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State Water Resources Control Board

NOTICE OF PROPOSED EMERGENCY RULEMAKING

Emergency Actions due to Insufficient Flow for Specific Fisheries in Tributaries to the Russian River

Proposed Addition of Section 876 to Title 23 and Amendment to the Title of Article 24 in Division 3, Chapter 2 of the California Code of Regulations

Required Notice of Proposed Emergency Action

Government Code section 11346.1, subdivision (a)(2) requires that, at least five working days prior to submission of a proposed emergency action to the Office of Administrative Law (OAL), the adopting agency must provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. After the submission of the proposed emergency to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6. This document provides the required notice.

Proposed Emergency Action

On January 17, 2014, Governor Brown declared a drought state of emergency (January 2014 Proclamation). On March 1, 2014, Governor Brown signed a drought relief package, Senate Bill 104 (Statutes 2014, Chapter 3, Committee on Budget and Fiscal Review), which, among other things, expanded the State Water Board's authority under Water Code section 1058.5.

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."

On April 25, 2014, the Governor 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. The April 2014 Proclamation ordered that the provisions of the January 2014 Proclamation remain in full force and also added several new provisions. As part of the April 2014 Proclamation, the Governor directed the State Water Board to adopt and implement emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right. The Governor's April 2014 Proclamation also suspended environmental review under the California Environmental Quality Act for certain activities, including adoption of emergency regulations by the State Water

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Board pursuant to Water Code section 1058.5. On December 22, 2014, Governor Brown issued Executive Order B-28-14, which extended the suspension of the California Environmental Quality Act for certain activities identified in the January 2014 and April 2014 Proclamations through May 31, 2016.

On April 1, 2015, Governor Brown signed Executive Order B-29-15 (April 2015 Order), replacing the earlier calls for voluntary conservation with directives, among other things, for the State Water Board to impose restrictions to achieve a statewide 25 percent reduction in potable urban water usage through February 2016, with a focus on irrigation of outdoor ornamental landscapes. The April 2015 Order also directs the State Water Board to increase enforcement of waste and unreasonable use violations and to collect increased information from water users. The April 2015 Order mandates that the Governor's January 17, 2014 Proclamation, April 25, 2014 Proclamation, Executive Order B-26-14, and Executive Order B-28-14 remain in full force and effect except as modified.

On June 17, 2015, as part of the regular June 16-17 State Water Board meeting, the State Water Board will consider a proposed resolution adding section 876 to title 23 of the California Code of Regulations, and amending the title of division 3, chapter 2, article 24. The meeting is scheduled to start at 9:00 a.m. and will take place in the Coastal Hearing Room of the Joe Serna Jr.-CalEPA Building, at 1001 "I" Street in Sacramento. In general, proposed section 876 would: (1) establish drought emergency enhanced water conservation requirements; and (2) authorize the State Water Board to issue informational orders regarding surface and sub-surface diversions in order to collect additional water user information in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds. The enhanced conservation requirements would support public trust needs for minimum flows for summer dispersal and summer rearing of state- and federally-listed anadromous fish, while the informational orders would be used to better assess diversions for beneficial use and their impacts on surface stream flows. The conservation measures and the informational orders would apply to both direct diversions from the streams and diversions of sub-surface water.

Proposed Text of Emergency Regulations

See the attached proposed text of the emergency regulation.

Finding of Emergency (Gov. Code, § 11346.1, subd. (b))

The State Water Board finds that an emergency exists due to severe drought conditions, as identified in the Governor's drought emergency proclamations. Immediate action is needed to prevent the waste and unreasonable use of water in priority water bodies, where that water is necessary for threatened and endangered species, in light of limited water availability during the drought. The State Water Board needs to require enhanced water conservation and additional water user information for the protection of specific fisheries in four tributaries: Dutch Bill Creek, Green Valley Creek, portions of Mark West Creek, and Mill Creek. The conservation actions are necessary to help provide a minimum amount of water for the summer rearing and late-fall through spring migration life history stages of state- and federally-listed fish. Immediate action is also needed to obtain information on water diversions, should curtailments or other measures prove to be necessary to provide sufficient flows for summer rearing or the late-fall through spring migration period, or should the current drought fail to end this year.

The State Water Board is unable to address the situation through non-emergency regulations because the need for this regulation has arisen due to the current drought emergency and would not be appropriately addressed by non-emergency regulations.

