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## State Water Resources Control Board

### **NOTICE OF PROPOSED EMERGENCY RULEMAKING**

#### **Adoption of Emergency Information Order Reporting Regulations for the Clear Lake Watershed**

#### **Proposed Addition of Chapter 4.6 and Sections 1050, 1051, and 1052 within Title 23, Division 3 of the California Code of Regulations**

**November 27, 2023**

#### **Required Notice of Proposed Emergency Action**

The State Water Resources Control Board (State Water Board or Board) is providing this notice of proposed emergency rulemaking as required by Government Code section 11346.1, subdivision (a)(2). Government Code section 11346.1, subdivision (a)(2), requires that the adopting agency must provide notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. The notice must be provided at least five working days before the agency submits a proposed emergency action to the Office of Administrative Law (OAL). This document provides the required notice. After the agency submits the proposed emergency regulations to OAL, OAL allows interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

#### **Proposed Emergency Action**

On April 21, 2021, Governor Newsom proclaimed a drought State of Emergency for Mendocino and Sonoma counties. On May 10, 2021, the Governor expanded the emergency to 41 counties, including Lake County. On March 28, 2022, the Governor acknowledged continued drought conditions and called for increased conservation. On March 24, 2023, the Governor issued Executive Order N-5-23, which recognized that while conditions have improved in some parts of the State, other parts remain in drought, and continued State action is needed to address ongoing impacts of the drought emergency on the Clear Lake hitch (hitch). As part of the order, the Governor directed the State Water Board to consider emergency regulations to establish minimum instream flows to mitigate the effects of drought on the hitch.

Water Code section 1058.5 grants the State Water Board authority to adopt emergency regulations 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

**E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR**

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 December 6, 2023, the State Water Board will consider a proposed resolution to add the proposed Emergency Information Order Regulations for the Clear Lake Watershed (emergency regulations) as chapter 4.6 to California Code of Regulations, Title 23, Division 3. The emergency regulations would allow the Board to collect information from some or all water users, including groundwater pumpers, in the Clear Lake Watershed (watershed). The information collected will inform the Board's evaluation of how groundwater pumping and other water uses in the watershed may influence creek flows that are critical for hitch spawning and migration and will assist the Board's efforts to protect the hitch.

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

The State Water Board finds that an emergency exists in the Clear Lake watershed due to the impacts of severe record-breaking droughts, as identified in Executive Order N-5-23. Immediate action is needed to address drought impacts to the hitch. The State Water Board requires emergency regulatory authority to gather information on water use in the watershed to inform the Board's evaluation of how groundwater pumping and other water uses in the watershed may influence creek flows that are critical for hitch spawning and migration and will assist the Board's efforts to protect the hitch.

The State Water Board is unable to address the situation through non-emergency regulations because the need for these regulations has arisen due to the emergency resulting from drought impacts and would not be appropriately or timely addressed by non-emergency regulations. Non-regulatory efforts have thus far been insufficient to provide a minimum level of protection for the hitch during these drought conditions.

More information regarding the State Water Board's finding of emergency can be found in the Informative Digest for the emergency regulations available on the [Clear Lake Hitch webpage](#).

**Proposed Text of Emergency Regulations**

See the attached text of the emergency regulations.

On September 5, 2023, the State Water Board released draft emergency regulations for public review and comment. Written comments were due on October 31, 2023. The emergency regulations are also available on the [Clear Lake Hitch webpage](#).

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

Water Code sections 1058 and 1058.5 provide authority for the emergency regulations. The emergency regulations implement, interpret, or make specific Article X, section 2 of the California Constitution, and sections 100, 100.5, 104, 105, 106.3, 109, 187, 275, 348, 1011, 1011.5, 1051, 1052, 1055, 1058.5, 1253, 1825, 1831, 1841, and 5106 of the

Water Code. The emergency regulations also interpret and implement the State Water Board's authority to prevent the unreasonable use of water, described in *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, and *EDF v. EBMUD* (1980) 26 Cal.3d 183.

Authorities and references associated with the emergency regulations can also be found under each section of the emergency regulations text available on the [Clear Lake Hitch webpage](#).

