 17, 2015, the State Water Board adopted an emergency regulation for [Enhanced Water Conservation and Additional Water User Information for the Protection of Specific Fisheries in Tributaries to the Russian River](#) (California Code of Regulations, title 23, section 876). The emergency regulation applies to the four Russian River tributary watersheds of Dutch Bill Creek, Green Valley Creek, portions of Mark West Creek, and Mill Creek. The emergency regulation requires enhanced water conservation in critical areas of the four tributary watersheds and submittal of information on water diversion and use when requested by the Deputy Director for the Division of Water Rights (Deputy Director). The emergency regulation became effective July 6, 2015 upon approval by the Office of Administrative Law (OAL), and remains in effect;
7. On August 24, 2015, the Deputy Director issued [Order WR 2015-0026-DWR](#) requiring all landowners and water suppliers in the four watersheds (approximately 10,100 parties) to provide information on their sources and uses of water. As of February 8, 2016, approximately 90 percent of landowners and water suppliers have submitted information in response to the informational order. State Water Board staff is following up with individuals that have provided incomplete or no information;
8. On December 1, 2015, the State Water Board adopted an emergency regulation amending and readopting an existing drought [emergency regulation regarding Informational Orders](#) (California Code of Regulations, title 23, section 879). The emergency regulation became effective December 17, 2015 upon approval by OAL. The State Water Board previously adopted emergency regulations regarding informational orders on [March 17, 2015](#) and [July 2, 2014](#);
9. Central California Coast coho salmon (*Oncorhynchus kisutch*) (CCC coho salmon) are listed as endangered under the state and federal Endangered Species Acts, and California Central Coast steelhead (*Oncorhynchus mykiss*) (CCC steelhead) are listed as threatened under the federal Endangered Species Act. Since being listed, CCC coho salmon populations have continued to decline and the California Department of Fish and Wildlife (CDFW) and the National Marine Fisheries Service (NMFS) consider CCC coho salmon to be among the species at highest risk of extinction in the country;
10. The Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds are recognized by CDFW and NMFS as high priority CCC coho salmon tributaries in the Russian River watershed. These four tributary watersheds provide critical spawning and rearing habitat for wild populations of CCC coho salmon and the Russian River Coho Salmon Captive Broodstock Program. Juvenile CCC steelhead also use these four Russian River tributaries and require similar rearing habitat and water quality conditions as juvenile CCC coho salmon during the summer months. Juvenile CCC coho salmon and CCC steelhead can survive very dry conditions in these watersheds in pools in the upper watersheds, provided the pools have sufficient water and stream connectivity to maintain appropriate temperature, dissolved oxygen, and other water quality conditions. While precipitation in the Russian River watershed is above average through December 31, 2015 (based on Department of Water Resources precipitation data), the United States Drought Monitor still considers the region to be in severe drought, and conditions for summer 2016 and beyond are uncertain;

11. In 2014, based on severe drought conditions and the need to protect fish species, CDFW undertook significant efforts to enter into voluntary agreements for water use reductions that have proven successful for other high-priority fishery streams, but was unable to enter into any agreements with landowners in the four watersheds. In 2015, CDFW and the State Water Board redoubled efforts to secure voluntary use reductions, meeting locally with many diverters in the affected watersheds. In 2015, CDFW entered into 35 residential voluntary agreements, seven vineyard/winery voluntary agreements, and five flow enhancement agreements;
12. Summer diversions tend to be high and summer streamflows tend to be low in Russian River tributaries during normal water years. Low flow conditions can persist into the fall in extremely dry years. There are also significant numbers of surface and sub-surface diversions in these four watersheds. In the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds, the connectivity between surface water and sub-surface water is significant, and sub-surface withdrawals can have a significant effect on surface water flow during the period when surface flows are most important and least available;
13. Water Code section 1058.5 grants the State Water Board the authority to adopt emergency regulations in certain drought years in order to: "prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter's priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports";
14. The California Constitution declares, at article X, section 2, that the water resources of the state must be put to beneficial use in a manner that is reasonable and not wasteful. Relevant to the current drought conditions, the California Supreme Court has clarified that "what may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time." (*Tulare Dist. v. Lindsay Strathmore Dist.* (1935) 3 Cal.2d 489, 567.) In applying the reasonableness doctrine, the State Water Board has a duty to consider the state's public trust resources, including fisheries. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.) The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351.) Accordingly, the reporting required by this regulation is in furtherance of article X, section 2 during this drought emergency;
15. In collaboration with CDFW and NMFS, State Water Board staff has identified the need to readopt portions of the emergency regulation to inform potential drought responses and future efforts to protect CCC coho salmon and CCC steelhead in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds should the drought continue. The regulation consists of enhanced information order authority that will allow the State Water Board to acquire information in circumstances beyond those covered under the statewide informational order emergency regulation adopted by the State Water Board on December 1, 2015;

16. Insufficient information exists to accurately estimate the number of water wells, the location of the wells, or the current demand for well water in the Russian River basin based on existing water right data. Approximately 10 percent of recipients of the August 2015 informational have yet to respond, and quality control sampling of submissions has revealed that a significant number of respondents have provided incomplete or inaccurate information. In addition, CDFW has indicated, and preliminary analysis of responses to the August 2015 informational order support, that several unreported surface diversions exist in the watersheds, which may contribute significantly to surface flow depletion. There are also several surface water diversions in the Division of Water Rights' [electronic Water Rights Information Management System \(eWRIMS\) database](#) for which required use reports have not been submitted. Continuation of the informational order authority will allow the State Water Board to collect comprehensive water source and use information in order to prepare for ongoing drought, should recent improvement in flow conditions in the tributaries not continue, or for future dry conditions;
17. Closing the information gap is necessary to more fully understand water use in the watersheds, and to inform possible future management actions (e.g., water conservation, curtailments, etc.) that may be necessary in dry or drought conditions to protect CCC salmon and CCC steelhead;
18. The State Water Board is renewing the emergency regulation because of the continuation of emergency drought conditions, and the potential to need the information to inform curtailment, reasonable use, conservation, or other emergency measures in a focused manner to protect listed salmonid species this year, or in future droughts or dry conditions;
19. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to 270 days; and
20. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to staff.

