

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2021-0038**

**TO ADOPT A DROUGHT-RELATED EMERGENCY REGULATION FOR
CURTAILMENT OF DIVERSIONS ON MILL AND DEER CREEKS DUE TO
INSUFFICIENT FLOW FOR SPECIFIC FISHERIES**

WHEREAS:

1. On May 10, 2021, Governor Gavin Newsom issued a Proclamation of a State of Emergency to exist in the Sacramento-San Joaquin Delta watershed, which include Mill Creek and Deer Creek, due to drought conditions (May 2021 Proclamation). The Proclamation directs various actions to strengthen the state's ability to manage water and habitat effectively in drought conditions. The May 2021 Proclamation finds the extreme drought conditions through much of the State presents urgent challenges, including the risk of water shortages in communities, greatly increased wildfire activity, diminished water for agriculture production, degraded habitat for many fish and wildlife species, threat of saltwater contamination of large fresh water supplies conveyed through the Sacramento-San Joaquin Delta, and additional water scarcity if drought conditions continue into 2022;
2. To ensure critical instream flows for species protection in the Sacramento-San Joaquin Delta Watersheds, the May 2021 Proclamation directs the State Water Resources Control Board (State Water Board) and California Department of Fish and Wildlife (CDFW) to evaluate the minimum instream flows and other actions needed to protect salmon, steelhead, and other native fishes in critical streams systems in the State and to work with water users and other parties on voluntary measures to implement those actions if possible. If voluntary measures do not occur, the proclamation directs the State Water Board to consider the development of emergency regulations to establish minimum drought instream flows. The May 2021 Proclamation also suspends the environmental review required by the California Environmental Quality Act to allow drought emergency regulations and other actions to take place as quickly as possible;
3. Due to extreme drought conditions, there is not enough water for all users or uses in most streams, and diversions under junior water rights will need to be curtailed to preserve flows for senior water right holders. In addition, some streams that provide habitat and migration corridors for federally or state listed endangered species will not maintain the minimum flows for these species to survive unless water diverters curtail use;

4. Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) (CV SR Salmon) are listed as threatened under the state and federal Endangered Species Acts (Fish & G. Code, § 2050 et seq.; 16 U.S.C. § 1531 et seq.) and California Central Valley steelhead (*Oncorhynchus mykiss*) (CCV Steelhead) are listed as threatened under the federal Endangered Species Act. Because of the fragile nature of the fisheries in these watersheds, regulatory action to protect this public trust resource is warranted;
5. The National Marine Fisheries Service (NMFS), in consultation with CDFW and the United States Fish and Wildlife Service, has identified Deer Creek and Mill Creek, tributaries to the Sacramento River, along with Butte Creek, as priority watersheds for sustaining CV SR Salmon and CCV Steelhead. These streams contain migration, spawning, and rearing habitat for some of the last remaining naturally produced populations of threatened CV SR Salmon and CCV Steelhead;
6. Due to significant concerns over protection of CV SR Salmon and CCV Steelhead from reduced flows during the drought years of 2014 and 2015, NMFS and CDFW recommended and the State Water Board adopted emergency regulations requiring curtailment of diversions, with a small number of identified exceptions such as for minimum health and safety needs, to preserve minimum drought flows on Mill Creek and Deer Creek, as well as Antelope Creek, under California Code of Regulations, title 23, division 3, chapter 2, article 24, where those minimum flows were needed to protect fish and would not be available without emergency regulatory action by the Board. On Mill Creek, voluntary agreements authorized under the regulation as an alternative to curtailment provided for the drought emergency minimum instream flows for CV SR Salmon and CCV Steelhead in 2014 and 2015. For Deer Creek, a curtailment order was issued to water right holders in 2014 and 2015 to provide for the required minimum flows for CV SR Salmon and CCV Steelhead. Fish passage data collected by CDFW in 2014 and 2015 suggest that the drought emergency minimum instream flow requirements provided for successful fish passage on both Mill Creek and Deer Creek;
7. NMFS and CDFW have again recommended that the State Water Board adopt emergency flow protections for Mill Creek and Deer Creek consistent with the prior emergency regulations. Other regulatory requirements are in place that provide for flow needs on Antelope Creek. The Mill Creek and Deer Creek flows establish bare minimum flow levels needed for passage of migrating fish to and from spawning and rearing grounds in the watersheds above major diversions in the lower watersheds and do not represent flows that may be needed in the longer term to support these fish species and their habitat. CDFW and NMFS are currently developing such recommendations for consideration by the State Water Board in longer term planning processes;