Authority and Reference (Gov. Code, § 11346.5, subd. (a)(2))

Water Code sections 1058 and 1058.5 provide authority for the emergency regulation. The proposed regulation implements, interprets, or makes specific article X, section 2 of the California Constitution, and sections 100, 102, 104, 105, 109, 174, 275, 1011, 1051, 1052, and 1058.5 of the Water Code. *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463 also describes the authority for adopting this type of reasonable use regulation.

Informative Digest (Gov. Code, § 11346.5, subd. (a)(3))

Immediate action is needed to prevent the waste and unreasonable use of water diverted from priority water bodies that provide habitat for threatened and endangered species in light of limited water availability during the drought. Immediate action is needed to support fish and wildlife and to maintain beneficial uses of water in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds. The California Department of Fish and Wildlife (CDFW) and the National Marine Fisheries Service (NMFS) have identified these four creeks as high priority tributaries for the adoption of an emergency regulation to prevent the extirpation of Central California Coast (CCC) coho salmon from the Russian River watershed. These four tributaries have also been identified as Coho Partnership Priority watersheds (Obedzinski and Nossaman, 2012). All four tributaries support CCC coho salmon and CCC steelhead populations, and do not contain major flow-regulating reservoirs. CCC coho salmon and CCC steelhead present in Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek are at risk of extirpation due to low flow conditions affecting multiple year-classes in this extended drought.

Under existing law, end users of potable water are prohibited from taking certain actions, including: irrigating outdoor ornamental landscapes with potable water in a manner that causes runoff or within 48 hours of measurable rainfall; applying potable water to driveways and sidewalks; and washing motor vehicles with potable water with a hose that is not fitted with an automatic shut-off nozzle. (Cal. Code Regs., tit. 23, § 864.) Given the low flows in the four tributaries resulting from diversions of surface and sub-surface water in the four watersheds, and exacerbated by the current drought conditions, it is necessary to require additional limitations on the uses of water for the protection of the state- and federally- listed species in these watersheds. The proposed regulation targets more discretionary water uses for these additional limitations. Violations of the enhanced conservation measures by a user of water sourced from these four tributaries would be subject to enforcement for both a violation of the regulation under Water Code section 1846 and a criminal infraction, punishable by an administrative civil liability of up to \$500 per day and a fine of up to \$500 per day, respectively.

Informational orders issued by the Deputy Director would be subject to reconsideration and violations would be subject to enforcement pursuant to Water Code section 1846.

Proposed section 876 establishes drought emergency enhanced water conservation requirements, and authorizes the State Water Board to issue informational orders to collect additional water user information in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds. These drought emergency requirements are specified in proposed section 876, subdivisions (d) and (e). Proposed section 876, subdivision (d) requires mandatory water conservation by parties located in the four tributary watersheds. These mandatory water conservation requirements are intended to have an immediate effect, and will help to maintain the summer base flows and habitat conditions (e.g., high dissolved oxygen concentrations, low stream temperatures, and high rates of invertebrate drift) needed to support juvenile coho salmon and juvenile steelhead viability. Proposed section 876, subdivision (e) authorizes the

State Water Board to issue informational orders for surface and sub-surface water diversions. Information collected through the issuance of informational orders will inform the State Water Board's understanding of total water demand and sub-surface water connectivity in the four tributary watersheds.

Information collected through the issuance of informational orders could be used to inform State Water Board curtailment decisions, or other actions, should the conservation measures prove to be insufficient for summer rearing or the late-fall through spring migration period for listed species, or should the current drought continue past this year. The State Water Board could potentially adopt further conservation measures, or diverters in these four tributary watersheds could be curtailed in the order of priority as necessary to maintain a reasonable assurance of maintaining instream flows and habitat conditions needed to support juvenile coho salmon and juvenile steelhead rearing conditions, and the needs of senior users. The proposed regulation would also provide information for important exceptions to priority-based curtailments in order to protect public health and safety.

This emergency regulation is a logical first step to help improve instream flow and habitat conditions in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds. If this emergency regulation is ineffective in improving instream flows and habitat conditions for juvenile salmonids, the State Water Board will evaluate whether additional actions are necessary. Additional actions, including the establishment of minimum instream flows, may be necessary if the enhanced water conservation measures do not improve juvenile coho salmon and juvenile steelhead rearing conditions.

