

PROPOSED TEXT OF REGULATION

Title 23. Waters

Division 3. State Water Resources Control Board and Regional Water Quality Control Boards

Chapter 2. Appropriation of Water

~~**Article 22. Prevention of Waste and Unreasonable Use**~~

Chapter 3. Determination of Right to the Use of Water

Article 2. Adjudications Under Water Code Sections 2500 Through 2900

Chapter 3.5. Conservation and the Prevention of Waste and Unreasonable Use

Article 1. Prevention of Waste and Unreasonable Use

~~§ 955. Claims to Water Supplied by District or Water Company. [Renumbered]~~

~~§ 855. § 955.~~ Policy and Definition.

(a) In investigating any uses of water and making the determinations required by this article, the board shall give particular consideration to the reasonableness of use of ~~reclaimed~~ recycled water or reuse of water.

(b) As used in this article, “misuse of water” or “misuse” means any waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water.

Authority cited: Section 1058, Water Code.

Reference: Sections 100, 275, 1240, 1251, 1253 and 1257, Water Code; and Section 2, Article X, California Constitution.

~~§ 956. Divided Interests. [Renumbered]~~

~~§ 856. § 956.~~ Investigations.

The board staff shall investigate an allegation of misuse of water:

- (1) when an interested person shows good cause, or
- (2) when the board itself believes that a misuse may exist.

Authority cited: Section 1058, Water Code.

Reference: Sections 100, 183, 275 and 1051, Water Code; and Section 2, Article X, California Constitution.

~~§ 957. Undivided Interests. [Renumbered]~~

~~§ 857. § 957.~~ Notifications, Hearings and Orders.

(a) If the investigation indicates that a misuse of water has occurred, the board staff shall notify interested persons and allow a reasonable period of time in which to terminate such misuse or demonstrate to the satisfaction of the board staff that misuse has not occurred.

(b) At the end of the time set by the board staff, and upon application of any interested person or upon its own motion, the board may hold a hearing to determine if misuse has occurred or continues to occur.

(c) If the misuse is alleged to have occurred or to continue to occur in connection with exercise of rights evidenced by a permit or license issued by the board, the board shall

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notice the hearing as a permit revocation hearing pursuant to Water Code Section 1410.1, or as a license revocation hearing pursuant to Water Code Section 1675.1, as appropriate; or as a preliminary cease and desist order hearing pursuant to Water Code Section 1834.

(d) The board may issue an order requiring prevention or termination thereof.

Authority cited: Section 1058, Water Code.

Reference: Sections 100, 275, 183, 1051, 1401, 1675.1 and 1834, Water Code.

~~§ 958. General Requirements for Proofs of Claims. [Repealed]~~

~~§ 858.~~ § 958. Noncompliance with Order Regarding Misuse Under Water Right Entitlement.

If a permittee or licensee does not comply with any order issued pursuant to Section ~~857957~~ within such reasonable period of time as allowed by the board, or such extension thereof as may for good cause be allowed by the board, and if such order includes a finding that waste, unreasonable use, method of use, or method of diversion has occurred in connection with exercise of a right evidenced by a permit or license issued by the board, a revocation action may be commenced by the board:

(a) If the hearing has been noticed as a permit or license revocation hearing, and if the board finds that misuse has occurred or continues to occur, the board may order the permit or license revoked or impose appropriate additional or amended terms or conditions on the entitlement to prevent recurrence of the misuse;

(b) If the hearing pursuant to Section ~~857957~~ has been noticed as a preliminary cease and desist order hearing, and if the board finds that misuse has occurred or continues to occur, the board may issue a preliminary cease and desist order.

Authority cited: Section 1058, Water Code.

Reference: Sections 1410, 1675 and 1831, Water Code.

~~§ 959. Specific Requirements for Irrigation Proofs. [Repealed]~~

~~§ 859.~~ § 959. Noncompliance with Other Order.

If a person other than a permittee or licensee does not comply with any order issued pursuant to Section ~~857957~~ within such reasonable period of time as allowed by the board, or such extension thereof as may for good cause be allowed, and if such order includes a finding that such person has misused or continues to misuse water, the board may request appropriate legal action by the Attorney General.

Authority cited: Section 1058, Water Code.

Reference: Section 275, Water Code.

~~§ 960. Uses Other than Irrigation. [Repealed]~~

~~§ 860.~~ § 960. Alternative Procedure.

The procedure established in this article shall be construed as alternative to, and not exclusive of, the procedures established in Chapter 5 of Title 23, California Administrative Code, in accordance with Section 4007 therein.

Authority cited: Section 1058, Water Code.

Reference: Section 275, Water Code.