8. The importance of Mill Creek and Deer Creek to the survival and recovery of salmon and steelhead in the Northern California's Central Valley is significant. Of the 19 independent CV SR Salmon populations that historically occurred, the populations in Mill Creek and Deer Creek are among the last of a small group of naturally produced populations. Mill Creek and Deer Creek are identified in NMFS's Final Central Valley Salmon and Steelhead Recovery Plan as Core 1 populations for CV SR Salmon and CCV Steelhead. Preserving and restoring Core 1 populations is the foundation of the recovery strategy because Core 1 populations are considered to have the greatest potential to support independent viable populations;
9. These two streams are unique in the Central Valley because they support naturally produced populations of CV SR Salmon and CCV Steelhead, yet have no upstream water storage facilities that can be managed to buffer the effects of drought on streamflow and water temperature requirements for these fish species. Instead, all of the water management facilities and water use occur on downstream reaches near the confluence with the Sacramento River, and their careful management is needed this year to ensure CV SR Salmon and CCV Steelhead are able to successfully migrate upstream to spawning habitat and downstream to the Sacramento River;
10. The State Water Board has a duty to protect, where feasible, the state's public trust resources, including fisheries, to the extent reasonable. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.);
11. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code, section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code, section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies..." to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351.) What constitutes reasonable water use is dependent upon the entire circumstances presented and varies as the current situation changes. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.);
12. The State Water Board has determined, based on the best available information, that certain minimum flows are necessary in the identified watersheds, below which levels serious harm and endangerment to the species may occur. The drought emergency minimum flow requirements due to insufficient flow for specific fisheries in the 2021 emergency regulation are consistent with recommendations from NMFS and CDFW and largely

consistent with those adopted in response to similar drought emergency conditions in 2014 and 2015. Specifically, the minimum flows identified in the 2021 emergency regulation remain unchanged from the 2015 minimum baseflow requirements for CV SR Salmon and CCV Steelhead, including the seasonal timing of required flows. The State Water Board recognizes that these drought emergency minimum flows do not represent optimal passage and ecosystem protection conditions for CV SR Salmon and CCV Steelhead and that such long-term flows should be developed and implemented as soon as practicable to balance the various needs in the watershed during all year types. The State Water Board encourages that such long-term efforts be developed through voluntary agreements where possible;

13. The State Water Board has identified the need for these drought emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet all needs during these emergency conditions. Application of the reasonable use doctrine under these circumstances requires specific consideration of the benefits of diverting water for current uses from the identified water bodies and the potential for harm to the protected species from such diversions under the current drought conditions. Having considered the available information, the State Water Board finds that, during the current drought conditions, diversions that would cause flows in these creeks to drop below these minimum passage levels are not reasonable, and that curtailment of such diversions is necessary to implement the requirements of California Constitution, Article X, section 2. This finding is narrowly targeted only to diversions of water needed under the current extraordinary drought conditions to afford minimum protection to migrating CV SR Salmon and CCV Steelhead, and should not be construed as a finding concerning the reasonableness of these diversions in general;
14. Given the essential nature of water in sustaining human life, and particularly in light of the declaration in Water Code section 106.3 of water supplies for consumption, sanitation and cooking as a human right, the statutory declaration of domestic use as the highest use in Water Code sections 106, and the statutory declaration in Water Code sections 350 et seq. that public water suppliers may declare a water shortage emergency to allow sufficient water for human consumption, sanitation, and fire protection, the State Water Board has determined that, under the circumstances being addressed by the regulation, diversion under even a more senior right for any other use when supplies required for minimum health and safety needs cannot be met is not reasonable under the California Constitution, Article X, §2.;
15. The regulation would provide that diversions from Mill Creek and Deer Creek are not reasonable to the extent those diversions would cause flows to drop below the specified minimums. Under the regulation, such diversions would be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. Diversions for minimum health and safety needs may not be curtailed,

notwithstanding a lower seniority than other, curtailed rights. The diversion or use of water in violation of this regulation would be not be a reasonable diversion or use and would constitute a violation of Water Code section 100;

