



State of California - Natural Resources Agency  
DEPARTMENT OF FISH AND WILDLIFE  
Region 1 – Northern  
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Redding, CA 96001  
[www.wildlife.ca.gov](http://www.wildlife.ca.gov)

EDMUND G. BROWN, Jr., Governor  
CHARLTON H. BONHAM, Director



October 28, 2015

Fort Bragg City Council  
416 North Franklin Street  
Fort Bragg, CA 95437

**Subject: Permitting City of Fort Bragg Water Diversions**

Dear Fort Bragg City Council:

On October 13, 2015, California Department of Fish and Wildlife (Department) staff attended a special meeting of the Fort Bragg City Council concerning the current Stage 3 Water Emergency. This letter's purpose is to provide the City Council with background regarding the regulatory context of the City of Fort Bragg's (City) water diversions and proposed Summers Lane Reservoir, and information about impacts from the City's diversion on stream flow and public trust resources.

The Department has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and their habitat. As a responsible agency, the Department administers the California Endangered Species Act and other provisions of the Fish and Game Code (FGC) that conserve the State's fish and wildlife public trust resources. The Department's primary concerns regarding the City of Fort Bragg's existing water diversions include: (a) inadequate bypass flow which may potentially impact fish and wildlife resources (FGC §§5901, 5937, and 2080), and (b) ongoing diversion of water without notification (FGC §1602).

**Current Conditions**

The October 16, 2015 update of the Governor's Drought Task Force states that California is in the fourth year of a severe, record-setting drought. The Governor declared a drought State of Emergency on January 17, 2014, which remains in effect. The most recent U.S. Drought Monitor map (October 20, 2015) depicts extreme drought conditions in coastal Mendocino County.

The City declared a Stage 1 Water Emergency establishing mandatory conservation measures in August, 2015, which escalated to a Stage 3 Water Emergency on September 30, 2015. The October 15, 2015 U.S. Seasonal Drought Outlook from the National Oceanic and Atmospheric Administration (NOAA) Climate Prediction Center<sup>1</sup> shows that drought conditions are expected to persist or intensify throughout much of northern California, including Mendocino County, at least through January 31, 2016.

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<sup>1</sup> <http://www.cpc.ncep.noaa.gov/>



The NOAA Drought Task Force brief assessment<sup>2</sup> states that “El Niño events have not reliably delivered above-average precipitation across the entire state, especially not in the northern watersheds.”

### **Ongoing Water Diversion**

The City's municipal water supply consists of water diverted from three streams: Noyo River, Newman Gulch (tributary to Noyo River), and Waterfall Gulch (tributary to Hare Creek).

The Noyo River supports three listed salmonid species: coho salmon (*Oncorhynchus kisutch*) is State-listed as “endangered” and federally-listed as “endangered”; steelhead trout (*O. mykiss*) and Chinook salmon (*O. tshawytscha*) are federally-listed as “threatened.” Hare Creek supports coho salmon and steelhead trout. Populations of these salmonids have undergone a substantial decline in abundance in recent decades. Coho salmon has undergone at least a 70 percent decline in abundance since the 1960s, and is currently at 6 percent to 15 percent of its abundance during the 1940s. These species have been impacted by loss and degradation of habitat, including lack of adequate in-stream flow, high water temperatures due to lack of streamside vegetation, siltation of spawning gravels, and lack of in-stream shelter and pools (DFG 2004).

The City's diversions are impacting fish and wildlife resources in the Noyo River and Waterfall and Newman gulches during low-flow periods. The City is diverting up to 50 percent of the stream flow in the Noyo River, at times over 90 percent of Waterfall Gulch stream flow, and an unknown percentage of Newman Gulch stream flow. These rates of diversion are substantial and lack adequate bypass flows to maintain aquatic species downstream and to ensure fish are not stranded or otherwise impacted. Therefore, these stream diversions are not in compliance with FGC sections 1602, 5901, and 5937.

