



California Department of
Fish and Wildlife



NOAA's National Marine
Fisheries Service

**NOAA'S NATIONAL MARINE FISHERIES SERVICE, WEST COAST REGION, AND
THE CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE**

California Voluntary Drought Initiative

Goals of the Voluntary Drought Initiative

NOAA's National Marine Fisheries Service (NMFS) and the California Department of Fish and Wildlife (CDFW) are among the Federal and State agencies that recognize the severe constraints drought conditions have on water supply, human health and safety, agriculture, and fish and wildlife in California. This California Voluntary Drought Initiative (Drought Initiative) expresses our intention to work with Landowners or Water Users in watersheds throughout the State to reduce the negative effects of the drought on salmon, steelhead, and sturgeon listed under the Federal Endangered Species Act (ESA), the California Endangered Species Act (CESA), and to provide improved regulatory certainty for those who participate in the Drought Initiative.

The purposes of this document are to describe: (a) the rationale for the initiative; and (b) the basic elements of the initiative.

NMFS is charged by Congress to protect, conserve, and recover endangered and threatened marine and anadromous species under the ESA, which provides for formal agreements with individuals and organizations pursuing activities that have the potential to affect the viability of such species, or the quality and/or quantity of their habitat. This includes activities that may affect water supply, such as agriculture and municipal water diversions. NMFS may enter into formal agreements with legal Landowners or Water Users that protect them from ESA liability, while also protecting ESA-listed fish and their habitat. However, these processes can be lengthy and complex, and may simply be impractical to address dynamic drought-related conditions.

CDFW is the State agency with jurisdiction over the conservation, protection, and management of fish and wildlife. In addition to being charged with protecting certain species through CESA, CDFW is California's Trustee Agency for the State's fish and wildlife resources.

To address the urgency created by drought, NMFS and CDFW have developed the Drought Initiative to reduce the effects of the drought on salmon, steelhead, and sturgeon populations. Another goal is to provide improved regulatory certainty for those participating individuals and entities. The Drought Initiative creates the opportunity for individual Drought Initiative Agreements (Individual Agreements) among: (1) Landowners or Water Users and NMFS; (2) Landowners or Water Users and CDFW; or (3) Landowners or Water Users and both agencies. The Drought Initiative also considers the ESA's section 9 enforcement provisions (and similar provisions under CESA), that pertain to the withdrawal of water from streams and rivers containing salmon, steelhead, and sturgeon.



The Drought Initiative does not expire, but it can instead be considered a “living document” that can be updated by NMFS and CDFW at any time. Likewise, either agency may withdraw from this Drought Initiative at any time. Individual Agreements under this initiative are limited to a duration not exceeding one year, and may be renewed on an annual basis. The geographic range covered by this initiative is all watersheds within the State containing salmon, steelhead, and sturgeon listed under either the ESA or CESA. Finally, given that drought-like conditions and resulting low streamflow levels can impact salmon, steelhead, and sturgeon habitat during periods not coinciding with a state drought declaration, the decision of whether an Individual Agreement is appropriate at a given location or during a given year will be made on a case-by-case basis by NMFS and CDFW.

Most importantly, the Drought Initiative represents the shared vision of NMFS and CDFW that voluntary, collaborative solutions memorialized in writing can best minimize the impacts of water use on participating individuals and entities as well as vulnerable species, while providing improved regulatory certainty for local communities during drought.

Relationship to Possible Water Rights Curtailments

This Drought Initiative is limited to actions taken pursuant to the authorities and responsibilities of NMFS and CDFW under ESA and CESA, respectively. The initiative is separate from actions the State Water Resource Control Board (State Water Board) may take under its authorities, or independent actions that it may pursue related to droughts, including emergency curtailments.

Individual Agreements between either or both of the fisheries agencies and Landowners or Water Users (or groups of Landowners or Water Users) that modify diversions or take other appropriate measures to protect listed species can potentially secure sufficient instream flows and resolve competing calls for water by Landowners or Water Users possessing a legal water right. Mindful of the fact that such agreements cannot supersede water right priorities under the authority of the State Water Board, NMFS and CDFW intend to endorse local cooperative solutions that are formalized through an executed Individual Agreement(s) between either or both NMFS and CDFW, the Landowner or Water User, or group of Landowners or Water Users.

