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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2014-

TO ADOPT EMERGENCY REGULATIONS FOR CURTAILMENT OF DIVERSIONS DUE TO INSUFFICIENT FLOW FOR SPECIFIC FISHERIES

WHEREAS:

1. On April 25, 2014, Governor Edmund G. Brown Jr. issued an executive order to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The executive order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages in communities and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue into 2015;
2. The executive order refers to the [Governor's Proclamation No. 1-17-2014](#), issued on January 17, 2014, declaring a drought State of Emergency to exist in California due to severe drought conditions. The January Proclamation notes that the state is experiencing record dry conditions, with 2014 projected to become the driest year on record. Since January, state water officials indicate that reservoirs, rainfall totals and the snowpack remain critically low. Current electronic readings show the snowpack's statewide water content at just 16% of average. This follows two other dry or below average years, leaving reservoir storage at alarmingly low levels. The January 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 Proclamation also calls on all Californians to reduce their water usage by 20%;
3. Due to extreme drought conditions, there is not enough water for all users or uses in most streams, and diversions under junior water rights will need to be curtailed to preserve flows for senior water right holders. In addition, some streams that provide habitat and migration corridors for federally or state listed endangered species will not maintain the minimum flows for these species to survive unless water diverters curtail use;
4. Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) (CV SR Salmon) and California Central Valley steelhead (*Oncorhynchus mykiss*) (CCV Steelhead) are listed as threatened. (16 U.S.C. § 1531 et seq.) Because of the fragile nature of the fisheries in these watersheds, regulatory action to protect this public trust resource is warranted;
5. The National Marine Fisheries Service, in conversation with Department of Fish and Wildlife and United States Fish and Wildlife Service, has identified the Sacramento River tributaries Mill, Deer and Antelope creeks as priority watersheds for sustaining the CV SR Salmon and the CCV Steelhead. These streams contain migration, spawning, and rearing habitat for some of the last remaining naturally-produced populations of

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threatened CV SR Salmon and the CCV Steelhead. The National Marine Fisheries Service has identified minimum flows necessary to prevent extirpation of these species in Mill, Deer and Antelope creeks. These flows establish a minimum flow needed for passage of migrating fish to and from spawning and rearing grounds in the watersheds above major diversions in the lower watersheds;

6. The importance of Deer, Mill, and Antelope creeks to the survival and recovery of salmon and steelhead in the Northern California's Central Valley is significant. Of the 19 independent spring-run Chinook salmon populations that historically occurred in the Central Valley, the Deer, Mill, and Antelope creek populations are among the last of a small group of naturally-produced populations. Mill and Deer creeks are identified in the National Marine Fisheries' Services' Draft Central Valley Salmon and Steelhead Recovery Plan as Core 1 populations for CV SR salmon and CCV steelhead. Antelope Creek is a Core 1 population for CCV steelhead and a Core 2 population for CV SR salmon. Preserving and restoring Core 1 populations is the foundation of the recovery strategy because Core 1 populations are considered to have the greatest potential to support independent viable populations. Core 2 populations are assumed to have the potential to meet the moderate risk of extinction criteria and protecting these populations is also a priority of the recovery plan;
7. These three streams are unique in the Central Valley because they support naturally-produced populations of CV SR salmon and CCV steelhead, yet have no upstream water storage facilities that can be managed to buffer the effects of drought on stream flow and water temperature requirements for these fish species. Instead, all of the water management facilities and water use occur on downstream reaches near the confluence with the Sacramento River, and their careful management is needed this year to ensure CV SR salmon and CCV steelhead are able to successfully migrate upstream to spawning habitat and downstream to the Sacramento River;
8. The State Water Resources Control Board (State Water Board) has a duty to protect, where feasible, the state's public trust resources, including fisheries. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.);
9. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies . . ." to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. 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.);
10. The State Water Board has determined, based on the best available information that certain minimum flows are necessary in the identified watersheds, below which levels serious harm and endangerment to the species may occur. The State Water Board recognizes that these drought emergency minimum flows do not represent optimal passage conditions for CV SR Salmon and CCV Steelhead. The State Water Board has identified the need for these drought emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet these emergency

