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## State Water Resources Control Board

### **NOTICE OF PROPOSED EMERGENCY RULEMAKING**

### **Emergency Actions to Establish Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Mill Creek and Deer Creek Watersheds**

### **In Title 23, Division 3, Chapter 2, Article 24 of the California Code of Regulations, Add Sections 876.5, 876.7, and 878.4 and Amend Sections 878.1 and 879**

**September 16, 2021**

#### **Required Notice of Proposed Emergency Action**

Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to the submission of a proposed emergency action to the Office of Administrative Law (OAL), the adopting agency must provide a notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. This document provides the required notice. After the submission of the proposed emergency regulation to OAL, OAL shall allow interested persons five calendar days to submit comments on the proposed emergency regulation as set forth in Government Code section 11349.6.

#### **Proposed Emergency Action**

California and the entire western United States are facing a significant drought in the wake of one of the driest periods on record, driven by climate change and extreme hydrologic conditions over the past two years. Water supply in many parts of California, including the Sacramento River watershed, is insufficient to meet a significant portion of water demands, including ecological needs. The water supply shortage is a particular concern in Mill Creek and Deer Creek, which are tributaries to the Sacramento River, and which provide high priority habitat for listed salmonid species. Addressing the severe water shortage in Mill and Deer creeks requires urgent action to ensure water supplies are and will remain available to meet minimum instream flows for fish passage, as well as for human health and safety needs.

On May 10, 2021, Governor Gavin Newsom extended an earlier drought State of Emergency proclamation to cover 41 counties in California, including the Sacramento-San Joaquin Delta watershed, which includes the Mill Creek and Deer Creek watersheds in Tehama County ([May 2021 Proclamation](#)). To ensure critical instream

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flows for species protection, the May 2021 Proclamation directs the State Water Resources Control Board (State Water Board) and California Department of Fish and Wildlife (CDFW) to evaluate minimum instream flows and other actions to protect salmon, steelhead, and other native fishes in critical systems in the watersheds in which a drought state of emergency was proclaimed and to work with water users and other parties on voluntary measures to implement those actions. To the extent that voluntary actions are not sufficient, the State Water Board, in coordination with CDFW, is to consider emergency regulations to establish minimum drought instream flows. For purposes of approving an emergency regulation pursuant to this directive, the May 2021 Proclamation suspends the California Environmental Quality Act (CEQA) in Public Resources Code, Division 13 (commencing with section 21000) and regulations adopted pursuant to that Division.

Water Code section 1058.5 provides the State Water Board the authority to adopt emergency regulations in certain drought years or when the Governor proclaims a drought state of emergency in order to, among other things, prevent the unreasonable use of water, require curtailment of diversions when water is not available under the diverter's priority of right, or require monitoring and reporting of diversion or use.

On September 22, 2021, the State Water Board will consider a proposed resolution to amend California Code of Regulations, title 23, division 3, chapter 2, article 24, to include the emergency curtailment and reporting regulation for Mill and Deer Creeks. In general, the proposed emergency regulation would:

1. Establish emergency drought minimum flow requirements to protect threatened Central Valley spring-run Chinook salmon (CV SR salmon) and threatened California Central Valley steelhead (CCV steelhead);
2. Ensure continued access to water supplies for minimum health and safety needs;
3. Provide a path for local cooperative solutions to more effectively support flow and fishery needs;
4. Prohibit inefficient domestic lawn watering practices; and
5. Require curtailment order reporting.

The proposed emergency curtailment regulation will provide minimum passage flows for CV SR Salmon and CCV Steelhead on Mill Creek and Deer Creek during critical migratory periods, which are consistent with flow requirements adopted during the previous drought year of 2015. Additionally, the proposed regulation would provide for exceptions to curtailment for minimum human health and safety needs and would allow for voluntary local cooperative solutions in lieu of curtailment orders. To increase the amount of diverted water available for economic and fishery use in this drought emergency, the proposed regulation also establishes new limitations for domestic lawn irrigation consistent with California Code of Regulations, title 23, section 697.

