



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Region 1 – Northern
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EDMUND G. BROWN JR., Governor
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April 15, 2016

The Honorable Grace Bennett
Chair, Siskiyou County Board of Supervisors
P.O. Box 750
Yreka, CA 96097

Subject: Lake or Streambed Alteration Agreements

Dear Ms. Bennett:

Thank you for your March 11, 2016 letter inviting the Department of Fish and Wildlife (Department) to attend one of your upcoming meetings to discuss how Fish and Game Code (FGC) section 1602 will be interpreted and applied by the Department following the Third District Court of Appeal's decision in the case of *Siskiyou County Farm Bureau v. Department of Fish and Wildlife*. The Department accepts your invitation and will be available on April 19, 2016, which was one of the dates your letter proposed. In the meantime, the Department provides its perspective below.

First, however, the Department understands the situation your constituents face. With an irrigation season having started and the above-mentioned recent court activity over long-standing provisions of the Fish and Game Code, we acknowledge that those who may divert water for consumptive use are contemplating decisions about operations while requesting additional information and certainty about the law. The Department remains ready and available to work with any individual or business that has specific questions about this upcoming irrigation season and FGC section 1602. At its very core, that section of the code simply requires a notification for purposes of further discussion to find mutually agreeable solutions.

The Court of Appeal (Court) in *Siskiyou County Farm Bureau v. Department of Fish and Wildlife* confirmed that the notification requirement in FGC section 1602 applies to "the taking of water from a river or stream (by any method), and not merely blocking or altering the course of the stream or river itself." (*Siskiyou County Farm Bureau v. Department of Fish and Wildlife* (2015) 237 Cal.App.4th 411, 436.) In this regard, the Court affirmed the Department's interpretation of the word "divert" in FGC section 1602. The Department acknowledges that some water diverters have not understood "divert" to include water diversions that do not alter the streambed itself (e.g., by means of a pump, opening a headgate or installing flashboards). With this decision, the Court resolved the meaning of "divert" in FGC section 1602. Hence, before an entity takes water from a river, stream, or lake by *any method*, the entity must first notify the Department, provided the diversion is "substantial."

Although the Court of Appeal recognized that what constitutes a "substantial" diversion is a difficult question (*id.* at 429), the Court acknowledged that the Attorney General's

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Office and at least two courts have grappled with the issue and provided some guidance. As the Court explained, a 1973 opinion by the Attorney General concluded:

"a general rule cannot be laid down for what would constitute a substantial diversion, because of the innumerable factual variations [citation omitted], and therefore "whether a diversion was substantial depended on the specific facts of each case." (Id. at 429.)

However, in the same opinion, the Attorney General found:

"Any pump diversion or series of pump diversions that are capable of dewatering a stream...or could result in detriment to fish life in the stream because of flow reduction would constitute substantial diversion of natural flow." (Id. at 429, citation omitted.)

In *People v. Weaver*, the Court, in rejecting the claim that the word "substantially" was too vague, explained:

*"In enacting [former section 1602], we feel confident that the Legislature was not concerned with children skipping rocks across a stream, or building sand castles, or hikers dislodging a few stones as they climbed the bank of a river. On the contrary, by using the word substantially, the Legislature certainly intended to prohibit an owner from bulldozing material in a streambed which would cause the stream to change its course materially, or a like change which might interfere with the spawning grounds of anadromous fish, unless the plans were first approved by the Department (or found to have an insignificant effect upon the ecosystem in the vicinity of the projected change)." (Id. at 429 (citing *People v. Weaver* (1983) 147 Cal.App.3d Supp. 23, 37-38).*

In *Rutherford v. State of California*, the Court defined substantial as follows:

*"[S]omething [of] ample or of considerable amount, quantity or size; [or] within the legal context...as important or material and of considerable amount or value rather than inconsequential or small." (Id. at 428-429 (citing *Rutherford v. State of California* (1987) 188 Cal.App.3d 1267, 1279).)*

Because the Fish and Game Code and Department regulations do not define the word "substantially," the Department looks to the Attorney General's opinion and *Weaver* and *Rutherford* for guidance. The Department understands you, your constituents, and your consultants and attorneys may interpret opinions and case law differently. At this moment in time, in response to your letter, the Department shares its view of the legal opinions and case law – most recently in the *Siskiyou County Farm Bureau v. Department of Fish and Wildlife* case – that are most directly relevant to the interpretation and application of section 1602.

