

**State of California  
Office of Administrative Law**

**In re:**  
**State Water Resources Control Board**

**Regulatory Action:**

**Title 23, California Code of Regulations**

**Adopt sections:** 877, 878, 878.1, 878.2, 879,  
879.1, 879.2

**Amend sections:**

**Repeal sections:**

**NOTICE OF APPROVAL OF EMERGENCY  
REGULATORY ACTION**

**Government Code Sections 11346.1 and  
11349.6**

**OAL File No. 2014-0523-05 E**

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The State Water Resources Control Board proposed to adopt sections 877, 878, 878.1, 878.2, 879, 879.1 and 879.2 of title 23 of the California Code of Regulations to provide for curtailment of diversions in certain tributaries of the Sacramento River (Mill Creek, Deer Creek, and Antelope Creek) when insufficient flows are available to protect salmon and steelhead as emergency regulations. The finding of emergency is not subject to review by the Office of Administrative Law pursuant to subdivision (b) of Water Code section 1058.5.

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

This emergency regulatory action is effective on 6/2/2014 and will expire on 2/28/2015 pursuant to subdivision (c) of Water Code section 1058.5. The Certificate of Compliance for this action is due no later than 2/27/2015.

**Date:** 6/2/2014

**AIQ TARPENNING**

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Craig S. Tarpenning  
Assistant Chief Counsel

**For:** DEBRA M. CORNEZ  
Director

**Original:** Thomas Howard  
**Copy:** Daniel Schultz

## NOTICE PUBLICATION/REGULATIONS SUBMISSION

**EMERGENCY**

(See instructions on reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER <b>Z-</b>	REGULATORY ACTION NUMBER	EMERGENCY NUMBER <b>2014-0523-05E</b>
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For use by Office of Administrative Law (OAL) only

2014 MAY 23 PM 4:09

OFFICE OF  
ADMINISTRATIVE LAWENDORSED FILED  
IN THE OFFICE OF

2014 JUN -2 PM 3:48

  
 DEBRA BOWEN  
 SECRETARY OF STATE

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY

State Water Resources Control Board

AGENCY FILE NUMBER (if any)

2014-0023

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

1. SUBJECT OF NOTICE Emergency Regulations for Emergency Curtailment where insufficient flows are available to protect fish in certain watersheds		TITLE(S) <b>23</b>	FIRST SECTION AFFECTED <b>877</b>	2. REQUESTED PUBLICATION DATE <b>June 1, 2014</b>
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON <b>Daniel Schultz</b>	TELEPHONE NUMBER <b>916-323-9392</b>	FAX NUMBER (Optional) <b>916-314-5400</b>
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER	PUBLICATION DATE

**B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)**

1a. SUBJECT OF REGULATION(S) <b>Article 24 Curtailment of Diversions Based on Insufficient Flow to Meet All Needs</b>	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)

SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	ADOPT <b>Article 24, Sections 877, 878, 878.1, 878.2, 879, 879.1, 879.2</b>
	AMEND
	REPEAL
TITLE(S) <b>23</b>	

3. TYPE OF FILING

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

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

5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, § 100)

<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code § 11343.4(a))	<input checked="" type="checkbox"/> Effective on filing with Secretary of State	<input type="checkbox"/> \$100 Changes Without Regulatory Effect	<input type="checkbox"/> Effective other (Specify) _____
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6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

<input checked="" type="checkbox"/> Department of Finance (Form STD. 399) (SAM § 6660)	<input type="checkbox"/> Fair Political Practices Commission	<input type="checkbox"/> State Fire Marshal
<input type="checkbox"/> Other (Specify) _____		

7. CONTACT PERSON

Daniel Schultz

TELEPHONE NUMBER

916-323-9392

FAX NUMBER (Optional)

