

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2023-0044**

**ADOPTING EMERGENCY INFORMATION ORDER REGULATIONS FOR THE
CLEAR LAKE WATERSHED**

WHEREAS:

1. The State Water Resources Control Board (State Water Board or Board) proposes to adopt Emergency Information Order Regulations for the Clear Lake Watershed (emergency regulations). The emergency regulations will 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 Clear Lake hitch (hitch) spawning and migration and will assist the Board's efforts to protect the hitch;
2. On April 21, 2021, Governor Gavin 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 October 19, 2021, the Governor extended the emergency to [all of California](#). On March 28, 2022, the Governor acknowledged [continued drought conditions and called for increased conservation](#);
3. On March 24, 2023, Governor Newsom 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, including drought-related harm to native fish in the Clear Lake Watershed. Executive Order N-5-23 directs the State Water Board and California Department of Fish and Wildlife (CDFW) to evaluate minimum instream flows and other actions needed to protect the Clear Lake hitch; work with water users, Native American Tribes, and other parties on voluntary measures; and consider emergency regulations to establish minimum instream flows to mitigate the effects of drought. Executive Order N-5-23 also suspends the environmental review required by the California Environmental Quality Act in Public Resources Code, Division 13 (commencing with Section 21000) and regulations adopted pursuant to that Division to address the impacts of drought as quickly as possible;

4. The Clear Lake hitch, also known as “chi,” is a medium-sized fish found only in Clear Lake and its tributaries. Each spring, adult hitch spawn in Clear Lake creeks before returning to the lake. Based on best available science, juvenile hitch need at least two to three weeks to hatch and migrate to the lake, but they can remain in creeks for several months if there is enough water, which increases their likelihood of survival. The hitch is an important species in the watershed and holds cultural and ecological significance. The hitch population has been in decline for some time, but the recent droughts have exacerbated the decline. There are many factors potentially impacting the hitch population including reduced and degraded habitat, passage barriers in the creeks, predation, competition with invasive species, and pollution; but a primary threat to hitch survival is water availability in creeks where hitch spawn and migrate;
5. While historical accounts and oral histories describe large spawning runs that crowded the creeks in the late 19th century, more recent observations and scientific studies indicate drastically less hitch exist in Clear Lake and its tributaries. In 2014, California designated the hitch as a threatened species, and CDFW began visual spawning surveys throughout the watershed. Three years later, the United States Geological Survey (USGS) conducted [gill net surveys](#) regarding conditions in the lake. The results of these investigations indicated that (I) the hitch population has declined from historical levels, (II) lack of flow through creeks reduced the habitat available for hitch spawning in 2021 and 2022, and (III) there was near complete failure of juvenile hitch recruitment after 2017. As hitch have a six-year life cycle, additional drought years without intervention may jeopardize population recovery;
6. Local Native American Tribes have been working to protect the hitch for many years. In 2014, some of these Tribes and CDFW began hitch rescues, which involves capturing and collecting hitch from drying creeks or disconnected pools and relocating them to parts of the watershed that can support their survival. Tribal environmental departments are also conducting numerous hydrological and biological monitoring and modeling efforts. The State Water Board appreciates the activities conducted by Native American Tribes and values the traditional ecological knowledge that Native American Tribes have gained and passed down from generation to generation regarding the hitch and the importance of this knowledge in addressing the hitch emergency;
7. While some Clear Lake creeks have been known to go dry at some point each year, the timing appears to have changed. Oral histories describe the creeks flowing through September in many years. Conversely, in 2022, many of the creeks were dry by March. Even with the very wet spring of 2023, most creeks only flowed through June and resulted in more than 60 hitch rescues;

8. In December 2022, a coalition of local Native American Tribes including the Big Valley Band of Pomo Indians, Robinson Rancheria of Pomo Indians, Habematolel Pomo of Upper Lake, and Scotts Valley Band of Pomo Indians requested that state and federal agencies, including the State Water Board, help address the extinction risk faced by the hitch. Shortly thereafter, the Lake County Board of Supervisors [asked the Board](#) to increase activities to stop illegal water diversions affecting Clear Lake and its tributaries and consider regulations to assure the continued viability of the Clear Lake hitch and other aquatic species;