There is no comparable federal statute or regulation. The proposed regulation is not inconsistent or incompatible with existing state regulations.

Other Matters Prescribed by Statute (Gov. Code, § 11346.5, subd. (a)(4))

The proposed emergency regulation would be adopted 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. The proposed updated emergency regulation would be adopted in response to conditions which exist, or are threatened, in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with Section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions.

Local Mandate (Gov. Code, § 11346.5, subd. (a)(5))

The proposed emergency regulation does not impose a mandate on local agencies or school districts because it does not mandate a new program or a higher level of service of an existing program. The regulation is generally applicable to public and private entities, and is not unique to local government. No state reimbursement is required by part 7 (commencing with section 17500) of division 4 of the Government Code.

Estimate of Cost or Savings (Gov. Code, § 11346.5, subd. (a)(6))

The three fiscal effects of the proposed emergency regulation relevant to Government Code section 11346.5, subdivision (a)(6) are the costs that would be incurred by state and local government agencies: (1) to replace ornamental turf; (2) to complete and submit online the information required by an informational order issued pursuant to section 876, and supporting

documentation; and (3) for the Department of Water Resources (DWR) to respond to requests for well completion information by well owners in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds. The State Water Board estimates the total cost to all state and local (including city, county, schools and publicly owned water suppliers) government agencies due to the proposed emergency regulation as approximately \$4,846,495. The total cost for all local (including city, county, schools, and publically owned water suppliers) and state agencies for ornamental turf replacement is \$4,118,040 (\$166,400 for the State of California, \$374,040 for local schools and school districts, and \$3,577,600 for other local government entities). The total cost for all local (including city, county, schools, and publically owned water suppliers) and state agencies to fill out informational orders is \$336,505 (\$14,105 for the State of California, \$21,158 for local schools and school districts, and \$301,242 for other local government entities). The total estimated cost to the DWR as a consequence of the proposed regulation is \$391,950 for staff time needed to fulfill well completion report requests. The proposed emergency regulation is not anticipated to result in costs or savings in federal funding to the State.

All of the above are explained in greater detail in the State Water Board's Emergency Regulation Digest, which is available at:

www.waterboards.ca.gov/waterrights/water_issues/programs/drought/water_action_russianriver.shtml

The text of the regulation is available at:

http://www.waterboards.ca.gov/board_info/agendas/2015/jun/061715_12_emergency_reqs.pdf

The agenda for the State Water Board's June 16-17, 2105 meeting is available at:

http://www.waterboards.ca.gov/board_info/calendar/index.shtml#jun15.

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Emergency Actions due to Insufficient Flow for Specific Fisheries in Tributaries to the Russian River

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 Emergency Enhanced Water Conservation and Additional Water User Information for the Protection of Specific Fisheries in Tributaries to the Russian River

The State Water Resources Control Board (State Board) has determined that it is a waste and unreasonable use of water under Article X, section 2 of the California Constitution to divert or use water sourced from within the watersheds listed in subdivision (c) in a manner inconsistent with subdivision (d) during the current drought emergency, regardless of water right seniority, given limited available supply and the need for the water to support other more critical uses.

(a) For the purposes of this section:

- (1) "Gray water" means all untreated rainwater collected in a runoff capture system or any water meeting the definition in Health and Safety Code section 17922.12.
- (2) "Ornamental turf" means all turf other than turf used for community recreation by education facilities, recreation-related business, non-profit organizations, or recreational facilities, including but not limited to sports fields and playgrounds, that are generally accessible to the public.
- (3) "Landscapes" includes all plantings besides ornamental turf, including but not limited to trees, annual plants, perennial plants, and edible plants, but does not include agricultural commodities meeting the definition of Government Code section 51201, subdivision (a).

(b) For the protection of threatened and endangered fish, all water users who receive water from diversions sourced within the watersheds designated in subdivision (c) shall comply with subdivision (d). To better assess impacts on surface stream stage and flow, all landowners in, or suppliers of water from, the watersheds designated in subdivision (c) shall comply with subdivision (e).

(c)(1) The 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). All landowners and water users within the following watersheds and the use of said water shall be subject to this section.

