
State Water Resources Control Board

NOTICE OF PROPOSED EMERGENCY RULEMAKING

Emergency Actions to Protect Water Supplies and Threatened and Endangered Fish in the Russian River Watershed

Proposed Addition of Sections 877, 877.1, 877.2, 877.3, 877.4, 877.5, 877.6, 878, 878.1, 879, 879.1, and 879.2 to Title 23, Division 3, Chapter 2, Article 24 of the California Code of Regulations

June 22, 2021

Required Notice of Proposed Emergency Action

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

Proposed Emergency Action

On April 21, 2021, Governor Gavin Newsom declared a drought state of emergency in Mendocino and Sonoma counties due to severe drought conditions in the Russian River Watershed ([April 2021 Proclamation](#)). As part of the April 2021 Proclamation, the Governor directed the State Water Board to consider adoption of “emergency regulations to curtail water diversions when water is not available at water rights holder’s priority of right or to protect releases of stored water.” The Governor’s April 2021 proclamation also suspended environmental review under the California Environmental Quality Act for certain activities, including the adoption of emergency regulations by the State Water Board pursuant to Water Code section 1058.5.

Water Code section 1058.5 grants the State Water Resources Control Board (State Control Board, or Board) the authority to adopt emergency regulations to prevent the unreasonable use of water, and to require curtailment of diversions when water is not available under the diverter’s priority of right.

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

During the June 15, 2021 Board Meeting, State Water Board staff presented the proposed regulations for public comment and adoption by the Board. The Board voted unanimously to adopt the proposed emergency regulation. In general, proposed section 877.1 provides definitions used in the regulation. Proposed Section 877.2 and 877.3 establish processes for issuing curtailment orders and specify unique curtailment triggers for both the Upper and Lower Russian River watershed. Upper Russian River watershed curtailments would be triggered if Lake Mendocino storage targets are not met and supplemental storage releases are occurring to satisfy inbasin uses, while Lower Russian River watershed curtailments would be triggered when flows are insufficient to satisfy all water right demands. Proposed sections 878 and 878.1 provide for continued diversions for certain non-consumptive uses and minimum human health and safety needs. Proposed section 879 details reporting requirements for water right holders that receive a curtailment order.

Proposed Text of Emergency Regulations

See the attached proposed text of the emergency regulation.

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

The State Water Board finds that an emergency exists due to severe drought conditions in the Russian River watershed, as identified in the Governor's drought emergency proclamations.¹ Immediate action is needed to most effectively administer water rights, ensure adequate reliable water supplies for minimum human health and safety needs, and prevent the unreasonable use of water in the Russian River watershed. The State Water Board needs emergency regulatory authority to issue water right curtailments in the Russian River watershed to prevent the diversion and use of water unavailable at diverters' priority of right—including releases of stored water—and to prevent the diversion and use of water that threatens the availability of water for minimum human health and safety needs. Emergency action also is needed to ensure adequate carry-over storage in Lake Mendocino to ensure continued access to water for minimum human health and safety in the event of prolonged drought conditions.

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

More detailed information regarding the State Water Board's finding of emergency can be found on pages 1 to 4 of the Emergency Regulation Digest available at the hyperlink provided below.

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

Water Code section 1058 and 1058.5 provide authority for the emergency regulation. The proposed regulation implements, interprets, or makes specific Article X, section 2 of the California Constitution, and sections 100, 100.5, 104, 105, 106.3, 109, 174, 187, 275, 348, 1051, 1052, 1055, 1058.5, 1253, 1825, 1831, and 1841 of the Water Code. The proposed regulation also interprets and implements the State Water Board's authority to prevent the

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

unreasonable use of water, described in *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, and *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

Additional detail regarding the authority and references associated with the proposed regulation can be found under each section of the proposed regulation text available at the hyperlink provided below.

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

Immediate action is needed to prevent the unreasonable use of water in the Russian River watershed in light of severely limited water availability during the drought. The State Water Board will need to curtail water diversions in response to decreased natural or abandoned flows so that water is available for: (1) senior water right users; (2) water right permits' drought-adjusted minimum permit flow requirements for fish and wildlife, aligned with minimal flows for threatened and endangered fish species; and (3) minimum human health and safety needs. Where natural and abandoned flows are present but insufficient to satisfy all water rights, the State Water Board may need to curtail junior diversions to protect senior water right holders and to protect releases of stored water.