THEREFORE BE IT RESOLVED THAT:

1. The State Water Board renews and amends California Code of Regulations, title 23, section 876, as appended, as an emergency regulation;
2. State Water Board staff will submit the regulation to OAL for final approval;
3. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director, the Deputy Director, or their designees may make such changes;
4. This regulation shall remain in effect for 270 days after filing with the Secretary of State unless the State Water Board determines that it is no longer necessary due to changed conditions, or unless the State Water Board renews the regulation due to drought conditions as described in Water Code section 1058.5;

5. The State Water Board directs staff to conduct a follow up meeting in Santa Rosa, after data collection and processing are substantially complete, to share with stakeholders a summary of the information collected through the informational order and how the data may be used to inform more focused management decisions in the short and long term. Better information allows for more effective actions that impact fewer water users;
6. The State Water Board encourages all water users to continue voluntary conservation and other species protection efforts; and
7. The State Water Board directs staff to continue coordination with CDFW, NMFS, Sonoma County, and the Sonoma County and Gold Ridge Resource Conservation Districts.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 1, 2016.

AYE: Chair Felicia Marcus
 Vice Chair Frances Spivy-Weber
 Board Member Tam M. Doduc
 Board Member Steven Moore
 Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

**Emergency Actions due to Insufficient Flow for Specific Fisheries in
Tributaries to the Russian River**
(As adopted by the State Water Resources Control Board on March 1, 2016.)

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In Title 23, Division 3, Chapter 2, amend the title of Article 24, and add section 876 to read:

Article 24. Curtailment of Diversions and Other Actions Based on Insufficient Flow to Meet All Needs

§ 875 [reserved]

§ 876 Additional Water User Information for the Protection of Specific Fisheries in Tributaries to the Russian River

(a) [reserved]

(b) [reserved]

(c) The State Water Resources Control Board (State Board) has authority to ensure the protection and preservation of streams and to limit diversions to protect critical flows for species, including for state- and federally- threatened and endangered salmon and steelhead species. The following watersheds have been identified as critical rearing habitat for juvenile state- and federally-listed Central California Coast coho salmon (CCC coho salmon) and Central California Coast steelhead (CCC steelhead).

- (1) The portion of the Mark West Creek watershed as defined by the United States Geological Survey- Watershed Boundary Dataset- Hydrologic Unit Code 180101100706. Mark West Creek enters the Russian River from the south at river mile 31, along the northern border of Forestville. This portion of the Mark West Creek watershed spans approximately 57 square miles.
- (2) Mill Creek. Mill Creek is a tributary to Dry Creek, which enters the Russian River from the west at river mile 42, approximately one mile south of Healdsburg. The Mill Creek watershed spans approximately 23 square miles.
- (3) Green Valley Creek. Green Valley Creek enters the Russian River from the south at river mile 29, along the northwestern border of Forestville. The Green Valley Creek watershed spans approximately 38 square miles.
- (4) Dutch Bill Creek. Dutch Bill Creek enters the Russian River from the south at river mile 13, within the town of Monte Rio. The Dutch Bill Creek watershed spans approximately 12 square miles.

(d) [reserved]

(e) Due to the known hydraulic connection between sub-surface water and surface streams in the Russian River watershed, as well as the limited water use information in the area, additional information on diversions, whether surface or subsurface, and use of water is needed to better assess impacts on surface stream flows. The Deputy Director for the Division of Water Rights

(Deputy Director) may issue informational orders to some or all landowners in, or suppliers of water from, the watersheds identified in subdivision (c)(1), requiring them to provide additional information related to diversion and use of water, including but not limited to the: date of first use, location of diversion, type of diversion, types of beneficial uses, distance of well from the nearest surface stream, depth of the well, well screen interval(s), place of use, estimated diversion amount, estimated use amount, source of water, volume of storage, estimated pumping/diversion rate, amount of water anticipated to be needed this year, or any other information relevant to forecasting use and impacts to the surface streams in the current drought year or in contingency planning for continuation of the existing drought emergency. Any party receiving an order under this subdivision shall provide the requested information within 30 days. The Deputy Director may grant additional time for the submission of information regarding diversion and use of water upon substantial compliance with the 30-day deadline and a showing of good cause.

- (1) Each landowner is responsible for immediately providing notice of any informational order(s) to all water users associated with the parcel of land related to the informational order.
- (2) 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.

- (f) **New Diversions.** For purposes of this subdivision, a new diversion means a surface or subsurface diversion initiated after issuance of a watershed-wide informational order to landowners in the watershed in which the new diversion is located. The owner of any new diversion must submit to the Deputy Director any information required by a watershed-wide informational order issued under subdivision (e) prior to commencement of the new diversion, unless the Deputy Director approves commencement of the diversion based on substantial compliance.
- (g) The State Board has established an email distribution list that landowners or others may join to receive notices and updates regarding informational orders and conservation measures required per this section. Notice provided by email or by posting on the State Board's webpage shall be sufficient for all purposes related to notices and updates regarding the provisions of this section.

Authority: Sections 1058, 1058.5, Water Code

Reference: Article X, Section 2, California Constitution; Sections 100, 102, 104, 105, 109, 174, 275, 1011, 1051, 1052, 1058.5, Water Code; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463