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

California is currently recovering from a significant drought that included the driest three-month period on record (January-March 2022) and occurred on the heels of the record-setting drought of 2012-2016. While conditions have improved in many parts of the state, it will take communities and ecosystems across California many years to recover from the impacts of successive multi-year droughts. This need is particularly acute in the Clear Lake watershed, where the hitch, a threatened species under the California Endangered Species Act, is suffering from critically low populations, with very low returns to key spawning creeks from 2017 to 2022.

Therefore, the State Water Board finds that an emergency exists due to the impacts of multi-year droughts and that adoption of the Emergency Information Order Regulations for the watershed are necessary to address the emergency. The emergency regulations are designed to allow the State Water Board to collect information from some or all water users, including groundwater pumpers, in the watershed. The information collected would inform the Board's evaluation of how groundwater pumping and other water uses in the watershed may influence creek flows that are critical for hitch spawning and migration and will assist the Board's efforts to protect the hitch.

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

Water Code section 1058.5 grants the State Water Board the authority to adopt emergency regulations to prevent the unreasonable use of water, to require curtailment of diversions when water is not available under the diverter's priority of right, and to require related monitoring and reporting.

The emergency regulations would be adopted to require reporting of diversion or use or the preparation of monitoring reports in furtherance of preventing the unreasonable use of water, promoting water conservation, and evaluating or establishing minimum instream flows.

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

The emergency regulations do not impose a mandate on local agencies or school districts because they do not mandate a new program or a higher level of service of an

existing program. The emergency regulations are generally applicable to public and private entities and are 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 resulting from the emergency regulations are the costs that state and local government agencies could incur in response to any requirements therein, pursuant to Government Code section 11346 et seq. The Fiscal Impact Statement has been prepared in accordance with State Administrative Manual 6600-6616.

Because these emergency regulations are solely authorizing the State Water Board to issue information orders, the only fiscal effect that state and local government agencies could incur would be the cost to submit water use reports. The Board estimates the maximum amount of staff time is one eight-hour day to complete all reporting obligations at an assumed pay rate of \$65 per hour, for a total cost of \$520 per report. Staff have determined that there are two local government agencies with surface water rights in the watershed, Lake County Watershed Protection District and the City of Lakeport Municipal Sewer District. Additionally, 16 cities, county water districts, county service areas, and other government entities may divert groundwater and therefore potentially be affected. Accordingly, the total estimated maximum cost to all local agencies combined is \$9,880.

Due to the limited timeframe that the emergency regulations will be in effect, there will be no fiscal impacts to any state, local, or federal agency beyond the expiration of the emergency regulations one year after adoption. Impacts are assumed to be limited to Fiscal Year 2023-2024.

Proposed Emergency Regulations text:

**Emergency Information Order Regulations for the Clear Lake Watershed**

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In Title 23, Division 3, Chapter 4.6, Article 1, adopt sections 1050, 1051, and 1052, to read:

**§ 1050. Definitions**

- (a) "Clear Lake Watershed" refers to the collective area within the following watersheds as defined by the National Watershed Boundary Dataset 12-digit Hydrologic Unit Codes: Thurston Lake (180201160301), Cole Creek (180201160302), Kelsey Creek (1802011603), McGaugh Slough-Frontal Clear Lake (180201160305), Adobe Creek (180201160304), Manning Creek-Frontal Clear Lake (180201160306), Rodman Slough-Frontal Clear Lake (180201160307), Lower Scott's Creek (180201160104), Middle Scott's Creek (180201160103), Upper Scott's Creek (180201160102), South Fork Scott's Creek (180201160101), Salt Flat Creek - Middle Creek (180201160204), West Fork Middle Creek (180201160202), East Fork Middle Creek (180201160201), Clover Creek ( 180201160203), Burns Valley - Frontal Clear Lake (180201160309), Schindler Creek - Frontal Clear Lake (180201160308), Copsey Creek (180201160601), Seigler Canyon Creek - Cache Creek (180201160602), and Clear Lake (180201160310).
- (b) "Deputy Director" means the Deputy Director of the State Water Resources Control Board's Division of Water Rights.
- (c) "Diversion" means taking water by gravity or pumping from a surface stream or subterranean stream flowing through a known and definite channel, or other body of surface water, into a canal, pipeline, or other conduit, and includes impoundment of water in a reservoir, as defined in Water Code section 5100, subd. (c).
- (d) "Extraction" means taking groundwater.
- (e) "Groundwater" means water beneath the surface of the earth within the zone below the water table in which the soil is completely saturated with water, but does not include water that flows in known and definite channels unless included pursuant to Section 10722.5, as defined in Water Code section 10721, subd. (g).