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~~§ 961. Signature of Deponent. [Renumbered]~~

~~§ 735.~~ § 961. Napa River, Special.

(a) Budding grape vines and certain other crops in the Napa Valley may be severely damaged by spring frosts. During a frost, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users frequently exceeds the supply in the Napa River stream system. This results in uncoordinated diversions and possible infringements upon other rights. Therefore, all diversions of water from the stream system between March 15 and May 15 determined to be significant by the board or a court of competent jurisdiction shall be considered ~~unreasonably unreasonable~~ and a violation of Water Code Section 100 unless controlled by a watermaster administering a board or court approved distribution program. Diversions for frost protection and irrigation during this period shall be restricted to: (1) replenishment of reservoirs filled prior to March 15 under an appropriative water right permit, or (2) diversions permitted by the court.

(b) The service area of the distribution program may be revised at any time by order of the board or the court. The board will retain jurisdiction to revise terms and conditions of all frost protection permits should future conditions warrant.

(c) Under this section diversion of water during the spring frost season from March 15 to May 15 to replenish water stored in reservoirs prior to the frost season is "regulation," as defined in Chapter 2, Article 2, Section 657: Replenishment diversion must be to reservoirs for which a permit or license authorizing winter storage prior to the frost season has been issued.

Authority cited: Section 1058, Water Code.

Reference: Section 2, Article X, California Constitution; and Sections 100, 275 and 1051.5, Water Code.

~~§ 962. Objections. [Renumbered]~~

~~§ 862.~~ § 962. Russian River, Special.

Budding grape vines and certain other crops in the Russian River watershed may be severely damaged by spring frosts. Frost protection of crops is a beneficial use of water under section 671 of ~~this chapter 2 of this division~~. During a frost, however, the high instantaneous demand for water for frost protection by numerous vineyardists and other water users may contribute to a rapid decrease in stream stage that results in the mortality of salmonids due to stranding. Stranding mortality can be avoided by coordinating or otherwise managing diversions to reduce instantaneous demand. Because a reasonable alternative to current practices exists, the Board has determined these diversions must be conducted in accordance with this section.

(a) After March 14, 2012, except for diversion upstream of Warm Springs Dam in Sonoma County or Coyote Dam in Mendocino County, any diversion of water from the Russian River stream system, including the pumping of hydraulically connected groundwater, for purposes of frost protection from March 15 through May 15, shall be diverted in accordance with a board approved water demand management program (WDMP). For purposes of this section, groundwater pumped within the Russian River watershed is considered hydraulically connected to the Russian River stream system if that pumping contributes to a reduction in stream stage to any surface stream in the Russian River watershed during any single frost event.

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(b) The purpose of the WDMP is to assess the extent to which diversions for frost protection affect stream stage and manage diversions to prevent cumulative diversions for frost protection from causing a reduction in stream stage that causes stranding mortality. The WDMP, and any revisions thereto, shall be administered by an individual or governing body (governing body) capable of ensuring that the requirements of the program are met. Any WDMP developed pursuant to this section shall be submitted to the board by February 1 prior to the frost season.

(c) At a minimum, the WDMP shall include (1) an inventory of the frost diversion systems within the area subject to the WDMP, (2) a stream stage monitoring program, (3) an assessment of the potential risk of stranding mortality due to frost diversions, (4) the identification and timelines for implementation of any corrective actions necessary to prevent stranding mortality caused by frost diversions, and (5) annual reporting of program data, activities, and results. In addition, the WDMP shall identify the diverters participating in the program and any known diverters within the area subject to the WDMP who declined to participate. The WDMP also shall include a schedule for conducting the frost inventory, developing and implementing the stream stage monitoring program, and conducting the risk assessment.

(1) Inventory of frost diversion systems: The governing body shall establish an inventory of all frost diversions included in the WDMP. The inventory, except for diversion data, shall be completed within three months after board approval of a WDMP. The inventory shall be updated annually with any changes to the inventory and with frost diversion data. The inventory shall include for each frost diversion:

(A) Name of the diverter;

(B) Source of water used and location of diversion;

(C) A description of the diversion system and its capacity;

(D) Acreage frost protected and acres frost protected by means other than water diverted from the Russian River stream system; and

(E) The rate of diversion, hours of operation, and volume of water diverted during each frost event for the year.