9. In January 2023, the State Water Board's Division of Water Rights (Division) began engaging with representatives from the coalition of Native American Tribes, Lake County, state and federal agencies, the agricultural community, and other interested parties to better understand the problems facing the hitch, identify solutions, and encourage voluntary actions to protect the hitch in the near and long terms. The Division's work has been primarily focused on the following creeks where hitch are known to spawn: Cole, Kelsey, Adobe, Manning, Scotts, and Middle. Through public meetings and a [voluntary actions letter](#) (sent to more than 2,600 property owners), the Division asked water users to share data, participate in monitoring programs, and reduce water use in February through June. As a result of this engagement, the Division received fourteen responses from water users who are interested in sharing information about their water use or allowing the state access to their lands for hitch monitoring and recovery efforts. Moreover, a small coalition of agricultural landowners formed a group called the Lake County Land Stewards with the purpose of developing a data collection and evaluation program to evaluate contributors to creek dewatering;

10. The Division is meeting regularly with representatives from the agricultural community to discuss voluntary actions, explore ways to improve data quality and support longer-term data collection, understand concerns and interest in sharing information and provide updates on the state's activities. The Division is also meeting regularly with representatives from the coalition of Tribes, Lake County, and state and federal agencies to share updates, coordinate field work and data collection, share information, connect other agencies to data resources, convey or refer findings that may not always be in the Division's jurisdiction, share funding opportunities, and present updates on the Division's enforcement activities;

11. In January 2023, the Division also began collecting and evaluating existing data to identify how surface water diversions and groundwater extractions in the Clear Lake Watershed are impacting creek flows. The Division's preliminary analysis, which includes data from multiple sources described

above, indicates that groundwater pumping may be impacting creek flows, but additional data is needed to understand the magnitude and timing of potential impacts. The Division has identified well locations, construction information, and pumping volume as needed additional data;

12. The State Water Board has a duty to take into account and protect the state's public trust resources, including fisheries, whenever feasible. (*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.) The Board requires additional data to better understand the factors that affect creek flows in the Clear Lake Watershed and to protect fish populations, evaluate potential management actions and voluntary projects, and coordinate state-funded projects;
13. A robust understanding of how groundwater and surface water interactions in the Clear Lake Watershed affect creek flows will assist State Water Board efforts to identify measures that will protect the hitch population as well as other reasonable and beneficial diversions and uses of water in the watershed;
14. While there has been positive engagement and collaboration with local water users, the State Water Board requires additional information to evaluate how groundwater pumping and other water uses may influence creek flows that are critical for Clear Lake hitch spawning and migration and will assist the Board's efforts to protect the hitch. The Board has determined that authority to issue information orders in the Clear Lake Watershed is necessary to collect this data;
15. On September 5, 2023, the Division released draft emergency regulations for a public comment period ending on October 31, 2023. The Division also held two public workshops in October 2023, to accept comments and answer questions;
16. The State Water Board proposes to adopt the emergency regulations in accordance with title 2, division 3, chapter 3.5 of the Government Code (commencing with section 11340). The Board has the authority to adopt emergency regulations pursuant to Executive Order N-5-23;
17. The emergency regulations allow for alternative compliance that has the potential to improve reporting compliance and support local collaborative solutions. The State Water Board recognizes that listening to interested parties, addressing concerns, and offering alternatives can help improve data

quality, increase participation, and foster sustainable relationships. Furthermore, the Board values local knowledge and recognizes that providing for alternative compliance can help establish standards for collaboration and demonstrate whether voluntary efforts can help prevent the extinction of a species;

18. The State Water Board is considering these emergency regulations due to the pressing threat to hitch populations resulting from the conditions in the Clear Lake Watershed, the need for prompt information-gathering, and the unique attributes of the watershed. Pursuant to Water Code section 7, the Board is authorized to delegate authority to the Executive Director and to the Deputy Director.

THEREFORE BE IT RESOLVED THAT:

The State Water Board:

1. Adopts sections 1050, 1051, and 1052 within Title 23, Division 3, Chapter 4.6 of the California Code of Regulations as emergency regulations;
2. The Division will submit the emergency regulations to the Office of Administrative Law (OAL) for final approval;
3. The emergency regulations will remain in effect for one year after filing with the Secretary of State unless: (i) the State Water Board determines that the regulations are no longer necessary due to changed conditions, (ii) the conditions specified in Water Code section 1058.5 subdivision (a)(2) are no longer in effect, in which case the regulations are deemed repealed, or (iii) the Board renews or updates the regulations due to continued drought conditions as described in Water Code section 1058.5;
4. If, during the approval process, the State Water Board, Division, or OAL determines that minor corrections to the language of the emergency regulations or supporting documentation are needed for clarity or consistency, the Board's Executive Director or designee may make such changes;
5. The Division will continue to coordinate with local, state, and federal agencies, local water users, Native American Tribes, and other appropriate entities to support surface water and groundwater monitoring, install monitoring equipment, collect data that supports Clear Lake hitch protection efforts and evaluate how various actions could provide an alternative means for collecting the information needed to protect the hitch population, and use

the data received to refine hitch protection efforts and reassess the activities potentially impacting the hitch population;

6. The State Water Board delegates to the Deputy Director of the Division the authority to act on requests for approvals pursuant to the emergency regulations.

