

**State of California
Office of Administrative Law**

In re:
State Water Resources Control Board

Regulatory Action:

Title 23, California Code of Regulations

Adopt sections: 876.5, 876.7, and 878.4

**NOTICE OF APPROVAL OF EMERGENCY
REGULATORY ACTION**

**Government Code Sections 11346.1 and
11349.6**

OAL Matter Number: 2022-0912-02

OAL Matter Type: Emergency Readopt (EE)

In this readopt of OAL Matter No. 2021-0924-01E, the State Water Resources Control Board (the "Board") is adopting emergency curtailment and reporting regulations for Mill and Deer Creeks. The emergency regulations (1) establish emergency drought minimum flow requirements to protect threatened Central Valley spring-run Chinook salmon and threatened California Central Valley steelhead; (2) ensure continued access to water supplies for minimum health and safety needs; (3) permit local cooperative solutions in place of specified Board-issued curtailment orders; (4) prohibit inefficient domestic lawn watering practices; and (5) require curtailment order reporting.

OAL approves this emergency regulatory action pursuant to sections 11346.1 and 11349.6 of the Government Code.

This emergency regulatory action is effective on 9/21/2022 and will expire on 9/21/2023. The Certificate of Compliance for this action is due no later than 9/20/2023.

Date: September 21, 2022



Steven J. Escobar
Senior Attorney

Original: Eileen Sobeck, Executive
Director

Copy: David Rose

For: Kenneth J. Pogue
Director

NOTICE PUBLICATION/REGULATORY ACTION SUBMISSION

STD. 400 (REV. 10/2019)

EMERGENCY

For use by Secretary of State only

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER 2022-0912-02EE	EMERGENCY NUMBER
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ENDORSED - FILED
In the office of the Secretary of State
of the State of California

SEP 21 2022

1:53 Pm GH

For use by Office of Administrative Law (OAL) only	
NOTICE	REGULATIONS

OFFICE OF ADMIN. LAW
2022 SEP 12 PM2:25

AGENCY WITH RULEMAKING AUTHORITY
State Water Resources Control Board

AGENCY FILE NUMBER (if any)

A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE	
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON		TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn			NOTICE REGISTER NUMBER	PUBLICATION DATE

B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Emergency Action to Protect Threatened Species, Mill and Deer Creeks	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2021-0924-01E
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT 876.5, 876.7, 878.4
TITLE(S)	AMEND
23	REPEAL

3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346)	<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute.	<input checked="" type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h))	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100)
<input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input type="checkbox"/> File & Print	<input type="checkbox"/> Print Only
<input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))		<input checked="" type="checkbox"/> Other (Specify) <u>Water Code section 1058.5</u>	

4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal	
<input type="checkbox"/> Other (Specify)			

7. CONTACT PERSON David Rose	TELEPHONE NUMBER (916) 341-5196	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) David.Rose@waterboards.ca.gov
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8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE Eileen Sobeck, Executive Director	DATE August 22, 2022
TYPED NAME AND TITLE OF SIGNATORY Eileen Sobeck - Executive Director, State Water Resources Control Board	

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ENDORSED APPROVED

SEP 21 2022

Office of Administrative Law

Per agency's request: SE, 9/21/2022

Curtailment of Diversions on Mill and Deer Creeks Due to Insufficient Flow for Specific Fisheries

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In Title 23, Division 3, Chapter 2, Article 24, re-adopt Sections 876.5, 876.7, and 878.4, to read:

Article 24. Curtailment of Diversions Due to Drought Emergency

§ 876.5. Emergency Curtailments Due to Lack of Water Availability in Certain Watersheds.

The State Water Board has determined that it is an unreasonable use under Article X, section 2 of the California Constitution to continue diversions that would cause or threaten to cause flows to fall beneath the drought emergency minimum flows listed in subdivision (c), except as provided in section 878.1, and subdivision (b).

- (a) For the protection of threatened and endangered fish, no water shall be diverted from the streams listed below during the effective period of a curtailment order under this article, except as provided under sections 878, 878.1 or 878.4.
- (b) The Deputy Director may issue a curtailment order upon a determination that without curtailment of diversions flows are likely to be reduced below the drought emergency minimum flows specified in subdivision (c). Curtailment orders shall be effective the day after issuance. Except as provided in this subdivision and in sections 878, 878.1, and 878.4, where flows are sufficient to support some but not all diversions, curtailment shall be required in order of water right priority.