(2) Stream stage monitoring program: The governing body shall develop a stream stage monitoring program in consultation with National Marine Fisheries Service (NMFS) and California Department of Fish and Game (DFG). For the purposes of this section, consultation involves an open exchange of information for the purposes of obtaining recommendations. The governing body is authorized to include its own expert scientists and engineers in the consultation, and request board staff to participate, when desired. The stream stage monitoring program shall include the following:

(A) A determination of the number, type, and location of stream gages necessary for the WDMP to monitor and assess the extent to which frost diversions may affect stream stage and cause stranding mortality;

(B) A determination of the stream stage that should be maintained at each gage to prevent stranding mortality;

(C) Provisions for the installation and ongoing calibration and maintenance of stream gages; and

(D) Monitoring and recording of stream stage at intervals not to exceed 15 minutes.

(3) Risk assessment: Based on the inventory and stream stage information described above, and information regarding the presence of habitat for salmonids, the governing body shall conduct a risk assessment that evaluates the potential for frost diversions to cause stranding mortality. The risk assessment shall be conducted in consultation with NMFS and DFG. The governing body is authorized to include its own expert scientists

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and engineers in the consultation, and request board staff to participate, when desired. The risk assessment shall be evaluated and updated annually.

(4) Corrective Actions: If the governing body determines that diversions for purposes of frost protection have the potential to cause stranding mortality, the governing body shall notify the diverter(s) of the potential risk. The governing body, in consultation with the diverters, shall develop a corrective action plan that will prevent stranding mortality. Corrective actions may include alternative methods for frost protection, best management practices, better coordination of diversions, construction of off-stream storage facilities, real-time stream gage and diversion monitoring, or other alternative methods of diversion. Corrective actions also may include revisions to the number, location and type of stream stage monitoring pages, or to the stream stages considered necessary to prevent stranding mortality. In developing the corrective action plan the governing body shall consider the relative water right priorities of the diverters and any time delay between groundwater diversions and a reduction in stream stage. The corrective action plan shall include a schedule of implementation. To the extent feasible, the corrective action plan shall include interim corrective actions if long-term corrective actions are anticipated to take over three years to fully implement. The diverters shall implement corrective actions in accordance with the corrective action plan, or cease diverting water for frost protection.

(5) Annual Reporting: The governing body shall submit a publically available annual report of program operations, risk assessment, and corrective actions by September 1 following the frost season that is the subject of the report. The report shall include:

(A) The frost inventory, including diversion data.

(B) Stream stage monitoring data.

(C) The risk assessment and its results, identification of the need for any additional data or analysis, and a schedule for obtaining the data or completing the analysis.

(D) A description of any corrective action plan that has been developed, any corrective actions implemented to date, and a schedule for implementing any additional corrective actions.

(E) Any instances of noncompliance with the WDMP or with a corrective action plan, including the failure to implement identified corrective actions. The report shall document consultations with DFG and NMFS regarding the stream stage monitoring program and risk assessment and shall explain any deviations from recommendations made by DFG or NMFS during the consultation process. In addition, the annual report shall evaluate the effectiveness of the WDMP and recommend any necessary changes to the WDMP, including any proposed additions or subtractions of program participants. Any recommendations for revisions to the WDMP shall include a program implementation plan and schedule. The board may require changes to the WDMP, including but not limited to the risk assessment, corrective action plan, and schedule of implementation, at any time.

(d) The governing body may develop and submit for the Deputy Director for Water Rights' approval, criteria, applicable to any participant in its WDMP, for identifying groundwater diversions that are not hydraulically connected to the Russian River stream system. The governing body may submit to the Deputy Director a list of groundwater diverters that appear to meet these criteria and could be exempted from this section. The Deputy Director is authorized to exempt the listed groundwater diverters, or identify the reason for not exempting the listed groundwater diverters. Beginning three years from the effective date of this section, if an individual groundwater diverter can independently demonstrate to the satisfaction of the Deputy Director that the diversion is

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not hydraulically connected to the Russian River stream system, the Deputy Director is authorized to exempt the groundwater diverter from this section.

(e) Compliance with this section shall constitute a condition of all water right permits and licenses that authorize the diversion of water from the Russian River stream system for purposes of frost protection. The diversion of water in violation of this section, including the failure to implement the corrective actions included in any corrective action plan developed by the governing body, is an unreasonable method of diversion and use and a violation of Water Code section 100, and shall be subject to enforcement by the board. The board has continuing authority to revise terms and conditions of all permits and licenses that authorize the diversion of water for purposes of frost protection should future conditions warrant.

Authority cited: Section 1058, Water Code.

Reference: Section 2, Article X, California Constitution; and Sections 100, 275 and 1051.5, Water Code.

Article 2. Reporting

§ 990. Definitions

As used in this Article:

(a) "Board" means the State Water Resources Control Board.