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 December 6, 2023.

AYE: Chair E. Joaquin Esquivel
Vice Chair Dorene D'Adamo
Board Member Sean Maguire
Board Member Laurel Firestone
Board Member Nichole Morgan

NAY: None

ABSENT: None

ABSTAIN: None



Courtney Tyler
Clerk to the Board

Emergency Information Order Regulations for the Clear Lake Watershed

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

Chapter 4.6. Watershed Protection and Information

Article 1. Clear Lake Watershed

§ 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(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).

Authority: Sections 186, 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 106.3, 109, 187, 275, 1011, 1011.5, 1051, 1058, 1058.5, 1253, 1825, 5106, Water Code; 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.

§ 1051. Information Orders

Revised: November 3, 2023

- (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 relevant to forecasting use, impacts to surface flows, assessing compliance, or contingency planning for future impacts of drought. If this information is necessary for understanding stream flow in the watershed, Orders may request that recipients report diversions or extractions made in prior months and require recipients to record and report diversions or extractions during subsequent months; Orders may require recipients to report information on a repeated or ongoing basis. The Deputy Director will prioritize information orders for water users whose proximity to surface streams gives them the highest potential to impact surface flows.
- (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, which may not be less than 5 days following receipt of 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 through an online reporting platform 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.
- (1) The Deputy Director or delegee may approve alternative compliance reporting mechanisms, such as reporting information through a third party authorized by the Deputy Director or delegee or participating in an existing data collection program, that the Deputy Director or delegee determines will provide a greater quality of information, improve reporting compliance, enhance data collection, or support local collaborative solutions.
- (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 186, 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 7, 100, 100.5, 104, 105, 106.3, 109, 187, 275, 1011, 1011.5, 1051, 1058, 1058.5, 1253, 1825, 1846, 5106, Water Code; 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 186, 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 106.3, 109, 187, 275, 1011, 1011.5, 1051, 1052, 1055, 1058, 1058.5, 1253, 1825, 1831, 1846, 5106, Water Code; 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.

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.

November 27, 2023
Date



Courtney Tyler
Clerk to the Board

Informative Digest

Finding of Emergency

California is currently recovering from a significant drought that included the driest three-month winter period on record (January-March 2022), the driest three consecutive water years on record (Water Years 2020-2022), 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 Clear Lake hitch (hitch), a threatened species under the California Endangered Species Act,¹ is suffering from critically low populations with very low returns to key spawning creeks.

Therefore, the State Water Resources Control Board (State Water Board or Board) finds that an emergency exists due to the impacts of multi-year droughts and that adoption of the proposed Emergency Information Order Regulations for the Clear Lake Watershed (Emergency Regulations) 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 Clear Lake Watershed. The information collected would inform the Board's evaluation of how groundwater pumping and other water uses may influence creek flows that are critical for hitch spawning and migration and will assist the Board's efforts to protect the hitch.

Governor Newsom's Drought Emergency Proclamations

On April 21, 2021, Governor Newsom proclaimed a [State of Emergency](#) in response to drought conditions in the Russian River Watershed. On May 10, 2021, the Governor expanded the [drought emergency to cover 41 California counties](#), including Lake County. On October 19, 2021, the Governor extended the [drought emergency to all of California](#). On March 28, 2022, the Governor signed [Executive Order N-7-22](#), which acknowledged continued drought conditions throughout the state and called for increased conservation.

On March 24, 2023, the Governor issued [Executive Order N-5-23](#), which reaffirmed the need for continued action to address drought-related harm to native fish in the Clear Lake Watershed and directed the Board and Department of Fish and Wildlife to evaluate minimum instream flows and other actions needed to protect the hitch; work with water users, Native American Tribes, and other parties on voluntary actions; and consider emergency regulations to establish minimum instream flows to mitigate

¹ [State and Federally Listed Endangered and Threatened Animals of California](#)

the effects of drought. This order also suspended the environmental review by state agencies required by the California Environmental Quality Act in Public Resources Code, Division 13 (commencing with Section 21000) and regulations adopted pursuant to that Division to address the impacts of drought in the Clear Lake Watershed and ended the drought emergency for most of California.