Benefits for Landowners or Water Users Who Participate in the Drought Initiative

Improved Regulatory Certainty

Through this Drought Initiative, NMFS and CDFW seek to improve regulatory certainty for enrolled Landowners or Water Users. The Drought Initiative will improve regulatory certainty for participants in two ways: (1) through limiting a landowner’s liability and potential penalties under the ESA and CESA; and (2) by creating a pathway for local communities to develop cooperative solutions at the watershed scale that the State Water Board may consider when contemplating the development of future emergency regulations or curtailment orders. Drought conditions create substantial challenges for many Landowners or Water Users throughout



California. NMFS and CDFW have found that open dialogue with drought-affected Landowners or Water Users regarding voluntary steps to reduce significant risks to ESA and CESA-listed species from drought has been an effective way to achieve mutually beneficial outcomes. In addition, NMFS and CDFW have found the benefits of these outcomes are maximized for all parties when a significant portion of the watershed's Landowners or Water Users are engaged in the dialogue.

Because State and Federal endangered species laws differ in some respects, the actual implementation mechanisms may vary between a participating entity and NMFS or CDFW. For example, NMFS and CDFW expect to enter either jointly or separately into Individual Agreements as described in this document. Under existing State authorities and pursuant to executive orders related to the current drought emergency, CDFW may also employ voluntary written agreements as a tool to improve regulatory coverage for incidental take of species to the extent permissible under CESA. Depending on the situation, there could be one written agreement jointly covering each agency, or one agreement per agency. Participation in the Drought Initiative means executing either such arrangement.

NMFS and CDFW expect to reach out to Landowners or Water Users and fast-track discussions regarding measures that can be taken to protect ESA/CESA-listed species from impacts caused by dry weather patterns. These agreements would detail the proposed actions by each participating party. Improved regulatory certainty and coverage will be tied expressly to the agreed upon actions described in the Individual Agreement and limited in time only for the one-year period specified in the agreement.

Finally, to reduce the associated risks for Landowners or Water Users who enter into Individual Agreements under this Drought Initiative, NMFS and CDFW will support Individual Agreements as an alternative means to satisfy State Water Board emergency regulations, if NMFS and CDFW concur that the Individual Agreements satisfy the purposes of the curtailment/regulation.

ESA Enforcement

Under the ESA, NMFS has responsibility to protect and recover ESA-listed species, including salmon, steelhead, and sturgeon in California. The NMFS Office of Law Enforcement, often working with State and other Federal agencies, investigates activities that may result in the unlawful take of these species, and refers suspected unlawful activity to the Enforcement Section of the NOAA Office of the General Counsel for civil prosecution, or to the Department of Justice for criminal prosecution. Protecting ESA-listed salmon, steelhead, and sturgeon is a priority for NOAA across each species' range, and NOAA implements management plans and takes enforcement actions to help ensure the protection and recovery of these species.

At this time, severe and unprecedented drought conditions are affecting parts of California. To help address the concerns those conditions present, NMFS is working with those withdrawing



water from California streams and rivers to take into account those needs and at the same time carry out its responsibilities towards ESA-listed salmon, steelhead, and sturgeon by taking the extraordinary steps outlined in this Drought Initiative. NMFS encourages participation in the Drought Initiative, and will consider participation in the Drought Initiative an important mitigating factor when a Drought Initiative participant unintentionally takes an ESA-listed fish while withdrawing water (or other actions that affect fish passage) while complying with an Individual Agreement. To warrant this special consideration, a Drought Initiative participant must establish that it has implemented the specified water mitigation measures described in an Individual Agreement and fully complied with the requirements of the agreement. NOAA will pursue enforcement actions against those who act negligently, recklessly, or intentionally in violation of the ESA.

CESA Enforcement

CDFW recognizes that several populations of Chinook salmon and coho salmon are listed as threatened under both the ESA and CESA. When faced with discretionary enforcement decisions, CDFW considers all facts and factors involved. Given the current drought, CDFW will rank participation in the Drought Initiative as an important element when evaluating all the facts regarding the possible take of CESA-listed fish species while withdrawing water or carrying out other actions that cause take. However, as the State trustee of natural resources, CDFW is required by law to actively pursue enforcement actions against those who act negligently, recklessly, or intentionally in violation of the CESA. Finally, at the discretion of the Landowners or Water Users, Individual Agreements entered into pursuant to this initiative and CESA for fish management activities will include location-specific best management practices, and will provide increased regulatory certainty for cooperating Landowners or Water Users. Nothing herein shall be construed to allow any method of authorization for take of CESA-listed species, except as provided in the Fish and Game Code.