(b) "Commercial agricultural use" means "agricultural use" as defined in Government Code section 51201, subdivision (b), including irrigation of land, irrigation within green houses, frost protection, and heat control. "Commercial agricultural use" does not include cleaning, processing, or other similar post-harvest activities.

(c) "Non-revenue water" means the portion of water consumption that is not billed and does not produce revenue. It is equal to the sum of the urban water supplier's unbilled authorized consumption and apparent and real losses.

(d) "Commercial, industrial, and institutional" (CII) means all indoor and outdoor water used by all commercial water users, industrial water users, and institutional water users as respectively defined in Water Code, section 10608.12, subdivisions (d), (h), and (i). CII includes agricultural water and landscape water used for parks, medians, and other outdoor areas associated with CII.

(e) "Percent residential use" is calculated by dividing the amount of water provided to the residential sector for the reporting month (not including non-revenue water) by the total potable water production for the reporting month.

(f) "Total potable water production" means all potable water that enters into a water supplier's distribution system, excluding water placed into storage and not withdrawn for use during the reporting period and excluding water exported outside the supplier's service area during the reporting period. Total Potable Water Production includes all non-revenue waters.

(g) "Urban water supplier" means a supplier that meets the definition set forth in Water Code section 10617, except it does not include suppliers when they are functioning solely in a wholesale capacity. "Urban water supplier" does include suppliers when they are functioning in a retail capacity.

(h) "Water shortage response action level" means one of six standard water shortage levels corresponding to progressive ranges of up to 10, 20, 30, 40, and 50 percent

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shortages and greater than 50 percent shortage, as defined in Water Code section 10632, subdivision (a)(3)(A).

Authority: Sections ~~275~~, 1058, Water Code.

References: Article X, Section 2, California Constitution; Section 51201, Government Code; Sections 102, 104, 105, 350, 1122, 1123, 1124, 1846, 1846.5, 10617, and 10632, Water Code.

§ 991. Conservation and Use Reporting by Urban Water Suppliers.

(a) Each urban water supplier shall prepare and submit to the Board by the 21st of each month a monitoring report on forms provided by the Board. The monitoring report shall include the following information:

(1) The urban water supplier's public water system identification number(s).

(2) The urban water supplier's volume of total potable water production, including water provided by a wholesaler, in the preceding calendar month;

(3) The population served by the urban water supplier during the reporting period;

(4) The percent residential use that occurred during the reporting period;

(5) The water shortage response action level.

(b) When the governor declares a drought emergency, or when an urban water supplier invokes a water shortage level to respond to a shortage of greater than ten percent, consistent with Water Code section 10632; each urban water supplier shall prepare and submit to the Board by the 21st of each month an expanded monitoring report, on forms provided by the Board. The requirement to prepare and submit an expanded monitoring report shall remain in effect for the duration of the drought emergency or water shortage level, as applicable. The expanded monitoring report shall include the following information:

(1) Descriptive statistics on the urban water supplier's achievement of its water contingency plan response actions, and progress toward achieving a reduction in water consumption associated with the urban water supplier's existing water shortage response action level;

(2) Communication actions;

(3) Compliance and enforcement actions.

(c) The reporting required by subdivision (a) of this section shall continue monthly until such time as the Board determines that an equivalent or more comprehensive reporting system exists that addresses the same need for time-sensitive data. The Board may allow less frequent reporting. Each urban water supplier shall continue monthly monitoring and data collection identified in this section irrespective of the reporting interval required by the Board.

(d) Each urban water supplier that provides potable water for commercial agricultural use may subtract the amount of water provided for commercial agricultural use from its potable water production total, provided that any urban water supplier that subtracts any water provided for commercial agricultural use from its total potable water production shall clearly identify what water use qualifies as commercial agricultural use.

e) The Executive Director, or the Executive Director's designee, may issue an order to any urban water supplier that fails to submit the information required by this section, requiring the urban water supplier to provide the information by a specified date. Failure

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to provide the required information as identified in an order issued pursuant to this subdivision, or the submission of any information pursuant to an order issued pursuant to this subdivision that is found to be materially false by the Board, is a violation, punishable by civil liability of up to one thousand dollars (\$1,000) for each day in which the violation occurs. Every day that the failure or error goes uncorrected constitutes a separate violation. Civil liability for the violation is in addition to, and does not supersede or limit, any other remedies, civil or criminal.

(f) A decision or order issued under this section by the Board or an officer or employee of the Board is subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the Water Code.

Authority: Sections ~~275~~, 1058, 10609.28, Water Code.

References: Article X, Section 2, California Constitution; Section 51201, Government Code; Sections 102, 104, 105, 350, 1122, 1123, 1124, 1846, 1846.5, 10617, and 10632, Water Code.