

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 Readoption and Amendment of Section 876 of Title 23 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

Background of Drought Emergency

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 Resources Control Board's (State Water Board) 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 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), 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.

On November 13, 2015, Governor Brown issued [Executive Order B-36-15](#), which extends the terms of previous drought declarations through October 31, 2016 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.

Emergency Regulation to Protect Fisheries in Russian River Tributaries

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. OAL approved the emergency regulation, and the emergency regulation went into effect on July 6, 2015. The emergency regulation approved on July 6, 2015 requires: 1) enhanced water conservation in critical areas of the four watersheds; and 2) information on water diversion and use if requested by the Deputy Director for the Division of Water Rights (Deputy Director). On August 24, 2015, the Deputy Director issued [Order WR 2015-0026-DWR](#) (Informational Order) requiring all landowners in and suppliers of water from the four watersheds (approximately 10,100 parties) to provide information on their sources and uses of water. On October 28 and October 30, 2015, reminder letters were mailed to all landowners and water suppliers who had not submitted information in response to the Informational Order. On December 15, 2015, Administrative Civil Liability Complaints were issued to landowners and water suppliers who still had not submitted information in response to the Informational Order. 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. If the State Water Board does not take action to readopt the regulation, it will expire on April 1, 2016.

On March 1, 2016, as part of the State Water Board's regularly-scheduled public meeting, the State Water Board adopted a resolution to update and readopt portions of section 876 of title 23 of the California Code of Regulations. In general, updated section 876 would authorize the State Water Board to issue informational orders regarding surface water and sub-surface diversions in order to collect additional water user information in the Dutch Bill Creek, Green Valley Creek, portions of Mark West Creek, and Mill Creek watersheds. The proposed update to section 876 would also authorize the State Water Board to follow up with landowners and water suppliers regarding partial data submissions or to clarify and correct information previously submitted. The information collected through the informational orders would be used to better assess diversions for beneficial use and their impacts on surface stream flows. The informational order authority would apply to both surface 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 water is necessary for threatened and endangered species, in light of limited water availability during the drought. The State Water Board needs to require 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. Immediate action is needed to obtain information on water diversions 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 should the drought or dry conditions continue this year or into future years. The information would also benefit drought responses in future droughts or dry conditions.

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 gather more complete information regarding water diversion and use in priority water bodies that provide habitat for threatened and endangered species in light of limited water availability during the drought, and the potential need to implement measures to ensure that there is not waste or unreasonable use, or unreasonable method of diversion if drought or dry conditions persist. Dutch Bill Creek, Green Valley Creek, portions of Mark West Creek, and Mill Creek watersheds are priority watersheds for endangered and threatened salmonids. 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, portions of 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.) No changes to the existing statewide water conservation regulation would be made, and enhanced conservation measures

adopted under this emergency regulation in 2015 for these tributaries will not be readopted at this time. The information gathered will inform the scope, timing and form of any additional conservation or other requirements needed this year or in future years should the drought continue.

Proposed section 876 authorizes the State Water Board to issue informational orders to landowners and water suppliers in order to collect additional water user information in the Dutch Bill Creek, Green Valley Creek, portions of Mark West Creek, and Mill Creek watersheds. The drought emergency requirements are specified in proposed section 876, subdivision (e). Proposed section 876, subdivision (e) authorizes the State Water Board to issue informational orders regarding surface water 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. Continuation of the informational order authority will allow the State Water Board to collect more 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.

Informational orders issued by the State Water Board's Deputy Director for the Division of Water Rights would be subject to reconsideration and violations would be subject to enforcement pursuant to Water Code section 1846.

Information collected through the issuance of informational orders will be used to inform actions in the short term, if the drought continues this year or in subsequent years. Collection of a complete and accurate data set in the four watersheds will help to better inform any voluntary agreement efforts, curtailments, reasonable use determinations, conservation requirements, or other measures in a focused manner. This dataset would allow the State Water Board to consider a broader range of options, including more tailored options, in response to ongoing or future drought conditions. Such information and data are expected to provide the State Water Board with the ability to better understand the effects of curtailments of certain uses, identify outliers to assess whether requiring changes would provide the benefits being sought by its actions, and better understand how the various uses (e.g., domestic, agriculture, etc.) in these watersheds impact streamflow.

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 require reporting of diversion and use in furtherance of the prevention of 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, as described under Water Code section 1058.5. 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 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 to respond to any requests for additional information the State Water Board may require pursuant to the prior informational orders and any new informational orders.

The total cost for all local (including city, county, schools and publically-owned water suppliers) and state agencies to supply additional information required by the State Water Board under the proposed regulation is estimated to be \$54,275 (\$2,275 for the State of California, \$3,412.50 for local schools and school districts, and \$48,587.50 for other local government entities).

There are not expected to be any other nondiscretionary costs or savings to local agencies from the regulation, nor is the regulation anticipated to result in costs or savings in federal funding to the State.

The proposed emergency regulation is not anticipated to result in costs or savings in federal funding to the State.

All of the above information is 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

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

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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), 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