Emergency Defined

Water Code section 1058.5 grants the State Water Board authority to adopt emergency regulations 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.” Section 1058.5 applies to regulations “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.” As described above, the May 2021 proclamation declared a state of emergency covering Lake County based on drought conditions, which continues to be in place in the Clear Lake Watershed specifically.

Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to one year and may be renewed if the Board finds that drought conditions as defined remain in effect. Section 1058.5, subdivision (b) provides that, notwithstanding Government Code sections 11346.1 and 11349.6, the Board’s finding of emergency in connection with emergency regulations promulgated under section 1058.5 is not subject to review by Office of Administrative Law (OAL).

Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to submission of the proposed emergency action to OAL, the adopting agency 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 receiving the proposed emergency action, OAL must allow interested persons five calendar days to submit comments as set forth in Government Code section 11349.6.

The information contained within this finding of emergency provides information to support the State Water Board’s emergency rulemaking under Water Code section 1058.5 and meets the applicable requirements of Government Code sections 11346.1 and 11346.5.

Evidence of Emergency

Clear Lake Watershed Overview

The Clear Lake Watershed (Watershed) is located in Lake County, California with land elevations ranging from 1,318 to 4,840 feet above sea level. Clear Lake, which resides in the center of the Watershed, is the largest natural freshwater lake located wholly in California. Water enters the lake through many tributaries, the largest of which are Scotts and Middle Creeks, which enter at Rodman Slough, and Kelsey Creek, which enters from the Big Valley area. Clear Lake drains to the east through Cache Creek and into the Sacramento River.

Over the past two centuries, the Watershed has undergone significant changes. European settlement since the mid-1800s led to widespread farming, grading, and logging, along with the damming, channelization, and diversion of water resources.² More than 85 percent of nutrient-absorbing wetlands have been lost, contributing to a rise in toxic cyanobacterial algal blooms.³ The introduction of non-native species, such as carp and bass, has altered native ecosystems, and the lingering impacts of historical mining activities, such as instream gravel mining and mercury contamination from mining operations like the Sulphur Bank Mercury Mine,⁴ persist throughout the Watershed. These challenges intensify during drought conditions, creating a complex landscape for water resource management.

Groundwater is the primary water source in the Watershed, accounting for about two-thirds of the total supply. Most surface water diversions come directly from Clear Lake with a small amount diverted from tributary creeks.⁵ The Sustainable Groundwater Management Act identified several groundwater basins in the Watershed, but only one, the Big Valley Basin, is required to develop a groundwater sustainability plan (GSP). Because of this, groundwater information for the broader Watershed is limited.

According to the Big Valley GSP, over 90 percent of the basin's groundwater is used for agriculture, and groundwater wells (with depths from 42 to 421 feet) are concentrated around Kelsey Creek. However, there is not a comprehensive list of well locations and depths in Big Valley, and many may not be permitted.⁶ The GSP discusses seasonal or

² Gusti, 2009

³ Ibid

⁴ Suchanek et al., 2008

⁵ [Clear Lake Integrated Watershed Management Plan](#)

⁶ Verbal communications with Lake County staff

monthly groundwater elevations, but there is no long-term continuous monitoring that can help assess localized groundwater changes.

According to the Clear Lake Integrated Watershed Management Plan, while groundwater use may not exceed safe yield (or the amount of groundwater that may be extracted without causing long-term groundwater depletion), it can lead to earlier drying of streams, which could impact water quality and aquatic life.⁷ The extent of groundwater- surface water interactions throughout the Watershed is not well documented. The Big Valley GSP states that the two primary creeks within the basin, Kelsey and Adobe, may be interconnected with groundwater, but additional monitoring is needed to “better understand the nature and timing of hydraulic connectivity.”⁸ The GSP goes on to identify hitch spawning habitat in Clear Lake creeks as potential Groundwater Dependent Ecosystems and explains, “[t]he timing of the hitch life cycle and how it is possibly affected by interconnected surface water depletion requires both surface water and groundwater data that have sufficient temporal (daily or more frequent) and spatial resolution (multiple locations along each water body).”⁹

Clear Lake Hitch Overview

The Clear Lake hitch, *Lavinia exilicauda chi*, is a medium-sized fish found only in Clear Lake and its tributaries. Each spring, adult hitch spawn in Clear Lake creeks before returning to the lake. Based on best available science, juvenile hitch need at least two to three weeks to hatch and migrate to the lake, but they can remain in creeks for several months if there is enough water, which increases their likelihood of survival.¹⁰ The hitch is an important species in the Watershed and is culturally and ecologically important to both the region’s Pomo Tribes and the broader Clear Lake community.