916-314-5400

E-MAIL ADDRESS (Optional)

daniel.schultz@waterboards.ca.gov

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE



5/23/14

TYPED NAME AND TITLE OF SIGNATORY

Thomas Howard, Executive Director, SWRCB

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JUN 02 2014

Office of Administrative Law

In Title 23, Division 3, Chapter 2, add Article 24, Sections 877 through 879.2 to read:

**Article 24. Curtailment of Diversions Based on Insufficient Flow to Meet All Needs**

**§ 875 [reserved]**

**§ 876 [reserved]**

**§ 877 Emergency Curtailment Where Insufficient Flows are Available to Protect Fish in Certain Watersheds**

The State Water Resources Control Board has determined that it is a waste and 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 878.2.
- (b) The Deputy Director for the Division of Water Rights (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 878.2, where flows are sufficient to support some but not all diversions, curtailment orders shall be issued in order of 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 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 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 a bare minimum instream flows for migratory passage during the drought emergency, given the unprecedented 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) April 1 up to June 30 , if Adult CV SR Salmon are present -

- (i) Base Flows – 50 cfs or full flow without diversions, whichever is less.
    - (ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less.

Pulse flows may be required when Adult CV SR Salmon are observed between Ward dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow 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. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service. The 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 United States Geological Survey Mill Creek Near Los Molinos CA gauge (MLM/#11381500) is 100 cfs or less for three consecutive days;  
or
      - B. 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.

- (B) June 1 up to June 30 , if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present -

- (i) Pulse Flows – 100 cfs or full inflow without diversions, whichever is less. Pulse flows may be required when juvenile CV SR Salmon or CCV Steelhead are observed in the lower reaches of Mill Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 48 hours, and will be determined by the presence of fish

observed and desired migration movements downstream into the Sacramento River. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service and will apply if both of the following occur:

- A. California Department of Fish and Wildlife or the National Marine Fisheries Service conducts field surveys and observes juvenile CV SR Salmon and CCV Steelhead in the lower reaches of Mill Creek in June; and
- B. 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.

(C) October 1 - March 31, if Adult CCV Steelhead are present –

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

(D) November 1 – 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.

(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. The Deputy Director shall, no later than the next business day, suspend 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 or hydrologic conditions no longer support the need for the required flows.

(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 not determined that fish are 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 1 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) April 1 up to June 30, if Adult CV SR Salmon are present -

- (i) Base Flows – 50 cfs or full flow without diversions, whichever is less.
- (ii) Pulse Flows – 100 cfs or full flow without diversions, whichever is less.

Pulse flows may be required when Adult CV SR Salmon are observed between Vina Dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 72 hours, and will be determined by the presence of fish observed and desired migration movements upstream. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service. The pulse flow 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 United States Geological Survey Deer Creek Near Vina CA gauge (#11383500) is 100 cfs or less for three consecutive days; or
- B. 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.

(B) June 1 up to June 30, if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present -

- (i) Pulse Flows – 100 cfs or full flow without diversions, whichever is less.

Pulse flows may be required when juvenile CV SR Salmon or CCV Steelhead are observed in the lower reaches of Deer Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 48 hours, and will be determined by the presence of fish observed and desired migration movements downstream into the Sacramento River. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service. The pulse flow may be required if both of the following occur:

- A. California Department of Fish and Wildlife or the National Marine Fisheries Service conducts field surveys and observes juvenile CV SR Salmon and CCV Steelhead in the lower reaches of Deer Creek in June; and
- B. 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.

(C) October 1 - March 31, if Adult CCV Steelhead are present –

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

- (D) November 1 – 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.

- (E) The California Department of Fish and Wildlife and/or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director when the pertinent migration periods have ended. The Deputy Director shall, no later than the next business day, suspend 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 or hydrologic conditions no longer support the need for the required flows.

- (F) The California Department of Fish and Wildlife and/or the National Marine Fisheries Service may conduct field surveys and notify the Deputy Director that the pertinent the 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 not determined that fish are present and in need of the identified flows.