### **Proposed Text of Emergency Regulations**

On September 1, 2021, the State Water Board released a preliminary draft of the proposed emergency regulation for public review and comment. On September 10, the State Water Board released the proposed regulations for adoption, with comments due

on September 16, 2021. Staff has not proposed changes since the draft released on September 1, 2021. The proposed text of the emergency regulation is included below starting on page 7.

**Finding of Emergency** (Gov. Code § 11346.1 subd. (b))

The State Water Board finds that an emergency exists due to severe drought conditions, as identified in the Governor’s drought emergency proclamations.<sup>1</sup> Immediate action is needed to establish drought emergency minimum fisheries flows in the Mill Creek and Deer Creek watersheds, and to effectively and efficiently administer and enforce the State’s water rights system to meet those flows in light of severely limited water availability in those watersheds during the current drought. Immediate action is needed to ensure reasonable use of water, including prohibiting the flood irrigation of domestic lawns that is unreasonable in light of limited water availability during the drought. Current regulations do not provide for bare minimum fisheries flows in the Mill Creek and Deer Creek watersheds, specifically the minimum passage flows needed by CV SR Salmon and CCV Steelhead on Mill Creek and Deer Creek during critical migratory periods.

The State Water Board is unable to address the situation through non-emergency regulations because the need for this regulation has arisen due to the current drought emergency and would not be appropriately or timely be addressed by non-emergency regulations.

More information regarding the State Water Board’s finding of emergency can be found in the Emergency Regulation Informative Digest available on the [Mill Creek and Deer Creek Drought Response website](#).

**Authority and Reference** (Gov. Code, § 11346.5, subd. (a)(2))

Water Code sections 1058 and 1058.5 provide authority for the emergency regulation. The proposed regulation implements, interprets, or makes specific Article X, section 2 of the California Constitution, and sections 100, 100.5, 104, 105, 106.3, 109, 187, 275, 348, 1011, 1011.5, 1051, 1052, 1055, 1058.5, 1253, 1825, 1831, 1841, and 5106 of the Water Code. The proposed regulation also interprets and implements the State Water Board’s authority to prevent the unreasonable use of water, described in *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976, *EDF v. EBMUD* (1980) 26 Cal.3d 183, and *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937.

Additional detail regarding the authority and references associated with the proposed regulation can be found under each section of the proposed regulation text available on the [Mill Creek and Deer Creek Drought Response website](#).

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<sup>1</sup> Under Water Code section 1058.5, subdivision (b), the State Water Board’s finding of emergency made in connection with this proposed emergency regulation is not subject to review by the Office of Administrative Law.

**Informative Digest** (Gov. Code, § 11346.5, subd. (a)(3))

The Mill Creek and Deer Creek watersheds are located in Tehama County, and the watersheds provide water for agriculture, domestic uses, power, stockwatering, fire protection, recreation, and the environment. These watersheds have been identified as high-priority tributaries for the protection and recovery of wild populations of CV SR salmon and CCV steelhead which are listed as threatened under the state and federal Endangered Species Acts. Ensuring water is available to meet minimum human health and safety needs, notwithstanding the shortage conditions, is also of the utmost importance.

Under existing law, a water right holder is prohibited from diverting from a watercourse unless flows are available under their priority of right. Additionally, no water right extends to the use of water in a manner that is unreasonable under the circumstances of the diversion, per Article X, section 2 of the California Constitution. Reasonable use determinations under Article X, section 2 must consider the multiple uses of water in a system, including instream uses for fishery purposes. Water Code section 106.3 declares a state policy that every human being has the right to safe, clean, affordable, and accessible water for human consumption, cooking, and sanitation purposes. In normal times, the State Water Board can implement the requirements of the water right priority system and reasonable use requirements through its enforcement authorities (including the ability to impose civil liabilities or issue cease and desist orders through a notice and hearing process), through its permitting and licensing authorities for surface waters and subterranean streams, or through the adoption of permanent regulations. However, in a large-scale drought emergency, such as the present situation, existing authorities are insufficient because of the resources and time required to implement water law requirements.