Financial and Technical Assistance

Technical and financial assistance may be available for Landowners or Water Users who participate in this Drought Initiative to implement the actions described in any Individual Agreement. If requested and appropriate, NMFS and CDFW will provide recommendations and letters of support for targeting financial and technical assistance with initiative participants.

Elements of the Voluntary Drought Initiative

The specific elements of the initiative will be tailored by stream or river system and described in Individual Agreements. The general elements of this initiative include eligibility, as well as the covered beneficial actions allowed under the Drought Initiative.



Eligibility

The Drought Initiative will be available specifically to Landowners or Water Users who do not have an existing ESA section 7 nexus, ESA section 10 permit, CESA Incidental Take Permit or other CESA authorization, or other fish passage or flow agreements with NMFS or CDFW. A Drought Initiative participant must establish that it has implemented the specified measures described in an Individual Agreement and fully complied with the requirements of that agreement. Eligible applicants may include water companies, water districts functioning as water masters for multiple water rights holders, or individual water rights holders or Landowners or Water Users that do not have existing Federal or State regulatory coverage under the ESA or CESA.

Implementing the Drought Initiative and Individual Agreements

The Drought Initiative will be implemented beginning in summer 2021, and will remain in effect until NMFS or CDFW end the program. Implementation will occur as Landowners or Water Users sign Individual Agreements, which will remain in effect for a period of one year (but may be extended on an annual basis if drought conditions continue). Individual agreements are not intended to address long-term flow conservation issues. For longer term conservation issues, a Safe Harbor Agreement or Habitat Conservation Plan, or a Natural Community Conservation Plan or other CESA approach, would be the appropriate vehicle for providing regulatory assurances and conservation of listed fish resources.

Beneficial Actions Appropriate for Individual Agreements

Targeted Flow Conservation

Landowners or Water Users are encouraged to consider and apply targeted water conservation strategies that minimize the potential for water use to impact the critical survival needs of priority salmon, steelhead, and sturgeon populations. Stream and river flows targeted through these Individual Agreements will be the lowest flows that NMFS and CDFW expect will promote fish survival in the specific stream or river reaches they address, based on the best available scientific information.

Landowners or Water Users who contribute minimum instream base flows, periodic fish passage pulse flows, or both can help improve the likelihood of salmon, steelhead, and sturgeon survival during abnormally dry climatic conditions.

Securing Instream Flows

The intent of this Drought Initiative is to help ensure that flow augmentation efforts by Landowners or Water Users operating under an Individual Agreement will be honored by downstream Landowners or Water Users. This initiative will seek the support of all Landowners



or Water Users necessary to ensure that the minimum biological needs of the species are met. Securing instream flows through an Individual Agreement is voluntary, and may include options such as leases or transfers.

Monitoring

Monitoring and evaluation of these measures is necessary to determine their success. Landowners or Water Users will work closely with NMFS, CDFW and other agencies so that actions agreed upon in any Individual Agreement are closely coordinated, monitored, and evaluated to determine success. Each Individual Agreement will seek to allow initiative participants, in coordination with NMFS and CDFW, and subject to their approval, the ability to modify the covered activity to ensure life-stage-specific habitat requirements are met.

Fish Rescue

Rescuing and relocating stranded fish is not the preferred option for fish management activities. However, in certain circumstances, fish rescue and relocation may be a necessary step that NMFS and CDFW take to protect listed species. Currently, NMFS and CDFW have existing authorities to rescue fish. However, Landowners or Water Users should pursue Individual Agreements with NMFS or CDFW that facilitate access to streams where stranded fish are located (or where fish may be relocated). Such efforts will comply with NMFS and CDFW fish rescue policies.

Winter Floodplain Inundation and Groundwater Recharge

Managed floodplain inundation can recharge floodplain aquifers, which in turn slowly release stored water back to the stream during summer months. An additional benefit of floodplain inundation actions is reconnecting the stream channel with floodplain habitat, which can benefit juvenile salmon, steelhead, and sturgeon by creating off-channel habitat characterized by slow water velocities, ample cover in the form of submerged vegetation, and high food availability. Estimates of groundwater recharge volume, the subsequent streamflow accretion, and the degree that accretion offsets diversion impacts may be used to assess potential benefits to streamflow when floodplain inundation actions are included in an Individual Agreement. NMFS and CDFW will work with Landowners or Water Users adjacent to priority waterways to facilitate the development of floodplain inundation and groundwater recharge projects that provide benefits to ESA- and CESA-listed steelhead, salmon, and sturgeon.



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