- (3) Antelope Creek. Antelope Creek enters the Sacramento River at Army Corps of Engineers river mile 235 from the east approximately nine miles southeast of the town of Red Bluff. All water right holders in the Antelope 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 Antelope Creek:

- (A) April 1 up to June 30 , if Adult CV SR Salmon are present -
  - (i) Base Flows – 35 cfs or full flow without diversions, whichever is less.
  - (ii) Pulse Flows – 70 cfs or full flow without diversions, whichever is less. Pulse flows may be required when Adult CV SR Salmon are observed between the Edwards/Los Molinos Mutual diversion dam and the Sacramento River. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 72 hours, and will be determined by the presence of fish observed and desired migration movements upstream. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife and/or the National Marine Fisheries Service. The pulse flows may be required if either of the following conditions occur prior to the end of

the migration period:

- A. The average daily full natural flow measured upstream of the Edwards/Los Molinos Mutual diversion dam is 70 cfs or less for three consecutive days; or
  - B. 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.
- (B) June 1 up to June 30 , if Juvenile CV SR Salmon or Juvenile CCV Steelhead are present -
  - (i) Pulse Flows – 70 cfs or full flow without diversions, whichever is less. Pulse flows may be required when juvenile CV SR Salmon or CCV Steelhead are observed in the lower reaches of Antelope Creek. When required, pulse flows are in lieu of, not in addition to, base flow requirements. The pulse flow will last a minimum of 24 hours to a maximum of 48 hours, and will be determined by the presence of fish observed and desired migration movements downstream into the Sacramento River. The duration will be determined by the Deputy Director in consultation with California Department of Fish and Wildlife or the National Marine Fisheries Service. The pulse flows may be required if both of the following occur:
    - A. 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 Antelope Creek in June; and
    - B. 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.
- (C) October 1 - March 31, if Adult CCV Steelhead are present –
  - (i) Base Flows – 35 cfs or full flow without diversions, whichever is less.
- (D) November 1 – 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.
- (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. The Deputy Director shall, no later than the next business day, suspend 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 or hydrologic conditions no longer support the need for the required flows.



(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 the 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 not determined that fish are present and in need of the identified flows.

(4) The drought emergency minimum flows identified in subdivision (c)(1) through (c)(3) 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) Within 7 days of the effective date of this regulation, the State Board will establish 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 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; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

#### **§ 878. Non-Consumptive Uses**

Some water diverters will not be required to curtail in response to a curtailment order under this article because their use of water does not decrease downstream flows

(a) Direct diversions solely for hydropower.

(b) Other direct diversions solely for non-consumptive uses, if those diverters file with the Deputy Director a certification under penalty of perjury that the diversion is non-consumptive and does not decrease downstream flows in the applicable watershed. The certification must describe the non-consumptive use and explain, with supporting evidence, why the diversion and use do not decrease downstream flows in the applicable watershed. The Deputy Director may request additional information, or may disapprove any certification if the information provided is insufficient to support the statement, or if more convincing evidence contradicts the claims. If a certification submitted pursuant to this section is disapproved, the diversions are subject to any curtailment order issued regarding that basis of right.

Authority: Sections 1058, 1058.5, Water Code

**§ 878.1 Minimum Health and Safety Needs**

- (a) A diversion that would otherwise be subject to curtailment may be authorized if:
- (1) The diversion is necessary for minimum 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) Given the essential nature of water in sustaining human life, use even under a more senior right for any other purpose when domestic and municipal supplies required for minimum health and safety needs cannot be met is a waste and unreasonable use under the California Constitution, Article X, § 2.
- (1) Diversions for domestic and municipal use under any valid basis of right, of less than 50 gallons per person, per day, and not exceeding 10 acre-feet per year of storage or 4,500 gallons per day of direct diversion, 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)-(G), below. The Deputy Director may request additional information or set additional requirements on continued diversion.
    - (A) Not more than 50 gallons per person per day will be diverted under all bases of right;
    - (B) The diversion is necessary to achieve the minimum amount of water necessary for health and safety, up to 50 gallons per person per day, after all other alternate sources of potable water have been used. To the extent other potable water is available, those sources will be used first and the total used will not exceed 50 gallons per person, per day;
    - (C) The diverter or all end users 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) No potable water will be used for outdoor landscaping while this approval is in effect. Water service providers must implement this provision as rapidly as possible, up to a limit of 15 days. If additional approvals are required before implementation of the conservation regime, the diverter must certify that all possible steps will be taken to ensure prompt approval;
    - (E) If the diverter has the authority to set rates, that such rates are set to encourage conservation, or that changing the rates to encourage

