

DRAFT

STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2015-

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;

DRAFT

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;

DRAFT

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 State Water Board has a duty to protect, where feasible, the state's public trust resources, including fisheries, to the extent reasonable. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.);
11. 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 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;
12. 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;
13. 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;

DRAFT

14. Reducing water use in the Dutch Bill Creek, Green Valley Creek, Mark West Creek, and Mill Creek watersheds is necessary to promote conservation, prevent waste and unreasonable use, address the drought emergency, and maintain summer and fall instream flow conditions needed to support CCC coho salmon and CCC steelhead viability. 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;
15. 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;
16. 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;
17. The State Water Board is adopting the emergency regulation because of emergency drought conditions and the need for prompt action;
18. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to 270 days; and
19. 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

D R A F T

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.

Jeanine Townsend
Clerk to the Board