STATE OF CALIFORNIA
Edmund G. Brown Jr., Governor

Fish and Game Commission

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August 8, 2014

NOTICE OF PROPOSED EMERGENCY ACTION

Merced River Closure Due to Drought Conditions

Pursuant to the requirements of Government Code section 11346.1(a)(1), the Fish and Game Commission (FGC) is providing notice of proposed emergency action with regards to the above-entitled emergency regulation.

SUBMISSION OF COMMENTS

Government Code section 11346.1(a)(2) requires that, at least five working days prior to submission of the proposed emergency action to the Office of Administrative Law (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 submission of the proposed emergency to the OAL, the OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulations as set forth in Government Code section 11349.6.

Any interested person may present statements, arguments or contentions, in writing, submitted via U.S. mail, e-mail or fax, relevant to the proposed emergency regulatory action. Written comments submitted via U.S. mail, e-mail or fax must be received at the OAL within five days after FGC submits the emergency regulations to the OAL for review.

Please reference submitted comments as regarding "Merced River Closure Due to Drought Conditions" addressed to:

Mailing Address:	Reference Attorney Office of Administrative Law 300 Capitol Mall, Suite 1250 Sacramento, CA 95814	California State Fish and Game Commission Attn: Jon Snellstrom 1416 Ninth Street, Rm. 1320 Sacramento, CA 95814
E-mail Address:	staff@oal.ca.gov	fgc@fgc.ca.gov
Fax No.:	916-323-6826	916-653-5040

For the status of the FGC submittal to the OAL for review, and the end of the five-day written submittal period, please consult the Web site of the OAL at http://www.oal.ca.gov under the heading "Emergency Regulations."

CALIFORNIA FISH AND GAME COMMISSION
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

Emergency Action to
Amend subsection (b)(118) of Section 7.50,
Title 14, California Code of Regulations
Re: Emergency Closure Due to Low Flow Conditions

I. Statement of Facts Constituting the Need for Emergency Regulatory Action

The long range precipitation forecast for most of California predicts below normal rainfall. California and parts of western Oregon witnessed their driest year on record in 2013, according to statistics from the National Weather Service. As a result, 85 percent of California was categorized in severe drought. On January 16, 2014, the U.S. Department of Agriculture (USDA) designated portions of 11 drought-ridden western and central states as primary natural disaster areas, highlighting the financial strain the lack of rain is likely to bring to farmers in those regions. The federal disaster declaration includes counties in Colorado, New Mexico, Nevada, Kansas, Texas, Utah, Arkansas, Hawaii, Idaho, Oklahoma and California. While storms have dumped rain and snow in the East, droughts are persisting or intensifying in the West, according to officials connected with the U.S. Drought Monitor, an index on which the USDA's declarations are based. A ridge of high pressure is to blame for keeping storms off the Pacific coast and guiding them to the East. Poor snowpack is threatening regions dependent on major western rivers.

On January 17, 2014, Governor Edmund G. Brown Jr. proclaimed a State of Emergency for California and directed state officials to take all necessary actions to prepare for drought conditions with California facing water shortfalls in the driest year in recorded state history. The Department of Fish and Wildlife (Department) was ordered to evaluate and manage the changing impacts of drought on threatened and endangered species and species of special concern, and develop contingency plans for state Wildlife Areas and Ecological Reserves to manage reduced water resources in the public interest. The Department was also ordered to work with the Fish and Game Commission, using the best available science, to determine whether restricting fishing in certain areas will become necessary and prudent as drought conditions persist.

On April 25, 2014, Governor Edmund G. Brown Jr. signed an Executive Order redoubling state drought actions with additional measures to strengthen the state's response to drought.

In response to the above federal and state actions, the Department initiated statewide monitoring of rivers and streams that are subjected to these historically flow conditions. Low flows in many river systems are becoming inadequate as summer progresses impeding passage of spawning adults, increasing their vulnerability to mortality from predation, physiological stress, and angling. Furthermore, survival of eggs and juvenile fish in these systems over the coming months is likely to be extremely low as the current drought conditions continue.

The historically low stream flows have concentrated juvenile and adult wild rainbow trout/steelhead into shrinking pools of cold water making them easy prey for poachers, illegal angling methods such as snagging, increased hooking mortality due to legal catch and release angling targeting hatchery trout and steelhead, as well as other human-related disturbances within their spawning streams. When coupled with drought-related environmental stressors, such as high water temperature, poor water quality, and severely reduced suitable habitat, these human stressors can seriously affect reproductive success and adult survival rates.