Additional efforts are needed in this drought to ensure that water right holders and claimants in these watersheds without other means of accessing water supplies for basic human health and safety can continue to divert water, even under critical drought conditions.

It is imperative that water right holders and claimants, who do not have water available at their priority of right and do not provide water for minimum human health and safety needs, cease diversions of water that is needed for minimum instream flows to protect fish and more senior water rights, or implement other actions designed to provide equivalent or better protection to the fishery. Specifically, immediate action is needed to ensure the reasonable use of water in the Mill Creek and Deer Creek watersheds – two high priority tributaries to the Sacramento River that provide critically important habitat for threatened CV SR salmon and CCV steelhead. An emergency regulation will enable the State Water Board to enforce the water right priority system with respect to all water right holders and claimants in a timely manner, prohibit flood irrigating domestic lawns as an unreasonable use during the current drought emergency condition, and protect critical water supply needed for the protection of listed fish species' migration and for minimum health and safety needs.

More detailed information regarding existing laws, the need for the proposed regulation, and the anticipated effect of the proposed regulation, as well as the list of Information Relied-on and the Fiscal Impact Statement, can be found in the [Proposed Emergency Regulation and Informative Digest](#).

**Other Matters Prescribed by Statute** (Gov. Code, § 11346.5, subd. (a)(4))

The proposed emergency regulation would be adopted to require curtailment of diversion when water is not available under diverters' priority of right, to prevent an unreasonable use of water, and to require reporting of information needed to implement and enforce curtailments. The proposed emergency regulation would be adopted during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions.

**Local Mandate** (Gov. Code, § 11346.5, subd. (a)(5))

The proposed emergency regulation does not impose a mandate on local agencies or school districts because it does not mandate a new program or a higher level of service of an existing program. The regulation is generally applicable to public and private entities, and is not unique to local government. No state reimbursement is required by part 7 (commencing with section 17500) of Division 4 of the Government Code.

**Estimate of Cost or Savings** (Gov. Code, § 11346.5, subd. (a)(6))

The effects resulting from the proposed emergency regulation for Mill and Deer Creek watersheds are the costs and savings to state and local government agencies, pursuant to Government Code section 11346 et seq. This Fiscal Impact Statement has been prepared in accordance with State Administrative Manual 6600-6616.

The fiscal effect on local and state government agencies as a result of the proposed emergency regulation includes: (1) the costs to complete and submit certification forms; (2) revenue losses and other costs for public water supply agencies; and (3) state and local tax revenue losses.

The State Water Board estimates the total cost to all state and local agencies (including city, county, schools and publicly owned water suppliers) due to the proposed emergency regulation as \$319,443. The total reporting cost for all state and local agencies to complete and submit initial compliance certification forms and ongoing diversion reporting for the curtailment order is estimated to be \$130. Total revenue losses for the one public water supply agency affected by the regulation are estimated to be \$133,110, and additional costs for conservation and enforcement are estimated to be \$66,550. Total state and local tax revenue losses are estimated to be \$119,663, including \$115,779 to state government and \$3,949 to local government. The overall total fiscal impacts to state government are estimated to be up to \$115,779, and to local government are estimated to be up to \$203,664.

More detailed information regarding the cost or savings of the proposed emergency regulation can be found in the Fiscal Impact Statement, Appendix 1 of the Emergency

Regulation Informative Digest, which is available on the [Mill Creek and Deer Creek Drought Response website](#).

**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, add Sections 876.5, 876.7, and 878.4, and amend Sections 878.1 and 879 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.

- (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 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.