16. Given the need to act quickly and with reasonable assurance that domestic and municipal supplies required for minimum health and safety needs are met, the data indicating that basic human needs require up to 55 gallons per person per day, and the overall small impact that small diversions tend to make on other uses, it has been determined that diversions for domestic and municipal health and safety use of less than 55 gallons per person, per day, may continue after issuance of a curtailment order without further approval from the Deputy Director of Water Rights (Deputy Director), subject to the conditions outlined in the regulation. All other diversions for minimum health and safety needs will be considered by the Deputy Director upon request of the diverter, or appropriate regulatory agency where a single diverter's operations could not alone alleviate the identified emergency;
17. The practice of flood irrigation for domestic lawn irrigation, as has been reported and observed in the Mill Creek and Deer Creek watersheds, is highly inefficient and results in excessive water diversions that do not put water resources to beneficial use to the full extent that they are capable. A range of alternatives to flood irrigation of domestic lawns, including sprinkler irrigation and lawn replacement, are widely available. To address inefficient irrigation practices for lawn watering that are unreasonable during times of water shortage, the emergency regulation limits domestic lawn watering to 18.5 gallons per day per 100 square feet, based on existing regulatory guidance at California Code of Regulations, title 23, section 697 for the amount of water considered reasonable for water right applications for certain domestic uses. Water conservation actions to reduce inefficient water use practices are especially important in drought years when water supply is low, as the May 2021 Proclamation has recognized. If dry conditions continue into 2022, it may be necessary to limit additional inefficient water use practices in the watershed. The State Water Board will continue to explore the need to develop requirements for additional water conservation actions to reduce inefficient water uses should the drought emergency continue;
18. On September 1, 2021, the State Water Board released the draft emergency regulation for a one week public comment period ending September 8, 2021. The September 1 notice also identified that the State Water Board would consider adoption of the regulation at the Board's regularly scheduled September 22, 2021 public Board Meeting;
19. The State Water Board proposes to adopt the emergency regulation in accordance with title 2, division 3, chapter 3.5 of the Government Code (commencing with section 11340). The State Water Board has the authority to adopt emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable

method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right;

20. Voluntary agreements between diverters, NMFS, and CDFW in Mill Creek were reached in the drought years of 2014 and 2015. State Water Board staff have reached out to water users on Mill Creek and Deer Creek to discuss possible voluntary agreements this year. So far, agreements have not been reached in either Mill Creek or Deer Creek this year, but agreements may still be possible. Agreements may be reached that have the potential to provide comparable protection to the fisheries as the flows in proposed section 876.5, and the proposed regulation would allow substitution of these agreements for curtailments if the agreements cover a significant percentage of the water diverted in the watersheds;
21. As discussed above, the State Water Board is adopting this emergency regulation because of the emergency drought conditions, the need for prompt action, and the unique attributes of these two tributaries. The vehicle of adopting an emergency regulation to identify a minimum flow requirement for fisheries protection and health and safety needs and limitation for domestic lawn irrigation is an appropriate approach in these limited circumstances; and
22. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director and to the Deputy Director. The State Water Board has delegated authority to the Executive Director and to the Deputy Director.

THEREFORE BE IT RESOLVED THAT:

1. The State Water Board adopts sections 876.5, 876.7, and 878.4 and amends sections 878.1 and 879, in title 23, division 3, chapter 2, article 24 of the California Code of Regulations, as appended to this resolution, as an emergency regulation;
2. State Water Board staff shall submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. This regulation shall remain in effect for one year after filing with the Secretary of State unless: (i) the State Water Board determines that it is no longer necessary due to changed conditions, (ii) the conditions specified in Water Code section 1058.5 subdivision (a)(2) are no longer in effect, in which case this regulation is deemed repealed, or (iii) the State Water Board renews the regulation due to continued drought conditions as described in Water Code section 1058.5;
4. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director or designee may make such changes;

5. State Water Board staff shall coordinate with staff from CDFW, NMFS, and the California Department of Water Resources, along with other appropriate entities, to ensure that calibration of existing gages supports implementation of drought emergency flows, and to evaluate whether any new stream gages are needed or modifications to existing stream gages are needed in the long-term;
6. State Water Board staff shall coordinate with staff from CDFW, NMFS, and stakeholders in Deer and Mill Creeks to discuss interim and long-term resolution of needed measures to protect fisheries, including instream flow needs, water use efficiency and water conservation measures, habitat improvements, and potential funding sources. Staff shall update the Board no later than February 1, 2022, on efforts to achieve collaborative solutions and to develop and implement near-term and long-term measures needed to protect Mill and Deer Creek fisheries; and
7. The State Water Board delegates to the Deputy Director the authority to act on requests for approvals pursuant to the regulation.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on September 22, 2021.

AYE: Chair E. Joaquin Esquivel
 Vice Chair Dorene D'Adamo
 Board Member Sean Maguire
 Board Member Laurel Firestone
 Board Member Nichole Morgan

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

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

=====

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. Curtailement of Diversions due to Drought Emergency

§ 876.5 Emergency Curtailements 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). Curtailement 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