**§ 1051. Information Orders**

- (a) The Deputy Director, or delegee, may issue an order to any water right holder or water user to provide information related to the diversion, extraction, or use of

water in the Clear Lake watershed relevant to the Board's Clear Lake hitch protection efforts, including groundwater well location and depth, beneficial uses of diverted or extracted water, place of use of diverted or extracted water, volume and timing of diversions or extractions, the basis of right with supporting documents or other evidence, parcel information, or any other information. Orders may require recipients to report diversions or extractions made in prior months and diversions or extractions anticipated during subsequent months. Orders may require recipients to report information on a repeated or ongoing basis.

- (b) Any water right holder or water user receiving an order under subdivision (a) of this section must provide the requested information within the deadlines specified in the order, including any recurring deadlines associated with ongoing reporting requirements as applicable. The Deputy Director or delegee may grant additional time for submission of information upon substantial compliance with the specified deadline and a showing of good cause. Information provided pursuant to subdivision (a) of this section must be submitted in an online form maintained by the State Water Board and accessible through its website, or through an alternative compliance mechanism as specified by the Deputy Director or delegee.
- (c) Failure to provide the information required under subdivision (a) of this section within the deadlines specified in the order or any time extension granted by the Deputy Director or delegee is a violation subject to civil liability of up to the maximum allowed by statute per day for each day the violation continues pursuant to Water Code section 1846.
- (d) In determining whether to impose reporting requirements under subdivision (a) of this section, the Deputy Director will consider the need for the information and the burden of producing it and will make reasonable efforts to avoid requiring duplicative reporting of information that is already in the State Water Board's possession.
- (e) All orders issued under subdivision (a) of this section will be subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code.
- (f) Compliance with this article, including any conditions of certification or approval of a petition under this article, will constitute a condition of all water right permits, licenses, certificates and registrations for diversions from any watershed identified in this article.
- (g) Authorities delegated to the Deputy Director under this article may be redelegated.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 7, 100, 186, 187, 275, 348, 1051, 1052, 1055, 1058.5, 1253, 1825, 1831, 1841, 1846, Water Code; Sections 1822.50 et al., California Code of Civil Procedure; National Audubon Society v. Superior Court (1983) 33 Cal.3d 419; Environmental Law Foundation v. State Water Resources Control Board (2018) 26 Cal.App.5th 844.

**§ 1052. Compliance and Enforcement**

- (a) A water right holder or water user must comply with an order issued under this article, all conditions of certification or approval of a petition under this article, and all water right conditions under this article, notwithstanding receipt of more than one order. To the extent of any conflict between applicable requirements, the diverter must comply with the requirements that are the most stringent.
- (b) When conducting an inspection to assess a water user's compliance with this article, the State Water Board may obtain an inspection warrant pursuant to the procedures set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure where access is not granted by the property owner.
- (c) Failure to meet the requirements of this article or of any order issued thereunder constitutes a violation subject to civil liability pursuant to Water Code section 1846, and an infraction pursuant to Water Code section 1058.5, subdivision (d), each of which can carry a fine of up to the maximum allowed by statute for each day in which the violation occurs.
- (d) Nothing in this section will be construed as limiting the enforceability of or penalties available under any other provision of law.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1052, 1055, 1058.5, 1825, 1831, 1846, Water Code; Sections 1822.50 et al., California Code of Civil Procedure; National Audubon Society v. Superior Court (1983) 33 Cal.3d 419; Environmental Law Foundation v. State Water Resources Control Board (2018) 26 Cal.App.5th 844.

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November 27, 2023  
Date

  
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Courtney Tyler  
Clerk to the Board