The hitch population has been declining for some time, but recent record-setting droughts have exacerbated the decline. Historical accounts and oral histories describe large hitch spawning runs that crowded the creeks in the late 19th century, but more recent observations and scientific studies indicate drastically less hitch exist in Clear Lake and its tributaries. In 2012, the Center for Biological Diversity [petitioned to protect the hitch](#) under both the federal and state Endangered Species Acts. In response, California designated the hitch as a threatened species in 2014, and a response to the federal petition is expected by 2025.

⁷ CLIWMP, 2010

⁸ Big Valley GSP (page ES 8), 2022

⁹ Big Valley GSP (page 2-114), 2022

¹⁰ Freyer, 2019

In 2014, CDFW began visual spawning surveys throughout the Watershed. Three years later, the United States Geological Survey (USGS) began conducting gill net surveys regarding conditions in the lake. The results of these investigations indicated that (1) the hitch population has declined from historical levels, (2) lack of flow through creeks reduced the habitat available for hitch spawning in the drought years of 2021 and 2022, and (3) there was near complete failure of juvenile hitch recruitment after 2017.

In 2014, some of the local Native American Tribes began conducting hitch rescues in partnership with CDFW. The rescues involve capturing and collecting hitch from drying creeks or disconnected pools and relocating them to parts of the Watershed that can support their survival. While some Clear Lake creeks have been known to go dry at some point each year, the timing appears to have changed. Earlier drying and disconnections pose challenges to hitch survival and population recovery. Even with the very wet spring of 2023, when Lake County received approximately 151 percent of average annual precipitation (from January through May),¹¹ creek disconnections occurred, resulting in the need for more than 60 hitch rescues.

The collapse of the Clear Lake splittail (splittail) serves as a cautionary tale for hitch recovery. The once abundant splittail was also unique to Clear Lake. Despite having a later spawning season than the hitch, the splittail used to successfully spawn in creeks, but insufficient creek flows led to its extinction. Like the hitch, the splittail faced numerous stressors (including warming water temperatures, low dissolved oxygen from increased sedimentation, pollution, nutrient loading, and threats from nonnative fish) that were compounded by reduced water availability. A study concluded that low rainfall in the early 1940s, combined with creek diversions for agriculture, eliminated most remaining splittail habitat, leading to their ultimate extinction by 1969.¹² The Clear Lake splittail was the last species to go extinct in California.

Need for Emergency Regulations

In December 2022, a coalition of Native American Tribes including the Big Valley Band of Pomo Indians, Robinson Rancheria of Pomo Indians, Habematolel Pomo of Upper Lake, and Scotts Valley Band of Pomo Indians requested that state and federal agencies, including the State Water Board, help address the extinction risk faced by the hitch. In February 2023, the Lake County Board of Supervisors [proclaimed an emergency](#) due to persistent drought, habitat loss and potential extinction of the hitch and asked the Board to increase activities to stop illegal water diversions affecting Clear

¹¹ [NOAA Climate at a Glance County Time Series Data](#)

¹² [Extinctions of North American Fishes During the past Century \(umich.edu\)](#)

Lake and its tributaries and consider regulations to assure the continued viability of the hitch and other aquatic species.

In January 2023, the State Water Board's Division of Water Rights (Division) began engaging with representatives from the coalition of Native American Tribes, Lake County, state and federal agencies, the agricultural community, and other interested parties to better understand the problems facing the hitch, identify solutions, and encourage voluntary actions to protect the hitch in the near and long terms.

The Division's work has been primarily focused on the following creeks where hitch spawn: Cole, Kelsey, Adobe, Manning, Scotts, and Middle.

The Division is meeting regularly with representatives from the agricultural community to discuss voluntary actions, explore ways to improve data quality and support longer-term data collection, understand concerns, identify interest in sharing information, and provide updates on the state's activities. The Division is also meeting regularly with representatives from the coalition of Tribes, Lake County, and state and federal agencies to share updates, coordinate field work and data collection, share information, connect other agencies to data resources, convey or refer findings that may not always be in the Division's jurisdiction, share funding opportunities, and present updates on the Division's enforcement activities.