Under existing law, a water right holder is prohibited from diverting from a watercourse unless flows are sufficient to satisfy all more senior water right holders first. Water right holders are not entitled to redivert releases of another water right holder's previously stored water, such as flows released from an upstream reservoir. During times of shortage, the State Water Board ensures that the water that senior water right holders are entitled to divert remains available by curtailing junior appropriators in reverse order of priority (curtailing the most junior water rights first). Although Water Code section 106.3 declares a state policy that every human being has the right to safe, clean, affordable, and accessible water for human consumption, cooking, and sanitation purposes, ordinary application of the water right priority system does not make an exception allowing minimal diversions for basic human needs to continue notwithstanding curtailment.

The proposed emergency regulation would provide the State Water Board's Division of Water Rights and users within the Russian River watershed with a clear methodology for determining the extent to which water is unavailable for diversion at water users' priority of right. It also would authorize the Deputy Director to issue curtailment orders requiring recipients to cease diversions unless and until (1) they have authorization to continue diverting pursuant to one of the exceptions enumerated in the regulation, or (2) they receive notice that the curtailment order has been lifted. The emergency regulation will thus make the necessary curtailments during the drought emergency more effective and enforceable by defining when water is available under water right priorities—an issue of fact frequently contested in traditional curtailment enforcement proceedings—and by making the requirement to cease diversions in response to a curtailment order a regulatory requirement regardless of the curtailed user's basis of right. The proposed regulation also will promote the human right to water codified in Water Code section 106.3 by establishing procedures for important exceptions to curtailments based on minimum human health and safety needs.

Proposed Article 24 would provide the State Water Board's Deputy Director for the Division of Water Rights authority to implement curtailment actions in the event that Lake Mendocino storage targets are not met (for Upper Russian River watershed curtailments) or when flows are insufficient to support all water right priorities (for Lower Russian River watershed curtailments). The proposed regulation also defines non-consumptive uses and minimum human health and safety needs. Proposed Section 878 provides a pathway to allow for continued diversions for non-consumptive uses. Proposed Section 878.1 provides procedures for authorizing continued diversion to meet minimum human health and safety needs. Proposed Section 879 establishes reporting requirements for water right holders issued a curtailment notice.

There is no comparable federal statute or regulation. The proposed regulation is not inconsistent or incompatible with existing state regulations.

More detailed information regarding existing laws, the need for the proposed regulation, and the anticipated effect of the proposed regulation can be found on pages 4 to 15 of the Emergency Regulation Digest available at the hyperlink provided below.

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

The proposed emergency regulation would be adopted to prevent unreasonable use of water, to require curtailment of diversion when water is not available under the diverter's priority of right, and in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports. The proposed emergency regulation would be adopted in response to conditions which exist, or are threatened, in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years or during a period for which the Governor has issued a proclamation of a state of emergency under the California Emergency Services Act (Chapter 7 (commencing with section 8550) of Division 1 of Title 2 of the Government Code) based on drought conditions.

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

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

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

The fiscal effects resulting from the proposed emergency regulation are the costs that would be incurred by state and local government agencies to respond to any requirements therein, pursuant to Government Code section 11346 et seq. The Fiscal Impact Statement has been prepared in accordance with State Administrative Manual 6600-6616. The fiscal impacts include the costs of reporting and self-certification requirements associated with curtailment orders in both the Upper Russian River and Lower Russian River watershed, costs associated with an agreement between right holders to stored water in Lake Mendocino, and costs to pre-1914 appropriative right holders prohibited from diverting nominal natural flow that might otherwise be available to them. The State Water Board

estimates the total cost to all state and local (including city, county, schools and publicly owned water suppliers) agencies due to the emergency regulation as \$729,340. The total cost for all local and state agencies to complete and submit the initial compliance certification and biweekly reporting is \$39,500. The total cost for the Mendocino County Russian River Flood Control and Water Conservation Improvement District and Sonoma County Water Agency to negotiate an agreement for Lake Mendocino stored water is \$25,000. The total cost for pre-1914 right holder City of Ukiah to switch to groundwater is \$658,240. The cost to State agencies reviewing water substitution proposals is \$6,600. No reimbursable expenses were identified. The domestic/municipal supplies are set at a level that will prevent costs to public health, and prevent unacceptable future outcomes from a lack of drinking water in future years.