- (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, 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. 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. 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 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. 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. 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. 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. 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. 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. 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. A flow ramp down period at the end of a pulse flow may be included if requested by California Department of Fish and Wildlife or National Marine Fisheries Service. 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 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.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 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; *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.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 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; *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

**§ 878.1 Minimum Human Health and Safety Needs**

- (a) Diversions described in this section under any valid basis of right may be authorized to continue after issuance of a curtailment order, subject to the conditions set forth in this section. A diversion that would otherwise be subject to curtailment may be authorized if:
- (1) The diversion is necessary for minimum human health and safety needs; and therefore,
  - (2) The diversion is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the full extent they are capable, and that waste and unreasonable use be prevented, notwithstanding the effect of the diversions on more senior water rights or instream beneficial uses.
- (b) (1) Diversions for minimum human health and safety needs under any valid basis of right of not greater than 55 gallons per person per day may continue after issuance of a curtailment order without further approval from the Deputy Director, subject to the conditions set forth in this section. Any diverter wishing to continue diversion under this subdivision must submit to the Deputy Director certification, under penalty of perjury, of compliance with the requirements of subdivisions (b)(1)(A)-(E), below. The Deputy Director may request additional information or set additional requirements on continued diversion.
- (A) Not more than 55 gallons per person per day will be diverted under all

bases of right.

- (B) The diversion is necessary to serve minimum human health and safety needs as defined in section 877.1, subdivision (g), after all other alternate sources of water have been used. To the extent other water sources are available, those sources will be used first and the total used will not exceed 55 gallons per person per day.
- (C) The diverter and all end users of the diverted water are operating under the strictest existing conservation regime for that place of use, if such a plan exists for the area or service provider, or shall be operating under such regime within 30 days. If additional approvals are required before implementation of the conservation regime, the diverter must certify that all possible steps will be taken immediately to ensure prompt approval.
- (D) If the diverter is a distributor of a public water supply under Water Code sections 350 et seq., that it has declared a water shortage emergency condition and either already has adopted regulations and restrictions on the delivery of water or will adopt conservation and water delivery restrictions and regulations within a timeframe specified by the Deputy Director as a condition of certification.

- (E) The diverter has either pursued steps to acquire other sources of water, but has not yet been completely successful, as described in an attached report, or the diverter will pursue the steps in an attached plan to identify and secure additional water.
- (2) To the extent that a diversion for minimum human health and safety needs requires more than 55 gallons per person per day, the continued diversion of water after issuance of a curtailment order for the diversion requires submission of a petition demonstrating compliance with the requirements of subdivisions (b)(2)(A)-(F), below, and approval by the Deputy Director. The Deputy Director may condition approval of the petition on implementation of additional conservation measures and reporting requirements. Any petition to continue diversion to meet minimum human health and safety needs of more than 55 gallons per person per day must:
  - (A) Describe the specific circumstances that make the requested diversion amount necessary to meet minimum human health and safety needs, if a larger amount is sought.
  - (B) Estimate the amount of water needed.
  - (C) Certify that the supply will be used only for the stated need.
  - (D) Describe any other additional steps the diverter will take to reduce diversions and consumption.
  - (E) Provide the timeframe in which the diverter expects to reduce usage to no more than 55 gallons per person per day, or why minimum human health and safety needs will continue to require more water.
  - (F) As necessary, provide documentation that the use meets the definition of minimum human health and safety needs provided in subdivision (g) of section 877.1.
- (c) For public water systems with 15 or greater connections and small water systems of 5 to 15 connections, gallons per person per day shall be calculated on a monthly basis and the calculation methodology shall be consistent with the State Water Board's "Guidance for Estimating Percentage Residential Use and Residential Gallons Per Capita Daily" dated September 22, 2020.
- (d) Diversions for minimum human health and safety needs that cannot be quantified on the basis of an amount per person per day require a petition and

approval from the Deputy Director. The Deputy Director may approve a such a petition under this subdivision or subdivision (b)(2) upon a finding that the petition demonstrates that the requested diversion is in furtherance of the constitutional policy that the water resources of the state be put to beneficial use to the full extent they are capable, and that waste and unreasonable use be prevented, notwithstanding the effect of the diversion on senior water rights or instream beneficial uses, and may condition approval as appropriate to ensure that the diversion and use are reasonable and in the public interest.