conservation shall be considered at the next opportunity, but no later than 30 days from certification. If additional approvals are required before implementation of such a rate structure, the diverter must certify that all possible steps will be taken to ensure prompt approval. If the diverter does not implement rates to encourage conservation, it must submit to the Deputy Director with the next required reporting an explanation of why such rate setting is inappropriate despite the current drought;

- (F) If the diverter is a public water supplier under Water Code section 350 et seq., that it has declared a water shortage emergency condition and adopted regulations and restrictions on the delivery of water or has noticed a meeting for adoption within the next 10 days, and shall adopt conservation and water delivery restrictions and regulations within the next 30 days. To the extent regulations and restrictions require additional approval, the diverter must certify that all possible steps will be taken to ensure prompt approval.
- (G) 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 domestic or municipal use requires more than 50 gallons per person, per day to meet minimum health and safety needs, or for up to 50 gallons per person, per day exceeding 10 acre-feet of storage or a total of 4,500 gallons per day, the continuing diversion of water after issuance of a curtailment notice for the diversion requires submission of a petition and approval by the Deputy Director. The Deputy Director may condition the approval on implementation of additional conservation measures and reporting requirements. Any petition to continue diversion to meet minimum health and safety needs of more than 50 gallons per person, per day, or for up to 50 gallons per person, per day exceeding 10 acre-feet of storage or a total of 4,500 gallons per day, must:

- (A) Describe the specific circumstances that make the requested diversion amount necessary to meet minimum health and safety needs, if a larger amount is sought.
- (B) Certify compliance and provide documentation of the actions described in subdivision (b)(1)(C) – (b)(1)(G).
- (C) Describe any other additional steps the diverter will take to reduce diversions and consumption.
- (D) Provide the timeframe in which the diverter expects to reduce usage to no more than 50 gallons per person, per day, or why minimum health and safety needs will continue to require more water.

- (c) All other diversions for minimum health and safety needs, except for an imminent threat to life, require approval from the Deputy Director. The Deputy Director may

approve a petition under this subdivision or subdivision (b)(2) upon a finding that the 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.

(d) "Minimum health and safety needs," as used in this article, means the amount of water necessary for prevention of adverse impacts to human health and safety, for which there is no reasonable alternate supply. "Minimum health and safety needs" include:

- (1) Domestic and municipal supplies as described in subdivision (b).
- (2) Water supplies necessary for energy sources that are critical to basic grid reliability, as identified by the California Independent System Operator, California Public Utilities Commission, California Energy Commission, or a similar energy grid reliability authority, and as authorized by the Deputy Director.
- (3) Water supplies identified by the California Department of Forestry and Fire Protection, or another appropriate authority, as regionally necessary for fire preparedness, and as approved by the Deputy Director.
- (4) Water supplies identified by the California Air Resources Board, a local air quality management district, or other appropriate public agency with air quality expertise, as regionally necessary to address critical air quality impacts in order to protect public health, and as authorized by the Deputy Director.
- (5) Water supplies necessary to address immediate public health or safety threats, as determined by a public agency with health or safety expertise, subject to approval of the Deputy Director. Such a petition should include a description of the public health need, a description of why the need is immediate, an estimate of the amount of water needed, and a certification that the supply will be used only for the stated need. If necessary to resolve immediate public health or safety threats, the diversion may continue while the petition is being prepared and is pending. The Deputy Director may require additional information to support the initial petition, as well as information on how long the diversion is expected to continue, and a description of other steps taken or planned to obtain alternative supplies.
- (6) Other water needs not identified, which a state, local, tribal or federal health, environmental or safety agency has determined are critical to public health and safety, or to the basic infrastructure of the state, subject to Deputy Director approval. Petitioners wishing to continue diversions for these uses must identify the health and safety need, include approval from the appropriate public entity, describe why the amount requested is critical for the need and cannot be met through alternate supplies, state how long the diversion is expected to continue,

certify that the supply will be used only for the stated need, and describe steps taken and planned to obtain alternative supplies.