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water supply conditions. Application of the reasonable use doctrine under these circumstances requires particularized consideration of the benefits of diverting water for current uses from the identified water bodies and the potential for harm to the protected species from such diversions under the current drought conditions. Having considered the available information, the Board finds that, during the current drought conditions, curtailment of diversions that would cause flows in these creeks to drop below these minimum passage levels is necessary to prevent the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion, of water;

11. Given the essential nature of water in sustaining human life, and particularly in light of the declaration in Water Code section 106.3 of water supplies for consumption, sanitation and cooking as a human right, the statutory declaration of domestic use as the highest use in Water Code sections 106, and the statutory declaration that public water suppliers may declare a water shortage emergency to allow sufficient water for human consumption, sanitation, and fire protection (Wat. Code § 350 et seq.), the State Water Board has determined that, under the circumstances being addressed by the regulation, diversion under a higher priority for any other use when supplies required for minimum health and safety needs cannot be met is a waste and unreasonable use under the California Constitution, Article X, § 2.;
12. Furthermore, given the need to act quickly and with reasonable assurance that domestic and municipal supplies required for minimum health and safety needs are met, the data indicating that basic human needs require between 37 and 50 gallons per day, the regulatory guidance at California Code of Regulations, title 23, section 697 that under normal operating assumptions a domestic use for a fully plumbed building should generally encompass 55 to 75 gallons per person per day, and the overall small impact that small diversions tend to make on other uses, it has been determined that diversions for domestic and municipal use of less than 50 gallons per person, per day, not exceeding 4,500 gallons per day of direct diversion or 10 acre-feet per year of storage may continue after issuance of a curtailment order without further approval from the Deputy Director, subject to the conditions outlined in the regulation. All other diversions for minimum health and safety needs will be considered by the Deputy Director upon request of the diverter, or appropriate regulatory agency where a single diverter's operations could not alone alleviate the identified emergency;
13. The regulation would provide that diversions from Mill, Deer and Antelope creeks are unreasonable if those diversions would cause flows to drop below the specified minimums. Under the regulation, such diversions would be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. Diversions for minimum health and safety needs may not be curtailed, notwithstanding a lower seniority than other, curtailed rights. The diversion or use of water in violation of this regulation would be an unreasonable diversion or use and a violation of Water Code section 100;
14. On May 13 and 14, 2014, the State Water Board issued public notice that the State Water Board would consider the adoption of the regulation at the Board's regularly-scheduled May 20, 2014 public meeting, in accordance with applicable State laws and regulations. The State Water Board also distributed for public review and comment a Finding of Emergency that complies with State laws and regulations;

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15. The State Water Board proposes to adopt the emergency regulation in accordance with title 2, division 3, chapter 3.5 of the Government Code (commencing with section 11340). On April 25, 2014, the Governor suspended the review required by the California Environmental Quality Act to allow the State Water Board to adopt emergency regulations pursuant to Water Code section 1058.5, as it deems necessary 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;
16. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director and to the Division of Water Rights Deputy Director. The State Water Board has delegated authority to the Executive Director and to the Division of Water Rights Deputy Director; and

THEREFORE BE IT RESOLVED THAT:

1. The State Water Resources Control Board adopts Title 23, Division 3, Chapter 2, Article 24, Sections 877 through 879.2 as appended to this resolution as an emergency regulation;
2. The State Water Board staff to submit the regulation to the Office of Administrative Law (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 or designee may make such changes; and
4. The State Water Board delegates to the Division Deputy Director the authority to act on requests for approvals pursuant to the regulation.

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 May 20, 2014.

Jeanine Townsend
Clerk to the Board