- (A) 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.
 - (B) 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.
 - (C) 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.
 - (D) 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.
- (2) The State Board recognizes that the upper portion of each of the watersheds listed in (c)(1) is the most critical for mid- to late-summer rearing of state and federally threatened and endangered salmon and steelhead species. These upper portions are defined as:
- (A) On Mark West Creek, the portion of the watershed upstream of the confluence with an unnamed tributary (the tributary flowing parallel to western Riebli Road) as defined by the Latitude/Longitude of 38.5066°N and 122.72607°W.
 - (B) On Mill Creek, the portion of the watershed upstream of the confluence with Felta Creek, and including Felta Creek, as defined by the Latitude/Longitude of 38.58098°N and 122.88306°W.
 - (C) On Green Valley Creek, the portion of the watershed upstream of the confluence with Atascadero Creek as defined by the Latitude/Longitude of 38.44841°N and 122.88697°W.
 - (D) On Dutch Bill Creek, the portion of the watershed upstream of the confluence with Tyrone Gulch as defined by the Latitude/Longitude of 38.44776°N and 122.99979°W.
- (d)(1) The use of potable and non-potable water sourced from areas identified in accordance with subdivision (d)(3) is prohibited for any of the following actions, except where necessary to address an immediate health and safety need or where used exclusively for irrigation for commercial agricultural use meeting the definition of Government Code section 51201, subdivision (b):
- (A) The application of water, except gray water, to ornamental turf;
 - (B) The application of water to landscapes in a manner that causes runoff such that water flows onto adjacent property, non-irrigated areas, private and public walkways, roadways, parking lots, or structures;
 - (C) The application of water, except gray water, to landscapes more than two days per week;
 - (D) The application of water, except gray water, to landscapes between the hours of 8:00a.m. to 8:00p.m.;

- (E) Washing motor vehicles, except with gray water or at car wash facilities where the water is part of a recirculating system;
 - (F) The application of water to driveways and sidewalks;
 - (G) The use of water, except gray water, to fill or refill decorative ponds, fountains and other decorative water features;
 - (H) The use of water, except gray water, in a fountain or other decorative water feature, except where the water is part of a recirculating system; and
 - (I) The application of water to landscapes during and within 48 hours after measurable rainfall.
- (2) To prevent the waste and unreasonable use of water and to promote water conservation, operators of hotels and motels shall provide guests with the option of choosing not to have towels and linens laundered daily, if daily laundering is offered. The hotel or motel shall prominently display and/or communicate notice of this option to each guest using clear and easily understood language.
- (3) The conservation measures identified in subdivisions (d)(1) and (d)(2) shall take effect immediately for all water users who receive water from diversions, whether surface or subsurface, sourced from within the watersheds designated in subdivision (c)(2). The Deputy Director for the Division of Water Rights (Deputy Director), after consultation with the California Department of Fish and Wildlife (CDFW) or the National Marine Fisheries Service (NMFS), may extend those requirements to some or all of the remainder of each tributary watershed identified in subdivision (c) to support CCC steelhead and CCC coho salmon passage this migratory season. The Deputy Director may, after consultation with CDFW or NMFS, lift the conservation measures identified in subdivisions (d)(1) and (d)(2) for all or any portion of the watersheds listed in subdivision (c), based on availability of sufficient streamflow in the tributaries to protect CCC coho salmon and CCC steelhead.
- (4) Subdivision (d) shall not place additional restrictions on a party who participates in a voluntary drought initiative program (program) determined by CDFW or NMFS to be at least equivalent to the conservation measures in subdivisions (d)(1) and (d)(2), so long as the party fully complies with the terms and conditions of the program. CDFW or NMFS must provide the Division of Water Rights with a copy of the program and a list of all parties included in the program to confirm participation. Participation in such a program shall not affect any other obligations to implement conservation practices, comply with informational orders, curtail diversions, or comply with other requirements or prohibitions not based on subdivision (d).
- (5) The conservation measures required by subdivision (d) do not supersede or affect other conservation requirements for water suppliers, or individual end users.
- (6) The taking of any action prohibited in subdivisions (d)(1) or failure to take the action required by subdivision (d)(2) is an infraction, punishable by a fine of up to five hundred dollars (\$500) for each day in which the violation occurs. The fine for the infraction is in addition to, and does not supersede or limit, any other remedies, civil or criminal, including civil liability pursuant to Water Code section 1846.

- (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 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 2014 diversion amount, estimated 2014 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