- (e) To the extent necessary to resolve immediate public health or safety threats, a diversion subject to a curtailment order may continue while a petition under subdivision (b)(2) or (d) is being prepared and is pending. The Deputy Director may require additional information to support the initial petition, information on how long the diversion is expected to continue, and a description of other steps taken or planned to obtain alternative supplies.
- (f) Notice of certification, petitions, and decisions under this section and section 878 will be posted as soon as practicable on the State Water Board's drought webpage. The Deputy Director may issue a decision under this article prior to providing notice.
- (g) Diversion and use within the Russian River Watershed or Delta Watershed, including Mill Creek and Deer Creek, that deprives water for minimum human health and safety needs in 2021, or which creates unacceptable risk of depriving water for minimum human health and safety needs in 2022, is an unreasonable use of water. The Deputy Director shall prevent such unreasonable use of water by implementing the curtailment methodology described in section 877.2 for diversions in the Lower Russian River Watershed, sections 877.3, 877.4, 877.5, and 877.6 for diversions in the Upper Russian River Watershed, ~~and~~ section 876.1 for diversions in the Delta Watershed, and section 876.5 for diversions in the Mill Creek and Deer Creek Watersheds.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 106.3, 275, 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; *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.

Authority: Sections 1058, 1058.5 Water Code

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

### **§ 879. Reporting**

(a) All water right holders issued a curtailment order under section 876.5, 877.2, or 877.3 are required, within seven calendar days of the date of the curtailment order, to submit under penalty of perjury a certification of one or more of the following actions taken in response to the curtailment order, certifying, as applicable, that:

- (1) Diversions under the water right(s) identified have ceased;
- (2) Any continued use is under other water rights not subject to curtailment, specifically identifying those other rights, including the basis of right and quantity of diversion;
- (3) Diversions under the water right(s) identified continue only to the extent that they are authorized in accordance with section 878.4 or they are non-consumptive uses for which a certification for continued diversion has been submitted as specified in section 878;
- (4) Diversions under the water right(s) identified continue only to the extent that they are to provide for minimum human health and safety needs, a certification has been filed as authorized under section 878.1, subdivision (b)(1), and the subject water right authorizes the diversion in the absence of a curtailment order; or
- (5) Diversions under the water right(s) identified continue only to the extent that they are consistent with a petition filed under section 878.1, subdivision (b)(2) or (d), and diversion and use will comply with the conditions for approval of the petition.

(b) All water users or water right holders whose continued diversion may be authorized under section 878.1 are required to submit, under penalty of perjury,

information identified on a schedule established by the Deputy Director as a condition of certification or petition approval. The required information may include, but is not limited to, the following:

- (1) The water right identification numbers under which diversions continue
  - (2) How the diverter complies with any conditions of continued diversion, including the conditions of certification under section 878.1, subdivision (b)(1);
  - (3) Any failures to comply with conditions, including the conditions of certification under section 878.1, subdivision (b)(1), and steps taken to prevent further violations;
  - (4) Conservation and efficiency efforts planned, in the process of implementation, and implemented, as well as any information on the effectiveness of implementation;
  - (5) Efforts to obtain alternate water sources;
  - (6) If the diversion is authorized under an approved petition filed pursuant to section 878.1, subdivision (b)(2), progress toward implementing the measures imposed as conditions of petition approval;
  - (7) If the diversion is authorized under section 878.1, subdivision (d):
    - (A) The rate of diversion if it is still ongoing;
    - (B) Whether the water has been used for any other purpose; and
    - (C) The date diversion ceased, if applicable.
  - (8) The total water diversion for the reporting period and the total population served for minimum human health and safety needs. The total population must include actual or best available estimates of external populations not otherwise reported as being served by the water right holder, such as individuals receiving bulk or hauled water deliveries for indoor water use.
  - (9) Diversion amounts for each day in acre-feet per day, maximum diversion rate in cubic feet per second, and anticipated future daily diversion amounts and diversion rates.
- (c) The Deputy Director, or delegee, may issue an order under this article requiring any person to provide additional information reasonably necessary to assess their

compliance with this article. Any person receiving an order under this subdivision shall provide the requested information within the time specified by the Deputy Director, but not less than five (5) days.

