

CALIFORNIA FISH AND GAME COMMISSION
FINDING OF EMERGENCY AND
STATEMENT OF PROPOSED EMERGENCY REGULATORY ACTION

Emergency Action to Amend
Subsection (b)(40)(A) of Section 7.40
Subsections (a) and (b) of Section 8.00,
Title 14, California Code of Regulations (CCR)
Re: Low Flow Fishing Restrictions Due to Drought Conditions

Date of Statement: November 3, 2021

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

Background

On April 21, 2021, Governor Gavin Newsom proclaimed a State of Emergency to exist in Mendocino and Sonoma counties due to drought conditions in the Russian River Watershed in California and directed state officials to take immediate action to prepare for and mitigate the effects of drought conditions within the Russian River Watershed. The Department of Fish and Wildlife (Department) was ordered to evaluate and take immediate measures to protect terrestrial and aquatic species, increase water use efficiency on state Wildlife Areas and Ecological Reserves to maintain habitat for vulnerable species, and respond to human-wildlife interactions related to the drought. The Department was also ordered to work with commercial and recreational salmon fishing and tribal representatives to develop strategies to address salmon fishery impacts.

On May 10, 2021, Governor Newsom proclaimed a State of Emergency to also exist in the Klamath River, Sacramento-San Joaquin Delta, and Tulare Lake Watershed counties due to drought. The Governor ordered the Department to evaluate the minimum instream flows and other actions needed to protect salmon, steelhead, and other native fishes in critical stream systems in the State and to consider emergency regulations to establish minimum drought instream flows. The proclamation adds 39 counties, including Del Norte and Humboldt, to the Governor's April 21 drought emergency proclamation and provides new authority for the existing drought emergency for Mendocino and Sonoma counties.

Section 7.40, Title 14, CCR, Alphabetical List of Hatchery Trout, Hatchery Steelhead, and Salmon Waters with Special Fishing Regulations, currently sets forth the angling regulations in California streams with respect to Body of Water, Open Season and Special Restrictions, Daily Bag and Possession Limit. Every Body of Water listed is subject to Section 8.00 Low-Flow Restrictions, however, one exception is the stretch of the Eel River from the Pacific Ocean (mouth) upstream to Fulmor Road. The first objective of the proposed emergency amendment described below is to include this stretch of the Eel River in the Low-Flow Restrictions.

Section 8.00, Title 14, CCR, Low-Flow Restrictions, currently sets forth the criteria for angling closures in California streams in any year between October 1 and, depending on the body of water, either January 31 or March 31, when flows are deemed too low for passage of migrating adults. The streams are constantly monitored by the Department.

Occasionally circumstances such as drought, fire, or other environmental factors may require further restriction beyond the scope of the present regulation. In 2014, the Commission adopted similar emergency regulations extending the low-flow closure period for the North Coast and Central Coast areas, and the emergency regulation expired when no further action was required. Similarly, the primary objective of the proposed emergency amendment described below is to expand the temporal window of the Low-Flow Restriction authority to allow for protection of the fisheries during critically-dry conditions that occur outside of the closure periods currently defined in Section 8.00.

At this time, many coastal streams from Point Conception to the California/Oregon Border are already in extreme low-flow conditions. This year, 2021, all streams subject to low-flow closures under subsections 8.00(a) and 8.00(b) have been closed to angling since the low-flow angling restriction period began on October 1. The Department anticipates that most streams will experience low-flow conditions past the current restriction end dates of (a) January 31 and (b) March 31. Under low-flow conditions, steelhead and threatened and endangered salmon are prevented from migrating beyond the estuary and lower reaches, causing them to congregate in any available large body of water. If low-flow fishing restrictions are not extended, the fish could be subject to lawful and unlawful fishing techniques.

The Department believes that under these extreme conditions of the current drought, and possibly a prolonged period, it is prudent to extend the low-flow angling closure periods to September 1 through April 30, eight months, for the North Coast and Central Coast areas to eliminate angling as an additional stress on steelhead and salmon populations. This action is necessary to conserve wild steelhead and salmon populations by protecting as many adult fish as possible.

II. Proposed Emergency Regulations

The Department is proposing the following emergency regulatory changes:

- ***Subsection 7.40(b)(40)(A)1. Amend Eel River Special Fishing Regulation.***
 - Add a reference to “Section 8.00(a)(1)(A) Low-Flow Restrictions” implementing a low-flow fishing restriction between September 1 through April 30 on this stretch of the Eel River from mouth to Fulmor Road, at its paved junction with the south bank of the Eel River.
 - This subsection currently does not have low-flow closure criteria because it is a unique section that includes both estuary and stream conditions. To be more protective of listed and targeted game fish during low flows, the Department is proposing to implement the low-flow closure criteria on this section of the Eel River when the criteria in Section 8.00(a)(1) is under enforcement.
 - The Department recognizes that there are other targeted fisheries (crab, lamprey) in the estuarian section of the river, therefore, the Department is proposing a hook and line gear restriction for this section when low-flow closures are being implemented in 8.00(a)(1). This will still allow use of other legal fishing methods for targeting crab and lamprey.