An August 15, 2014, letter from NOAA's National Marine Fisheries Service protesting the City's petition for change of an existing water right emphasized this concern. The letter stated:

*“[t]he continuation of water diversions from Waterfall Gulch, in the absence of adequate flow bypass conditions, may cause adverse impacts to listed salmonids in Hare Creek by: (a) reducing the amount and quality of rearing habitat downstream; (b) reducing the amount and quality of spawning habitat downstream; and (c) reducing upstream and downstream passage opportunities for adults, juveniles, and smolts. ...In addition, proposed modifications to transport and storage of water have*

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<sup>2</sup><http://cpo.noaa.gov/ClimatePrograms/ModelingAnalysisPredictionsandProjections/MAPPTaskForces/DroughtTaskForce/ENSOCaliforniaDrought.aspx>



*the potential to alter streamflow conditions in the Noyo River watershed via Newman Gulch Reservoir and result in impacts similar to those described above for Hare Creek."*

### **Prior Requests to Comply with Fish and Game Code**

Pursuant to FGC section 1602, Lake or Streambed Alteration Agreements (LSAA) are required for new and ongoing projects that substantially divert or obstruct the natural flow of any river, stream, or lake. In issuing a LSAA, the Department develops avoidance and minimization measures to address affected fish and wildlife resources, including measures that avoid take of listed salmonids.

In a recent ruling<sup>3</sup>, the California Court of Appeal affirmed the Department's authority to require notification for water diversion pursuant to FGC section 1602. The ruling states that:

*"Regardless of an entity's legal right to take water, such as for agricultural purposes, and regardless of whether the taking alters the streambed itself, Section 1602 unambiguously requires notification to the Department if an entity plans to 'substantially divert' water. After notification, a statutory mechanism – arbitration followed by court review – exists to resolve disputes about diversions. This notification requirement neither encroaches on any entity's water rights, nor impairs the powers and duties of the State Water Resources Control Board (Board), which has filed an amicus brief fully supporting the Department's position (California Court of Appeal 2015)."*

This ruling reversed an earlier judgment in a lower court in Siskiyou County.

Over the past four years, the Department has repeatedly requested that the City enter into a LSAA, as the following list indicates:

- July 13, 2011 – In a letter, the Department advised the City that the Waterfall Gulch diversion was substantial and required notification pursuant to FGC section 1602.
- November 25, 2013 – In a Pre-harvest Inspection Report for THP 1-13-096 MEN, the Department requested the City provide notification for the diversion from Waterfall Gulch.
- March 3, 2014 – In a letter to the City, the Department requested notification pursuant to FGC section 1602 and reiterated the potential impacts to public trust resources from ongoing water diversion.

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<sup>3</sup> <http://www.courts.ca.gov/opinions/documents/C073735.PDF>

- July 21, 2014 – In a comment letter to the City regarding the mitigated negative declaration (MND) for the proposed Summers Lane Reservoir, the Department outlined potential impacts, requested notification pursuant to FGC section 1602, and provided additional recommendations to reduce or avoid impacts to aquatic resources.
- August 14, 2014 – Department staff met informally with the City's City Manager, Director of Public Works, and Community Development Director to discuss water-related compliance issues and potential solutions.
- August 15, 2014 – In a letter to the State Water Resources Control Board and the City of Fort Bragg regarding the Waterfall Gulch diversion, the Department requested compliance with FGC section 1602 and other regulations to prevent the take of State- and federally-listed species.
- January 20, 2015 – In a comment letter to the City regarding the MND for the proposed Hare Creek Center project, the Department requested notification pursuant to FGC section 1602 and reiterated the potential impacts to public trust resources from ongoing water diversion.

As of this date, the Department has not received notification from the City pursuant to FGC section 1602.