The Division has been actively enforcing water rights rules and regulations throughout the Clear Lake Watershed. In September 2023, the Division issued 227 notices of violation, conducted 13 inspections, and issued one cease and desist order related to cannabis operations in Lake County. The Division also issued 18 notices of violation to surface water diverters in Lake County who failed to file their 2022 annual reports. This is in addition to the 46 notices of violation and 61 notices of potential violation issued in Lake County earlier this year. Additional investigations, outreach, and education are underway.

In June 2023, the Administration [authorized \\$1 million to support the Board's hitch protection efforts](#). This included \$500,000 to monitor creek flows, groundwater pumping, and water use and \$500,000 to investigate groundwater-surface water interactions in the Clear Lake region. With these funds, the Division has (1) engaged O'Connor Environmental to provide technical assistance through hydrologic monitoring, data analyses and model development, (2) contracted Zephyr Collaboration to provide facilitation and engagement services that help support voluntary actions to protect the hitch and compliance with regulatory requirements, and (3) started to obtain monitoring equipment and materials.

Since the beginning of 2023, the Division has been collecting and evaluating existing data to identify how surface water diversions and groundwater extractions in the

Watershed are impacting creek flows. The Division's preliminary analysis, which includes data from multiple sources described above, indicates that groundwater pumping may be impacting creek flows, but additional data is needed to understand the magnitude and timing of potential impacts. Based on analysis of available data, the Division has identified the need for additional information, such as well locations, well construction information, and the amounts of groundwater water pumped, as necessary.

The State Water Board has a duty to protect the state's public trust resources, including fisheries, whenever feasible. (*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.) The Board requires additional data to better understand the factors that affect creek flows in the watershed and to protect fish populations, evaluate potential management actions and voluntary projects, and coordinate state-funded projects. A robust understanding of how groundwater and surface water interactions in the Clear Lake Watershed affect creek flows will assist State Water Board efforts to identify measures that will protect the hitch population as well as other reasonable and beneficial diversions and uses of water in the Watershed.

Through public meetings and a [voluntary actions letter](#) (sent to more than 2,600 property owners), the Division asked water users to share data, participate in monitoring programs, and reduce water use in February through June. As a result of this engagement, the Division received fourteen responses from water users who are interested in sharing information about their water use or allowing the state access to their lands for hitch monitoring and recovery efforts. Moreover, a small coalition of agricultural landowners formed a group called the Lake County Land Stewards with the purpose of developing a data collection and evaluation program to analyze contributors to creek dewatering. While there has been positive engagement and collaboration with local water users, the State Water Board requires additional information to evaluate how groundwater pumping and other water uses may influence creek flows that are critical for hitch spawning and migration and will assist the Board's efforts to protect the hitch.

The Board has determined that authority to issue information orders in the Watershed is necessary to collect this data and regulations are required to obtain that authority.

Proposed Emergency Regulations

On September 5, 2023, the Division released draft Emergency Regulations for a public comment period ending on October 31, 2023. The Division also held two public workshops on October 19, and 24, 2023, to accept comments and answer questions. The Emergency Regulations would allow the Board to collect water use information to inform the Board's evaluation of how groundwater pumping and other water uses may influence creek flows that are critical for hitch spawning and migration, assist the

Board's efforts to protect the hitch, and help address information gaps noted in local planning documents such as the Big Valley GSP.

The Emergency Regulations include an alternative compliance mechanism that has the potential to improve reporting compliance and support local collaborative solutions. The State Water Board recognizes that listening to interested parties, addressing concerns, and offering alternatives can sometimes help improve data quality, increase participation, and foster sustainable relationships. Furthermore, the Board values local knowledge and recognizes that providing for alternative compliance can potentially help establish standards for collaboration and demonstrate whether voluntary efforts can help prevent the extinction of a species.

The State Water Board is considering these Emergency Regulations due to the pressing threat to hitch populations resulting from conditions in the Clear Lake Watershed, the need for prompt information-gathering, and the unique attributes of the Watershed. Pursuant to Water Code section 7, the Board is authorized to delegate authority to the Executive Director and to the Deputy Director.

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Mandate on Local Agencies or School Districts

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.

Suspension of California Environmental Quality Act

On April 21, 2021, Governor Newsom issued an Executive Order and Proclamation addressing the drought state of emergency, which, among other things, suspended the California Environmental Quality Act (CEQA) as applied to the State Water Board's adoption of 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, and to require curtailment of diversions when water is not available under the diverter's priority of right." CEQA is therefore suspended as to adoption of this regulation.

Fiscal Effect on Local and State Government

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 a government agency would require 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.