- **Subsection 7.40(b)(40)(A)2. Amend Eel River Special Fishing Regulation**
 - Delete the reference “Section 8.00(a)(1)” and add the reference “Section 8.00(a)(1)(B) Low-Flow Restrictions”.
 - This part of the Eel River has been subject to the low-flow restrictions but because of renumbering of Section 8.00(a)(1), this change is necessary.
- **Subsection 8.00(a) Amend Low Flow Restrictions.**
 - In the first paragraph of the regulatory text, extend the low-flow closure period for a different stretch of the Eel River as well as the Mad River, Mattole River, Redwood Creek, Smith River and Van Duzen River (currently October 1 through January 31, four months) to September 1 through April 30 (eight months).
 - This change is necessary to increase the survival of adult Steelhead Trout, Coho Salmon and Coastal Chinook Salmon during these extreme drought conditions.
 - There is a minor typographical error in 8.00(a) which is corrected from “though” to “through” and has no effect on the regulation.
- **Subsection 8.00(a)(1) Amend Eel River Low Flow Restrictions.**
 - Add subsection (A) to 8.00(a)(1) “From mouth to Fulmor Road at its paved junction with the south bank of the Eel River.” Also add mention that when a Low-Flow Closure occurs in this section of the Eel River it will be “closed to hook-and-line fishing; other legal fishing methods are allowed during this timeframe.”
 - The Department recognizes that there are other targeted fisheries (crab, lamprey) in the estuarian section of the river, therefore, the Department is proposing a hook-and-line gear restriction for this section when low-flow closures are being implemented in 8.00(a)(1). This will still allow use of other legal fishing methods for targeting crab and lamprey.
 - The stream flow will be monitored as follows: Minimum Flow: 350 cfs at the gauging station near Scotia.
 - The addition of these provisions is necessary to increase the survival of adult Steelhead Trout, Coho Salmon and Coastal Chinook Salmon during these extreme drought conditions.
 - The current provision in 8.00(a)(1) is renumbered to 8.00(a)(1)(B) with no changes in the regulatory text.
 - There are no proposed changes to subsections 8.00(a)(2) through (7).
- **Subsection 8.00(b) Amend Low Flow Restrictions.**
 - In the first paragraph, extend the low-flow closure period (currently October 1 through March 31, six months) for the Mendocino, Sonoma, and Marin County coastal streams to September 1 through April 30 (eight months).

- This change is necessary to increase the survival of adult Steelhead Trout, Coho Salmon and Coastal Chinook Salmon during extreme drought conditions.
- There is a minor typographical error in the third paragraph which is corrected from “though” to “through” and has no effect on the regulation.

III. Findings for the Existence of an Emergency

Presently, the Commission considered the following factors in determining that an emergency does exist at this time:

The magnitude of potential harm:

The salmon and steelhead fisheries are important ecological, cultural, and recreational resources in the State of California. The Department has determined that the current drought conditions will continue to impact stream flows and prevent or delay the movement of migrating anadromous fish, including wild Steelhead Trout, Coho Salmon and Coastal Chinook Salmon, which can seriously affect reproductive success and adult survival rates.

The existence of a crisis situation:

The Department has determined that low stream flows will concentrate adult wild salmon and 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 steelhead, as well as other human-related disturbances within their spawning streams. When coupled with drought-related environmental stressors, such as elevated water temperature, poor water quality, and severely reduced suitable habitat, these human stressors can seriously affect reproductive success and adult survival rates. Emergency action is necessary now to protect adult Steelhead Trout, Coho Salmon, and Coastal Chinook Salmon populations in a timely manner.

The immediacy of the need:

The Department is already observing stream flows in many of our coastal systems that are below the defined low-flow thresholds to allow passage of spawning adults, increasing their vulnerability to mortality from predation, physiological stress, and fishing. 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.

Whether the anticipation of harm has a basis firmer than simple speculation:

On April 21, 2021, Governor Gavin Newsom proclaimed a State of Emergency to exist in Mendocino and Sonoma counties due to drought conditions in the Russian River Watershed in California and directed state officials to take immediate action to prepare for and mitigate the effects of drought conditions within the Russian River Watershed.

IV. 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.

V. Technical, Theoretical, and/or Empirical Studies, Reports, or Documents Relied Upon: None.

VI. Authority and Reference

Section 7.40:

Authority cited: Sections 200, 205, 265, 270, 315, 316.5, 399 and 2084, Fish and Game.

Reference: Sections 200, 205, 265, 270, 316.5 and 2084, Fish and Game Code.

Section 8.00:

Authority cited: Sections 200, 205, 265, 270, and 399, Fish and Game Code.

Reference: Sections 200, 205, and 265, Fish and Game Code.