Merced River

Both resident and anadromous rainbow trout exist in the Merced River downstream of Crocker-Huffman Dam (C-H Dam). C-H Dam is located approximately seven miles downstream of Lake McClure and is the impoundment structure necessary for Merced Irrigation District (Merced ID) to divert water into its Main Canal. Water temperatures in the reach of the lower Merced River downstream of C-H Dam are of concern during the late spring through early fall time period, and are influenced in large part by water supply, Merced ID's water conveyance system and delivery operations (a.k.a. release schedule), and minimum instream flow schedule levels. If Merced ID extends its water delivery irrigation season throughout the late spring through early fall time period, then cooler water arrives at C-H Dam than what would otherwise occur. To clarify, in the absence of Merced ID delivering water to its Main Canal, water in the Merced River warms rapidly during the summer months prior to reaching C-H Dam because of the reduced amount of water traveling through the reach of the Merced River located between Exchequer Dam and C-H Dam (i.e. reduced flow volume warms more quickly than elevated flow volume).

In 2014, one of the driest years on record, Merced ID does not have sufficient water supply to meet its normal water supply demand and has had to adjust its delivery season, and amount of water available for diversion, accordingly. In the spring of 2014, Merced ID notified the Department that it expects to run its irrigation delivery season to at least September 1, 2014 based upon available hydrology forecasts.

From a water temperature data evaluation perspective, the Department was concerned that the combination of a truncated Merced ID delivery season combined with a minimum pool reduction would result in elevated water temperatures in the reach of Merced River downstream of C-H Dam where rainbow trout reside. In response to this concern, the Department has conducted rainbow trout (*Oncorhynchus mykiss*) population, and fishery habitat quality monitoring efforts in the lower Merced River during the spring and summer of 2014. The purpose of these monitoring efforts is to identify the number of rainbow trout in the anadromous reach of the lower Merced River, and to determine the water temperature quality of the over summering habitat available to rainbow trout in this river reach. Through these data collection efforts, the Department has learned that the available habitat area on the lower Merced

River is shrinking as air temperatures increase during the summer, and that rainbow trout population abundance is also shrinking. It has become apparent that rainbow trout are moving upstream to find water temperature refugia but that fewer trout are being detected over time as this upstream migration occurs.

The Department believes that the quantity and condition of rainbow trout will continue to decrease as the summer and early fall time periods progress, due to drought related instream flow reductions that have resulted in low instream flow levels and warmer water temperatures. As rainbow trout move upstream to seek cooler water they become isolated in a narrower reach of the lower Merced River making them susceptible to increased angling pressure. Even though the current regulations are designed for non-lethal catch and release, additional angling pressure on already stressed rainbow trout will substantially increase the likelihood that the relatively few rainbow trout that still exist will die.

In conclusion, historically low stream flows have concentrated rainbow trout, that may include steelhead, into shrinking pools of cold water making them easy prey for poachers, illegal angling methods such as snagging, increased hooking mortality due to legal catch and release angling targeting rainbow trout, as well as other human-related disturbances within their spawning streams. When coupled with drought-related environmental stressors, such as high water temperature, poor water quality, and severely reduced suitable habitat, these human stressors can seriously affect reproductive success and adult survival rates.

The Department believes that, under these extreme conditions, it is prudent to temporarily close the lower Merced River to angling in order to eliminate angling as an additional stressor on the existing rainbow trout population. This stream closure will also serve to deter poaching and snagging activity since all angling will be prohibited. This action is necessary to conserve the wild rainbow trout population by protecting as many adult fish as possible.

Subsection 7.00(e) provides the seasons, size, and bag and possession limits for trout and salmon for waters in the South Central District which are not otherwise specified in Section 7.50. Subsection 7.50(b)(118) provides the season, size, bag and possession limits for trout occurring in the anadromous reach of the lower Merced River.

The following proposed regulatory changes would implement the emergency closure through October 31, 2014 to increase survival of juvenile and adult wild rainbow trout/steelhead by reducing hooking-related mortality.

Merced River, (b)(118) of Section 7.50, Title 14, CCR, is to be amended as follows:

> Subsection (A). Complete fishing closure from Crocker-Huffman Dam downstream to the Snelling Road bridge, a distance of approximately 5.5 miles, through October 31.

New subsection (B). From the Snelling Road bridge downstream to the Schaffer bridge on Oakdale Road. This section will remain open to fishing through October 31 with existing gear restrictions and bag and possession limits.