### **Installation of Bladder Dam on Noyo River**

On October 16, 2015, the Department received a Notification of Emergency Lake or Streambed Alteration stating that on October 1, 2015, a bladder dam had been installed at the City's diversion on the Noyo River (Madsen Hole). The Notification stated that due to high tides, total dissolved solids at the point of diversion had exceeded levels that could be processed at the City's water treatment plant.

In subsequent communications, the City provided additional dates in October and November 2015 when the dam is expected to be installed to prevent sea water from contaminating the City's water supply. This activity was allowed to be conducted in 2015 under an emergency notification. The City has the ability to monitor stream and tidal conditions to determine when similar conditions will occur in 2016 and should do so. If installation of a dam is needed in the future, a standard LSAA will be required and must be in effect in advance of the activity.



## **Summers Lane Reservoir**

The Department supports the establishment of additional water storage by the City. However, the Department must ensure that water diversions occur in a manner that does not adversely impact fish and wildlife resources.

In order to change the existing water right to allow for the filling of the proposed Summers Lane reservoir, the City was required to file a Petition for Change of its water right with the State Water Resources Control Board. According to the Draft Amended Water License<sup>4</sup> (Term K):

*"No water shall be diverted or used under this right, and no construction related to such diversion shall commence, unless right holder has obtained and is in compliance with all necessary permits or other approvals required by other agencies."*

Because an LSAA is required, the City may not be in compliance with Water Right Permit Term K.

On October 17, 2014, the Department filed a protest of the City's petition for change to its water right. On December 2014, the Division of Water Rights accepted this protest and directed the City and the Department to "make a good faith effort to resolve the protest." The bases of the protest includes: a potential increase in the amount of water diverted from streams; potential impacts to public trust resources, including listed salmonids; and non-compliance with FGC sections 1602, 5937, and 5901. In a May 22, 2015 letter to the City, the Department requested a meeting to discuss protest dismissal terms. To date, the City has not responded to the Department's request to meet.

## **Water Conservation**

The Department commends the City's efforts to conserve water. To provide additional immediate and positive impact on its water supply, the City should continue to expand conservation efforts as well as provide additional water conservation-related resources to its residents. In 2009, the State adopted the Water Conservation Act through the passage of Senate Bill X7-7, requiring that California achieve a 20 percent reduction in urban per-capita water use by the end of December 2020. The Department encourages the City to implement specific and quantifiable year-round water conservation goals, and to develop a long-term water plan including measurable conservation goals consistent with Senate Bill X7-7.

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<sup>4</sup>[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/applications/petitions/2014/25418draft.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/petitions/2014/25418draft.pdf)

## Recommendations

The City of Fort Bragg is currently noncompliant with FGC section 1602, potentially noncompliant with FGC sections 5901 and 5937, and is impacting State- and federally-listed and other sensitive species by diverting water from streams without sufficient bypass flows. Because the City currently lacks a comprehensive plan to address water use and water shortage concerns, especially during drought periods, it is unclear to the Department how the City plans to address these impacts.

In order to resolve these issues, the Department recommends the City:

1. Contact the Department to schedule a meeting to discuss resolution of the Department's water right protest terms.
2. Pursuant to FGC section 1602, enter into a LSAA for ongoing and future water diversion from the three stream diversions.
3. Pursuant to FGC section 1602, enter into a LSAA for any future dam installation.
4. Develop a long-term, comprehensive plan to address water use and water shortage concerns including measureable conservation goals and strategies consistent with Senate Bill X7-7.

If you have questions or comments regarding this matter, please contact Environmental Scientist Angela Liebenberg at (707) 964-4830 or [angela.liebenberg@wildlife.ca.gov](mailto:angela.liebenberg@wildlife.ca.gov).

Sincerely,



**Curt Babcock**  
Habitat Conservation Program Manager

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## Reference

California Department of Fish and Game. 2004. Recovery Strategy for California Coho Salmon. Report to the California Fish and Game Commission.



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