(d) This subdivision applies to Delta Watershed curtailment orders and enhanced reporting to inform water unavailability determinations and the curtailment process described under section 876.1.

(1) All water right holders and claimants issued an initial order pursuant to section 876.1 are required, within the deadlines specified in the initial order but no sooner than seven calendar days following issuance of the order, to submit under penalty of perjury a certification that they have and will continue to take actions needed to comply with section 876.1, including the following actions:

(A) Regularly reviewing information posted on the State Water Board's drought webpage to determine when curtailments are required and when curtailments are suspended or reimposed, or subscribing to the State Water Board's Delta Drought email distribution list to receive updates directly; and

(B) Ceasing diversions of natural and abandoned flow when curtailments are ordered, except to the extent that continuing diversions are authorized in accordance with section 878, 878.1 or 878.2, and ceasing rediversions of water released from storage, except to the extent authorized by a water right or contract.

(2) In addition to the requirements identified under subdivision (d)(1), the Deputy Director may require water right holders and claimants who have been issued an initial order under section 876.1 and whose water right or claim has a total authorized face value or recent annual reported diversion amount of one thousand acre-feet or greater to report the following information by the date specified by the Deputy Director, but no earlier than seven days after receipt of the reporting order and as specified thereafter:

(A) Prior diversions, unless otherwise reported in annual reports of water diversion and use, including direct diversions and diversions to storage. Diversion volumes shall be provided in a daily, weekly, or monthly format, as identified in the order.

- (B) Demand projections for subsequent months through October 1, 2022, including direct diversions and diversions to storage. Diversion volumes shall be provided in a daily, weekly, or monthly format, as identified in the order.
  - (C) Before issuing orders issued pursuant to subdivision (d)(2) to water right holders and claimants in the Legal Delta, the Deputy Director will consult with and obtain the concurrence of the Delta Watermaster.
- (3) In order to inform curtailment decisions, the Deputy Director, or the Delta Watermaster for rights in the Legal Delta, may issue informational orders under subdivision (d) of this section requiring a water right holder, diverter, or user to provide additional information related to a diversion or use of water in the Delta Watershed, including but not limited to: additional reporting of water diversions and use; the basis of right with supporting documents or other evidence; property patent date for the place of use; the date of initial appropriation; anticipated or actual water transfer amounts; or any other information relevant to forecasting demands and supplies and determining compliance with curtailment orders in the current drought year or in contingency planning for continuation of the current drought emergency. Informational orders may require reporting of diversions made in prior months and diversions anticipated during subsequent months on a recurring, monthly basis.
- (4) Any water right holder or claimant receiving an order under subdivision (d) of this section shall provide the requested information within the deadlines specified therein, including any recurring deadlines associated with ongoing reporting requirements as applicable. The Deputy Director, or the Delta Watermaster for rights in the Legal Delta, may grant additional time for submission of information upon substantial compliance with the specified deadline and a showing of good cause. Information provided pursuant to subdivision (d) of this section shall be submitted in an online form maintained by the State Water Board and accessible through its website, or in an electronic format as specified by the Deputy Director or Delta Watermaster.
- (5) Failure to provide the information required under subdivision (d) of this section within the deadlines specified in the order or any time extension granted by the Deputy Director, or the Delta Watermaster for rights in the Legal Delta, is a violation subject to civil liability of up to \$500 per day for

each day the violation continues pursuant to Water Code section 1846.

- (6) In determining whether to impose reporting requirements under subdivision (d) of this section, the Deputy Director and Delta Watermaster will consider the need for the information for purposes of informing curtailment decisions and the burden of producing it, and will make reasonable efforts to avoid requiring duplicative reporting of information that is already in the Board's possession.
- (7) All orders issued under subdivisions (d)(2) and (d)(3) shall be subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code.

Authority: Sections 1058, 1058.5, Water Code

Reference: Sections 100, 187, 275, 348, 1051, 1058.5, 1841, Water Code