- (e) Notice of certification, petitions and decisions under this section and section 878 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: 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.

#### **§ 878.2. 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 Service or Department determines provides watershed-wide protection for the fishery that is comparable to or greater than that provided by this article, the diverter or diverters may request approval from the Deputy Director to implement the agreement in place of State Board-issued curtailment orders under this article. 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 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 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 the diversion meets the conditions described in section 879, subdivision (a)(4). 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 users or water right holders issued a curtailment order under this article are required within five days to submit under penalty of perjury a certification of the following actions taken in response to the curtailment order, certifying, as applicable, that:
  - (1) Diversion under the water right identified has been curtailed;
  - (2) 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 continue only to the extent that they are direct diversions for hydropower;
  - (4) A petition has been filed as authorized under section 878.1, that the diversion will be authorized if the petition is approved, that 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;
  - (5) A certification has been filed as authorized under section 878, subdivision (b) or section 878.1, subdivision (b)(1), that the subject water right authorizes the diversion in the absence of a curtailment order; or
  - (6) The only continued water use is for instream purposes.

- (b) All water users or water right holders whose continued diversion out of order of water right seniority are authorized under section 878.1 are required to submit, under penalty of perjury, monthly reports during the effective period of the curtailment order. In addition to any reporting required as a condition of certification or of approving a petition, such reports should describe:
- (1) how the diverter complies with any conditions of continued diversion, including the conditions of certification under section 878.1, subdivision (b)(1);
  - (2) 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;
  - (3) conservation and efficiency efforts planned, in the process of implementation, and implemented, as well as any information on the effectiveness of implementation;
  - (4) efforts to obtain alternate water sources;
  - (5) if the diversion is authorized under section 878.1, subdivision (b):
    - (i) progress towards implementing the measures described in section 878.1, subdivision (b)(1)(C)-(F), to the extent that implementation was incomplete at the time of certification or petition under section 878.1, subdivision (b) or the most recent report under this subdivision;
    - (ii) progress under any plan described in section 878.1, subdivision (b)(1)(G) or (b)(2)(C); and
  - (6) if the diversion is authorized under section 878.1, subdivision (d)(3):
    - (i) the rate of diversion if it is still ongoing;
    - (ii) whether the water has been used for any other purpose;
    - (iii) the date diversion ceased, if applicable.

Authority: Sections 1058, 1058.5, Water Code

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

#### **§ 879.1. Conditions of permits, licenses and registrations**

Compliance with this article, including any conditions of approval of a petition under this article, shall constitute a condition of all water right permits, licenses, certificates and registrations.

Authority: Sections 1058, 1058.5, Water Code

Reference: Sections 275, 1253, 1058.5, Water Code

#### **§ 879.2 Compliance and Enforcement**

Diversion or use in violation of this article constitutes an unauthorized diversion or use. A diverter must comply with a curtailment order issued under any section of this article, including any conditions of approval of a petition under this article and any water right condition under this article, notwithstanding receipt of more than one curtailment order based on more than

one section or water right condition. To the extent of any conflict between the requirements of applicable orders or conditions of approval, the diverter must comply with the requirements that are most stringent. Violations of this article shall be subject to any applicable penalties pursuant to Water Code sections 1052, 1831, 1845 and 1846.

Authority: Sections 1058, 1058.5, Water Code

Reference: Sections 1052, 1055, 1058.5, 1825, 1831, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.