In determining which diversions should be subject to curtailment, the Deputy Director shall take into account the need to provide reasonable assurance that the actual drought emergency minimum flows will be met.

If maintaining the flows described in subdivision (c) would require curtailment of uses described in section 878.1, then the State Water Board's Executive Director may decide whether or not those diversions should be allowed to continue based on the most current information available regarding fish populations, health and safety needs, and the alternatives available to protect both public health and safety and threatened or endangered fish.

Unless the California Department of Fish and Wildlife or the National Marine Fisheries Service objects, the Deputy Director shall approve a petition for a limited exception to curtailment for minimum stockwatering needs during a pulse flow event upon a determination by the Deputy Director that the petitioner has demonstrated that curtailing diversions to achieve the pulse flows described in subdivisions (c)(1)(C)(ii), (c)(1)(D)(i), (c)(2)(C)(ii), or (c)(2)(D)(i) would likely impair livestock survival, and that there are no reasonable water supply alternatives available (for example, stockponds, groundwater wells, or hauled water).

- (c) The State Water Board has authority to ensure the protection and preservation of streams and to limit diversions to protect critical flows for species, including for state and federally threatened and endangered salmon and steelhead species. To prevent the waste and unreasonable use of water, the Deputy Director may issue curtailment orders as described in subdivision (b). The flows described in this subdivision may be less than otherwise desirable minimum flows for fisheries protection, but have been developed to ensure bare minimum instream flows for migratory passage during the drought emergency, given the extreme nature of the current drought and the drought impacts to these fisheries.

This section shall only go into effect if the Executive Director determines that any agreements in any applicable watersheds entered into by diverters, the National Marine Fisheries Service and California Department of Fish and Wildlife either do not cover substantially all of the water diverted in the watershed or that the agreements are no longer in effect.

- (1) Mill Creek. Mill Creek enters the Sacramento River at Army Corps of Engineers river mile 230 from the east near Los Molinos and approximately one mile north of the town of Tehama. All water right holders in the Mill Creek Watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed Central Valley spring-run Chinook salmon (CV SR salmon) and federally listed California Central Valley steelhead (CCV steelhead) through the Sacramento Valley floor stream reaches in Mill Creek:

- (A) October 15 - March 31, if Adult CCV Steelhead are present –
(i) Base Flows – 50 cubic-feet per second (cfs) or full flow without diversions, whichever is less.

- (B) October 15 – June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present and Adult CV SR Salmon or Adult CCV Steelhead are not present –
 - (i) Base Flows – 20 cfs or full flow without diversions, whichever is less.

- (C) April 1 up to June 15, if Adult CV SR Salmon are present –
 - (i) Base Flows – 50 cubic feet per second (cfs) or full flow without diversions, whichever is less.

 - (ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. Pulse flows may be required when adult CV SR salmon are observed between Ward Dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. Pulse flows will last a minimum of 24 hours to a maximum of 72 hours, and will be determined based on the presence of fish observed and desired migration movements upstream. Pulse flow duration will be determined by the Deputy Director in consultation with the California Department of Fish and Wildlife or the National Marine Fisheries Service. A flow ramp down period at the end of a pulse flow may be included if requested by the California Department of Fish and Wildlife or the National Marine Fisheries Service. The flow ramp down period is part of the pulse flow period. Pulse flows may be required if either of the following conditions occurs prior to the end of the migration period:
 - A. The average daily full natural flow measured at the United States Geological Survey Mill Creek Near Los Molinos CA gauge (MLM/#11381500) is 100 cfs or less for three consecutive days; or
 - B. The California Department of Fish and Wildlife or the National Marine Fisheries Service submits a request to provide the pulse flow and it is approved by the Deputy Director.

- (D) June 1 up to June 15, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –
 - (i) Pulse Flows – 100 cfs or full inflow without diversions, whichever is less. Pulse flows may be required when juvenile CV SR salmon or CCV steelhead are observed in

the lower reaches of Mill Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. Pulse flows will last a minimum of 24 hours to a maximum of 48 hours, and will be determined based on the presence of fish observed and desired migration movements downstream into the Sacramento River. Pulse flow duration will be determined by the Deputy Director in consultation with the California Department of Fish and Wildlife or the National Marine Fisheries Service. A flow ramp down period at the end of a pulse flow may be included if requested by the California Department of Fish and Wildlife or the National Marine Fisheries Service. The flow ramp down period is part of the pulse flow period. Pulse flows may be required if both of the following occur:

- A. The California Department of Fish and Wildlife or the National Marine Fisheries Service conducts field surveys and observes juvenile CV SR salmon or CCV steelhead in the lower reaches of Mill Creek in June; and
 - B. The California Department of Fish and Wildlife or the National Marine Fisheries Service submits a request to provide the pulse flow and it is approved by the Deputy Director.
- (E) The California Department of Fish and Wildlife or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director when the pertinent migration periods have ended. Upon such notice, the Deputy Director shall, no later than the next business day, suspend relevant portions of curtailment orders that are based on the need for a particular flow volume when presence of adult or juvenile CV SR salmon and CCV steelhead no longer supports the need for the required flows. The Deputy Director may independently determine that hydrologic conditions no longer support the need for the required flows, and suspend relevant portions of curtailment orders.
- (F) The California Department of Fish and Wildlife or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director that the pertinent migration periods have not yet begun. The Deputy Director may choose not to issue curtailment orders for purposes of meeting the drought emergency minimum flows identified in this subdivision if these agencies have determined that fish are not present and in need of the identified

flows.

(2) Deer Creek. Deer Creek enters the Sacramento River at Army Corps of Engineers river mile 220 from the east approximately one mile west of the town of Vina. All water right holders in the Deer Creek Watershed are subject to curtailment pursuant to subdivision (b) and responsible to meet the drought emergency minimum flows identified in this subdivision. For purposes of this article, the following flows are the drought emergency minimum flows necessary for migratory passage of state and federally listed CV SR salmon and federally listed CCV steelhead through the Sacramento Valley floor stream reaches in Deer Creek:

(A) October 15 - March 31, if Adult CCV Steelhead are present –

(i) Base Flows – 50 cfs or full flow without diversions, whichever is less.

(B) October 15 – June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present and Adult CV SR Salmon or Adult CCV Steelhead are not present –

(i) Base Flows – 20 cfs or full flow without diversions, whichever is less.

(C) April 1 up to June 15, if Adult CV SR Salmon are present –

(i) Base Flows – 50 cfs or full flow without diversions, whichever is less.

(ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less. Pulse flows may be required when adult CV SR salmon are observed between Vina Dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. Pulse flows will last a minimum of 24 hours to a maximum of 72 hours, and will be determined based on the presence of fish observed and desired migration movements upstream. Pulse flow duration will be determined by the Deputy Director in consultation with the California Department of Fish and Wildlife or the National Marine Fisheries Service. A flow ramp down period at the end of a pulse flow may be included if requested by the California Department of Fish and Wildlife or the National Marine Fisheries Service. The flow ramp down period is part of the pulse flow period. Pulse flows may be required if either of the following conditions occur prior to the end of the migration period:

- A. The average daily flow measured at the United States Geological Survey Deer Creek Near Vina CA gauge (#11383500) is 100 cfs or less for three consecutive days; or
 - B. The California Department of Fish and Wildlife or the National Marine Fisheries Service submits a request to provide the pulse flow and it is approved by the Deputy Director.
- (D) June 1 up to June 15, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present –
- (i) Pulse Flows – 100 cfs or full inflow without diversions, whichever is less. Pulse flows may be required when juvenile CV SR salmon or CCV steelhead are observed in the lower reaches of Deer Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. Pulse flows will last a minimum of 24 hours to a maximum of 48 hours, and will be determined based on the presence of fish observed and desired migration movements downstream into the Sacramento River. Pulse flow duration will be determined by the Deputy Director in consultation with the California Department of Fish and Wildlife or the National Marine Fisheries Service. A flow ramp down period at the end of a pulse flow may be included if requested by the California Department of Fish and Wildlife or the National Marine Fisheries Service. The flow ramp down period is part of the pulse flow period. Pulse flows may be required if both of the following occur:
 - A. The California Department of Fish and Wildlife or the National Marine Fisheries Service conducts field surveys and observes juvenile CV SR salmon or CCV steelhead in the lower reaches of Deer Creek in June; and
 - B. The California Department of Fish and Wildlife or the National Marine Fisheries Service submits a request to provide the pulse flow and it is approved by the Deputy Director.

