

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2015-0045**

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

WHEREAS:

1. On January 17, 2014, Governor Edmund G. Brown, Jr., declared a drought state of emergency ([January 2014 Proclamation](#)). The January 2014 Proclamation finds that dry conditions and lack of precipitation present urgent problems to drinking water supplies and cultivation of crops, which put farmer's 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. On March 1, 2014, Governor Brown signed a drought relief package, [Senate Bill 104](#) (Statutes 2014; Chapter 3; Committee on Budget and Fiscal Review) to, among other things: provide funding to improve conservation and emergency supplies; reduce fire risk and increase fire-fighting capabilities; and expand the State Water Resources Control Board's (State Water Board) authority under Water Code section 1058.5 and increase penalties for unauthorized diversion of water. 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. On December 22, 2014, Governor Brown issued [Executive Order B-28-14](#), which extended the California Environmental Quality Act suspension through May 31, 2016 for certain activities identified in the January 2014 and April 2014 Proclamations;
2. On March 17, 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). This drought emergency regulation authorizes the Deputy Director for the Division of Water Rights to issue informational orders against any water right holder, diverter or user in response to: complaints; a claim of a previously unreported water right; a claim to contract or transfer water that is not supported by a water right; or an allegation of actual or threatened waste, unreasonable use or method of diversion, or unlawful diversions of water. The emergency regulation regarding Informational Orders became effective March 27, 2015 upon approval by Office of Administrative Law (OAL);
3. On April 1, 2015, Governor Brown issued [Executive Order B-29-15](#) that replaces 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 order also directs the State Water Board to increase enforcement of waste and unreasonable use violations and to collect increased information from water users;

4. On May 5, 2015, the State Water Board adopted an emergency regulation amending and readopting an existing [drought emergency regulation for Statewide Urban Water Conservation](#) (California Code of Regulations, title 23, sections 863-866), which includes end-user conservation restrictions and mandatory conservation requirements for urban water suppliers. The emergency regulation for Statewide Urban Water Conservation became effective May 18, 2015 upon approval by OAL;
5. 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;
6. 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. Conditions this year are as dry as or drier than last year. In this severe drought, action is needed to maintain connectivity in the pools to support the rearing habitat of juvenile CCC coho salmon and CCC steelhead;
7. In 2014, based on severe drought conditions and need to protect the species, CDFW undertook significant efforts to enter into the type of 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. Earlier this year, CDFW and the State Water Board redoubled efforts to secure voluntary use reductions, meeting locally with many diverters in the affected watersheds. However, the effort, with less than two percent of area landowners currently participating, is not providing the minimal amount of water savings needed for survival of this year's CCC coho salmon cohort;
8. 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. 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. In these four tributaries, there are also significant numbers of surface and sub-surface diversions, including private domestic diversions, that are not subject to the conservation standards adopted by the State Water Board on May 5, 2015;

9. 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";
10. 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.) In support of water conservation, the legislature has, through Water Code section 1011, deemed reductions in water use due to conservation as equivalent to reasonable beneficial use of that water. 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, this regulation is in furtherance of article X, section 2 during this drought emergency;
11. In collaboration with CDFW and NMFS, State Water Board staff has identified the need to establish and implement emergency drought requirements, to preserve additional water instream for the protection of CCC coho salmon and CCC steelhead in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds. The regulation consists of two elements: (1) enhanced conservation measures for all users of surface and sub-surface water diverted within the four watersheds; and (2) enhanced information order authority that will allow the State Water Board to acquire information in circumstances beyond those covered under the existing information order emergency regulation;
12. Based on available information, it appears that restrictions on irrigation of ornamental turf and landscapes and other identified water uses will not have significant economic impacts, but should account for a significant amount of water diverted from the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds. Restrictions on these non-critical uses are expected to provide the small amount of water necessary to support survival of juvenile CCC salmon and CCC steelhead in these watersheds over the summer, and support late fall through spring migration, during the drought emergency. These conservation measures are based on the existing drought emergency water conservation regulation measures, though they go further than those restrictions and also extend to both potable and non-potable water use in the affected watersheds;

13. Reducing water use in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds is immediately necessary to promote conservation, prevent waste and unreasonable use, address the drought emergency, and maintain summer instream flow conditions needed to support CCC coho salmon and CCC steelhead viability, and continued or further reductions in water use will be necessary to protect these species in fall, winter, and spring migrations, unless the drought emergency eases. The conservation measures constitute a reasonable immediate step to address critical needs of these species for survival, and, in combination with other ongoing and potential fishery protection measures in the watersheds, may prove to provide sufficient water for the duration of the rearing and migration seasons. If these conservation measures prove to be inadequate, additional measures may be needed, including possible curtailment of diversions in the watersheds;
14. 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. In addition, CDFW has indicated that several unreported surface diversions likely 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. Informational orders regarding surface water and sub-surface water diversions and uses in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds are necessary to address the information gap;
15. Closing the information gap is necessary to more fully understand water use in the watersheds, and assist the State Water Board in issuing curtailments or further water use restrictions in the future, should the proposed conservation efforts alone fail to provide sufficient protection for the year-class of salmonids in these four high-priority streams, or there is insufficient water to meet the projected demand;
16. The State Water Board is adopting the emergency regulation because of emergency drought conditions and the need for prompt action;
17. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to 270 days; and
18. 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 adopts California Code of Regulations, title 23, section 876, and amends the title of article 24 in division 3, chapter 2, 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 for the Division of Water Rights, or their designees may make such changes; and
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.

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 June 17, 2015.

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

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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 [reserved] 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) "Untreated rainwater or 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 untreated rainwater or 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 untreated rainwater or gray water, to landscapes more than two days per week;
 - (D) The application of water, except untreated rainwater or gray water, to landscapes between the hours of 8:00a.m. to 8:00p.m.;

- (E) Washing motor vehicles, except with untreated rainwater or 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 untreated rainwater or gray water, to fill or refill decorative ponds, fountains and other decorative water features;
 - (H) The use of water, except untreated rainwater or 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