Renumber subsection (B) to (C). From the Schaffer bridge on Oakdale Road downstream to the mouth. This section will remain open to fishing through October 31 with existing gear restrictions and bag and possession limits.

Additional streams closures are currently being evaluated by the Department for future actions as needed.

II. Impact of Regulatory Action

The potential for significant statewide adverse economic impacts that might result from the proposed regulatory action has been assessed, and the following determinations relative to the required statutory categories have been made:

(a) Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State:

None.

(b) Nondiscretionary Costs/Savings to Local Agencies:

None.

(c) Programs Mandated on Local Agencies or School Districts:

None.

(d) Costs Imposed on Any Local Agency or School District that is Required to be Reimbursed Under Part 7 (commencing with Section 17500) of Division 4, Government Code:

None.

(e) Effect on Housing Costs:

None.

III. Authority and Reference

The Fish and Game Commission proposes this emergency action pursuant to the authority vested by sections 200, 202, 205, 215, 220, 240, 315, and 316.5 of the Fish and Game Code and to implement, interpret, or make specific sections 200, 202, 205, 206, 215, 220, and 316.5 of said Code.

IV. Section 240 Finding

Pursuant to Section 240 of the Fish and Game Code, the Commission made the finding that the adoption of this regulation is necessary for the immediate conservation, preservation, or protection of birds, mammals, reptiles, or fish, including, but not limited to, any nests or eggs thereof.

Informative Digest (Plain English Overview)

On January 16, 2014, the U.S. Department of Agriculture (USDA) designated portions of 11 drought-ridden western and central states as primary natural disaster areas, highlighting the financial strain the lack of rain is likely to bring to farmers in those regions. The federal disaster declaration includes counties in Colorado, New Mexico, Nevada, Kansas, Texas, Utah, Arkansas, Hawaii, Idaho, Oklahoma and California. Poor snowpack is threatening regions dependent on major western rivers.

On January 17, 2014, Governor Edmund G. Brown Jr. proclaimed a State of Emergency for California and directed state officials to take all necessary actions to prepare for drought conditions with California facing water shortfalls in the driest year in recorded state history. The Department of Fish and Wildlife (Department) was ordered to evaluate and manage the changing impacts of drought on threatened and endangered species and species of special concern, and develop contingency plans for state Wildlife Areas and Ecological Reserves to manage reduced water resources in the public interest. The Department was also ordered to work with the Fish and Game Commission, using the best available science, to determine whether restricting fishing in certain areas will become necessary and prudent as drought conditions persist.

On April 25, 2014, Governor Edmund G. Brown Jr. signed an Executive Order redoubling state drought actions with additional measures to strengthen the state's response to drought.

In response to the above federal and state actions, the Department initiated statewide monitoring of rivers and streams that are subjected to these historically low flow conditions. Low flows in many river systems are becoming inadequate as summer progresses impeding passage of spawning adults, increasing their vulnerability to mortality from predation, physiological stress, and fishing. The historically low stream flows have concentrated juvenile and adult wild rainbow trout/steelhead into shrinking pools of cold water making them easy prey for poachers, illegal angling methods such as snagging, increased hooking mortality due to legal catch and release angling targeting hatchery trout and steelhead, as well as other human-related disturbances within their spawning streams. When coupled with drought-related environmental stressors, such as high water temperature, poor water quality, and severely reduced suitable habitat, these human stressors can seriously affect reproductive success and adult survival rates.

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cooler water arrives at C-H Dam than what would otherwise occur. To clarify, in the absence of Merced ID delivering water to its Main Canal, water in the Merced River warms rapidly during the summer months prior to reaching C-H Dam because of the reduced amount of water travelling through the reach of the Merced River located between Exchequer Dam and C-H Dam (i.e. reduced flow volume warms more quickly than elevated flow volume).

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From a water temperature data evaluation perspective, the Department was concerned that the combination of a truncated Merced ID delivery season combined with a minimum pool reduction would result in elevated water temperatures in the reach of Merced River downstream of C-H Dam where rainbow trout reside. In response to this concern, the Department has conducted rainbow trout (*Oncorhynchus mykiss*) population, and fishery habitat quality monitoring efforts in the lower Merced River during the spring and summer of 2014. The purpose of these monitoring efforts is to identify the number of rainbow trout in the anadromous reach of the lower Merced River, and to determine the water temperature quality of the over summering habitat available to rainbow trout in this river reach. Through these data collection efforts the Department has learned that the available habitat area on the lower Merced River is shrinking as air temperatures increase during the summer, and that rainbow trout fish population abundance is also shrinking. It has become apparent that rainbow trout are moving upstream to find water temperature refugia but that fewer trout are being detected over time as this upstream migration occurs.