VII. Fish and Game Code Section 399 Finding

In accordance with subdivision (a) of section 399 of the Fish and Game Code, the Commission finds that adopting this regulation is necessary for the immediate conservation, preservation, or protection of adult Steelhead Trout, Coho Salmon, and Coastal Chinook Salmon during the State of Emergency proclaimed to exist in California and directs state officials to take immediate action to prepare for and mitigate the effects of drought conditions.

Informative Digest (Policy Statement Overview)

Emergency Regulatory Action

On April 21, 2021, Governor Gavin Newsom proclaimed a State of Emergency to exist in Mendocino and Sonoma counties due to drought conditions in the Russian River Watershed in California and directed state officials to take immediate action to prepare for and mitigate the effects of drought conditions within the Russian River Watershed. On May 10, 2021, Governor Newsom proclaimed a State of Emergency to also exist in the Klamath River, Sacramento-San Joaquin Delta, and Tulare Lake Watershed Counties due to drought. The Governor ordered the Department to evaluate the minimum instream flows and other actions needed to protect salmon, steelhead, and other native fishes in critical stream systems in the State and to consider emergency regulations to establish minimum drought instream flows. The proclamation adds 39 counties, including Del Norte and Humboldt, to the Governor's April 21 drought emergency proclamation and provides new authority for the existing drought emergency for Mendocino and Sonoma counties.

The California Department of Fish and Wildlife (Department) proposes to amend sections 7.40 Special Fishing Regulations, and 8.00, Low-Flow Restrictions, Title 14, California Code of Regulations, thus providing additional protection to fish species if drought conditions were to persist. The amendments include the following:

- Subsection 7.40(b)(40)(A)1. Amend Eel River Special Fishing Regulation.
 - Implement a low-flow angling restriction on the section of the Eel River from mouth to Fulmor Road, at its paved junction with the south bank of the Eel River, September 1 through April 30, and reference subsection 8.00(a)(1)(A).
- 7.40(b)(40)(A)2. Amend Eel River Special Fishing Regulation
 - Delete the reference "Section 8.00(a)(1)" and add the reference "Section 8.00(a)(1)(B) Low-Flow Restrictions."
- Subsection 8.00(a) Amend Low-Flow Restrictions.
 - In the first paragraph of the regulatory text, extend the low-flow closure period for a different stretch of the Eel River as well as the Mad River, Mattole River, Redwood Creek, Smith River and Van Duzen River (currently October 1 through January 31, four months) to September 1 through April 30, eight months.
- Subsection 8.00(a)(1) Amend Eel River Low-Flow Restrictions.
 - Add subsection (A) to 8.00(a)(1) "From of the Eel River from the mouth to Fulmore Road at its paved junction with the south bank of the Eel River." Also add mention that when a Low-Flow Closure occurs in this section of the Eel River it will be "closed to hook-and-line fishing; other legal fishing methods are allowed during this timeframe."
- Subsection 8.00(b) Amend Low-Flow Restrictions.

- In the first paragraph, extend the low-flow closure period (currently October 1 through March 31, six months) for the Mendocino, Sonoma, and Marin County coastal streams to September 1 through April 30, eight months.

The Department believes that, under the extreme conditions of the current drought, and possibly a prolonged period, it is prudent to extend the low-flow angling closure periods for the North Coast and Central Coast areas to eliminate angling as an additional stress on steelhead and salmon populations. This action is necessary to conserve wild steelhead and salmon populations by protecting as many adult fish as possible.

Existence of an Emergency and Need for Immediate Action;

To determine whether an emergency exists, the California Fish and Game Commission (Commission) considered the following factors: the magnitude of potential harm; the existence of a crisis situation; the immediacy of the need; and, whether the anticipation of harm has a basis firmer than simple speculation.

Benefits:

The major benefit under the proposed emergency action is to provide additional protection to fish species (particularly steelhead and salmon) if drought conditions were to persist. The Low-Flow Restrictions give the Department an option, during drought conditions, to close waters to angling to reduce the loss of adult fish.

Benefits of the Regulation to the State's Environment:

The Commission anticipates benefits to the state's environment by sustainably managing California's inland fisheries resources. The environmental risk arising from the proposed rule are not regarded as significant, as the rule manages the resource more conservatively than existing regulation.

Pursuant to Section 399 of the Fish and Game Code, the Commission finds that the adoption of this emergency regulation is necessary for the conservation, preservation, and protection of fish in the affected waters.

Consistency and Compatibility with Existing State Regulations:

Article IV, Section 20 of the State Constitution specifies that the Legislature may delegate to the Fish and Game Commission such powers relating to the protection and propagation of fish and game as the Legislature sees fit. The Commission has reviewed its own regulations and finds that the proposed regulations are neither inconsistent nor incompatible with existing State regulations. The Commission has searched the California Code of Regulations and finds no other State agency regulations pertaining to the adjustment of low-flow seasonal restrictions for inland sportfishing regulations with regards to minimum flows designated at gauging stations.