Considering this law, the following scenarios involving water diversions would reasonably be considered substantial. However, we also emphasize the guidance from the 1973 Attorney General opinion that whether a diversion is substantial depends on the specific facts of each case.

- While actively diverting water from a stream, there is no flow or very low flow in the stream below the point of diversion.
- While actively diverting water from a stream, the flow in the stream below the point of diversion is considerably reduced, as determined by, for example, a measurable or visual decrease in the water surface elevation; a visual reduction in the width of the stream surface flow; or stranded aquatic organisms in pools or in the streambed outside of the wetted channel.

After the Department receives a notification for a water diversion under FGC section 1602, the Department will determine whether the proposed activity substantially diverts the stream's natural flow, and if so, whether or not the activity may substantially adversely affect an existing fish and wildlife resource. (Fish & G. Code, §§ 1602, 1603; see also *Rutherford v. State of California*, *supra*, 188 Cal.App.3d. 1267, 1280, fn. 4 ("*[I]t is the role of the Department to determine whether the individual's proposed activity will affect the existing fish or wildlife resources...[T]his determination rests upon the Department and not the individual.*")).) If the Department determines the activity could have such an effect, a Lake or Streambed Alteration Agreement (Agreement) would be required to conduct the activity.

Importantly, FGC section 1603 includes a provision for negotiation between an applicant and the Department to come to agreement on the measures. Specifically, after the Department has provided a draft agreement to the landowner, the landowner may propose changes to the measures, and the Department must meet with the landowner to resolve any differences. (Fish & G. Code, § 1602, subd. (a).) The Department takes this negotiation provision seriously. The Department is not authorized under the statute to skip past working with applicants. In fact, during last year's irrigation season, the Department engaged with many of your constituents to discuss and agree upon measures for water diversions.

A resource of primary concern to the Department in the Shasta and Scott Valleys is coho salmon, listed as threatened under the California Endangered Species Act. A substantial diversion of water may have an adverse effect on coho salmon. The measures the Department would include in an Agreement for such a water diversion would focus primarily on conserving coho salmon, their habitats, and other salmonids. Such measures might include screening diversions, providing fish passage, and maintaining adequate instream flows for various life history stages.

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The Department is aware many water diverters have been diverting water from a stream under a permit or license issued by the State Water Resources Control Board for many years, and that notifying the Department and obtaining an Agreement is an additional burden. However, the Department is ready to work with water diverters to develop agreements that meet both the Department's responsibilities as the trustee for the State's fish and wildlife resources and the diverter's objectives. It is a better outcome for all parties, including salmon, if water diverters feel their objectives have been feasibly met.

In regard to a water diverter's compliance with Fish and Game Code section 1602 in the near term, one factor the Department will consider in exercising its enforcement discretion is whether or not the diverter has begun or is willing to begin the process of obtaining an Agreement by notifying the Department. The Department does not expect a water diverter to cease an otherwise lawful diversion while in the process of obtaining an Agreement. If a water diverter is not certain whether a particular diversion is substantial or otherwise requires notification, the Department recommends the diverter to notify the Department. Any activity that includes substantial modification to the bed, bank or channel still requires an executed Agreement before work begins.

The Department recognizes that additional outreach may be required to educate the public on this topic, as well as the effect water diversions can have on fish and wildlife resources. General information on the Department's Lake or Streambed Alteration Program is available on our website at: <https://www.wildlife.ca.gov/Conservation/LSA>.

The Department looks forward to continuing this dialogue in person at your April 19, 2016 meeting. If you have any questions in the meantime, please contact Habitat Conservation Program Manager Curt Babcock at curt.babcock@wildlife.ca.gov or 530-225-2740.

Sincerely,


for **Neil Manji**
Regional Manager

cc: Curt Babcock and Cathie Vouchilas
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