The Department believes that the quantity and quality of rainbow trout will continue to decrease as the summer and early fall time periods progress, due to drought related instream flow reductions that have resulted in low instream flow levels and warmer water temperatures. As rainbow trout move upstream to seek cooler water they become isolated in a narrower reach of the lower Merced River making them susceptible to increased angling pressure. Even though the current regulations are designed for non-lethal catch and release, additional angling pressure on already stressed rainbow trout will substantially increase the likelihood that the relatively few rainbow trout that still exist will die.

In conclusion, historically low stream flows have concentrated rainbow trout, that may include steelhead, into shrinking pools of cold water making them easy prey for poachers, illegal angling methods such as snagging, increased hooking mortality due to legal catch and release angling targeting rainbow trout, as well as other human-related disturbances within their spawning streams. When coupled with drought-related environmental stressors, such as high water temperature, poor water quality, and severely reduced suitable habitat, these human stressors can seriously affect reproductive success and adult survival rates.

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Merced River, (b)(118) of Section 7.50, Title 14, CCR, is to be amended as follows:

> Subsection (A). Complete fishing closure from Crocker-Huffman Dam downstream to the Snelling Road bridge, a distance of approximately 5.5 miles, through October 31.
>
> New subsection (B). From the Snelling Road bridge downstream to the Schaffer bridge on Oakdale Road. This section will remain open to fishing through October 31 with existing gear restrictions and bag and possession limits.
>
> Renumber subsection (B) to (C). From the Schaffer bridge on Oakdale Road downstream to the mouth. This section will remain open to fishing through October 31 with existing gear restrictions and bag and possession limits.

Additional streams closures are currently being evaluated by the Department for future actions as needed.

Benefits: The proposed regulation will provide benefits to the environment through the conservation and preservation of steelhead and wild rainbow trout populations.

The proposed regulations are neither inconsistent nor incompatible with existing State regulations. The Legislature has delegated authority to the Commission to promulgate sport fishing regulations (sections 200, 202, 205, 315, and 316.5, Fish and Game Code).

Regulatory Language

§7.50. Alphabetical List of Waters with Special Fishing Regulations.

Subsection (b)(118) of 7.50, Title 14, CCR is amended to read:

Body of Water	***Open Season and Special Regulations***	***Daily Bag and Possession Limit***
(118) Merced River (Merced Co.).		
(A) From Crocker-Huffman Dam downstream to the ~~Schaffer bridge on Oakdale Road.~~ Snelling Road bridge, a distance of approximately 5.5 miles.	~~Jan. 1 through Oct. 31. Only artificial lures with barbless hooks may be used.~~ Closed to all fishing [OAL to insert effective date] through October 31.	~~2 hatchery trout or hatchery steelhead** 4 hatchery trout or hatchery steelhead** in possession~~
(B) From the Snelling Road bridge downstream to the Schaffer bridge on Oakdale Road.	Jan. 1 through Oct. 31. Only artificial lures with barbless hooks may be used.	2 hatchery trout or hatchery steelhead** 4 hatchery trout or hatchery steelhead** in possession
(~~B~~C) From the Schaffer bridge on Oakdale Road downstream to the mouth.	Jan. 1 through Oct. 31. Bait may be used from Jan. 1 through Oct. 31. However, from April 1 through the Friday preceding the fourth Saturday in May, bait may be used only with single hooks having a gap between 1/2 and 1 inch, or with multiple hooks having a gap between 1/4 and 1/2 inch.	2 hatchery trout or hatchery steelhead** 4 hatchery trout or hatchery steelhead** in possession

* Wild Chinook salmon are those not showing a healed adipose fin clip and not showing a healed left ventral fin clip.
**Hatchery trout or steelhead in anadromous waters are those showing a healed adipose fin clip (adipose fin is absent). Unless otherwise provided, all other trout and steelhead must be immediately released. Wild trout or steelhead are those not showing a healed adipose fin clip (adipose fin is present).
Note: Authority cited: Sections 200, 202, 205, 215, 220, 240, 315 and 316.5, Fish and Game Code.
Reference: Sections 200, 202, 205, 206, 215 and 316.5, Fish and Game Code.