- (E) The California Department of Fish and Wildlife or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director when the pertinent migration periods have ended. Upon such notice, the Deputy Director shall, no later than the next business day, suspend relevant portions of curtailment orders that are based on the need for a particular flow volume when presence of adult or juvenile CV SR salmon and CCV steelhead no longer supports the need for the required flows. The Deputy Director may independently determine that hydraulic conditions no longer support the need for the required flows, and suspend relevant portions of curtailment orders.
 - (F) The California Department of Fish and Wildlife or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director that the pertinent migration periods have not yet begun. The Deputy Director may choose not to issue curtailment orders for purposes of meeting the drought emergency minimum flows identified in this subdivision if these agencies have determined that fish are not present and in need of the identified flows.
- (3) The drought emergency minimum flows identified in subdivision (c)(1) and (c)(2) shall extend through the confluences with the Sacramento River. Compliance with the drought emergency minimum flows will be determined by the Deputy Director, measured at the most downstream gauge available. The Deputy Director may require additional compliance points as needed.
- (d) (1) Initial curtailment orders will be mailed to each water right holder or the agent of record on file with the Division of Water Rights. The water right holder or agent of record is responsible for immediately providing notice of the order(s) to all diverters exercising the water right.
- (2) The State Board has established an email distribution list that water right holders may join to receive drought notices and updates regarding curtailments. Notice provided by email or by posting on the State Water Board's drought web page shall be sufficient for all purposes related to drought notices and updates regarding curtailments.

Note: Authority cited: Sections 1058 and 1058.5, Water Code.

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275 and 1058.5, Water Code; *El Dorado Irrigation Dist. V. State Water Resources Control Board* (2006) 142 Cal.App.4th 937; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463; and *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

§ 876.7. Limitation on Inefficient Domestic Lawn Irrigation.

(a) Inefficient surface water uses in the Mill Creek and Deer Creek Watersheds for domestic lawn watering, which result in excessive water diversion for a small amount of water used for beneficial use are not reasonable in light of the alternatives available and needs of the fishery. For the purposes of this regulation, inefficient surface water use for domestic lawn watering are those that use more than 18.5 gallons per day per 100 square feet, a reasonable water quantity set forth in Article 5, section 697.

Note: Authority cited: Sections 1058 and 1058.5, Water Code.

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275 and 1058.5, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463; and *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

§ 878.4. Local Cooperative Solutions.

If the National Marine Fisheries Service and the California Department of Fish and Wildlife enter into an agreement with a diverter or diverters, that the National Marine Fisheries Service or the California Department of Fish and Wildlife determines provides watershed-wide protection for the fishery that is comparable to or greater than that provided by section 876.5, the diverter or diverters may request approval from the Deputy Director to implement the agreement in place of State Board-issued curtailment orders under section 876.5. The Deputy Director shall approve the request so long as other users of water will not be injured.

The Deputy Director's approval may be subject to any conditions, including reporting requirements, that the Deputy Director determines to be appropriate to assure that no other users of water will be injured and that the flows in the agreements will occur. If the Deputy Director does not act on a request within one week of receipt, the request will be deemed approved.

Other local cooperative solutions may also be proposed to the Deputy Director as an alternative means of reducing water use to preserve drought emergency minimum flows. Requests to implement voluntary agreements to coordinate diversions or share water in place of State Water Board-issued curtailment orders under this article may be submitted to the Deputy Director at any time. The Deputy Director may approve a request, or approve it subject to any conditions including reporting requirements that the Deputy Director determines to be appropriate, if the Deputy Director determines:

- (a) The continued diversion is reasonable;
- (b) That other users of water will not be injured; and
- (c) That the relevant minimum flows identified in this article will be met.

If a local solution is already in place at the time a curtailment order is issued, a diverter subject to a curtailment order must, within five days of issuance of the curtailment order, submit a petition to the Deputy Director and submit a certification under penalty of perjury that a petition has been filed as authorized under this section, the diversion will be authorized if the petition is approved, the subject water right authorizes the diversion in the absence of a curtailment order, and that diversion and use will comply with the conditions for approval of the petition, except that approval by other authorities may still be pending.

Diversions covered by an agreement approved by the Deputy Director to coordinate diversions or share water pursuant to this section are subject to this article and violations of such an approved agreement shall be subject to enforcement as a violation of this article. Notice of petitions and decisions under this section will be posted as soon as practicable on the State Board's drought webpage. The Deputy Director may issue a decision under this article prior to providing notice. Any interested person may file an objection to the certification, petition or decision. The objection shall indicate the manner of service upon the certifier or petitioner. The State Board will consider any objection, and may hold a hearing thereon, after notice to all interested persons.

Note: Authority cited: Sections 1058 and 1058.5, Water Code.

Reference: Sections 109, 1010, 1011, 1011.5 and 1051.5, Water Code; and *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.