Due to the limited timeframe the emergency regulation will be in effect, there will be no fiscal impacts to any state, local, or federal agency beyond the expiration of the emergency regulation on year after adoption. Impacts are assumed to be limited to Fiscal Year 2021-2022.

In the 2021-2022 proposed budget, the Governor has proposed \$300 million for drought relief and urban water management grants to plan for drought and potential water shortages that will help to offset any fiscal impacts to local governments and water districts.

More detailed information regarding the cost or savings of the proposed emergency regulation can be found in the Fiscal Impact Statement at the end of the Emergency Regulation Digest available at the hyperlink provided below.

The Emergency Regulation Digest is available on the State Water Boards' Russian River Drought Response webpage:

https://www.waterboards.ca.gov/drought/russian_river/

Curtailment of Diversions to Protect Water Supplies and Threatened and Endangered Fish in the Russian River Watershed

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In Title 23, Division 3, Chapter 2, Article 24, add Sections 877, 877.1, 877.2, 877.3, 877.4, 877.5, 877.6, 878, 878.1, 879, 879.1 and 879.2 to read:

Article 24. Curtailment of Diversions to Protect Water Supplies and Threatened and Endangered Fish in the Russian River Watershed

§ 877 [Reserved]

§ 877.1 Definitions

- (a) "Curtailment Order" refers to an order from the Deputy Director of the Division of Water Rights ordering a water right holder to cease diversions.
- (b) "Deputy Director" refers to the Deputy Director of the Division of Water Rights, or duly authorized designee, at the State Water Resources Control Board.
- (c) "Flood Control District" refers to the Mendocino County Russian River Flood Control and Water Conservation Improvement District.
- (d) "Lower Russian River" refers to the surface waters, including underflow and subterranean streams, of the Russian River downstream of the confluence of Dry Creek and the Russian River.
- (e) "Lower Russian River Watershed" refers to the area in Sonoma County that drains towards Dry Creek and the area downstream of the confluence of the Russian River and Dry Creek that drains towards the outlet of the Russian River to the Pacific Ocean.
- (f) "Mainstem of the Upper Russian River" refers to the surface waters, including underflow and subterranean streams, of the Upper Russian River downstream of Lake Mendocino and upstream of the confluence of Dry Creek and the Russian River.

(g) “Minimum human health and safety needs” refers to the amount of water necessary for prevention of adverse impacts to human health and safety, for which there is no feasible alternate supply. “Minimum human health and safety needs” include:

- (1) Indoor domestic water uses including water for human consumption, cooking, or sanitation purposes. For the purposes of this article, water provided outdoors for human consumption, cooking, or sanitation purposes, including but not limited to facilities for unhoused persons or campgrounds, shall be regarded as indoor domestic water use. As necessary to provide for indoor domestic water use, water diverted for minimum human health and safety needs may include water hauling and bulk water deliveries, so long as the diverter maintains records of such deliveries and complies with the reporting requirements of Section 879, and so long as such provision is consistent with a valid water right.
- (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.
- (3) Water supplies necessary to prevent tree die-off that would contribute to fire risk to residences, and for maintenance of ponds or other water sources for fire fighting, in addition to water supplies identified by the California Department of Forestry and Fire Protection or another appropriate authority as regionally necessary for fire preparedness.
- (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 necessary to address critical air quality impacts to protect public health.
- (5) Water supplies necessary to address immediate public health or safety threats, as determined by a public agency with health or safety expertise.

- (6) Other water uses necessary for human health and safety 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. Diverters wishing to continue diversions for these uses must identify the health and safety need, include approval or similar relevant documentation from the appropriate public agency, 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.
- (h) “State Water Board” refers to the State Water Resources Control Board.
- (i) “Upper Russian River” refers to the surface waters, including underflow and subterranean streams, of the Russian River upstream of the confluence of the Russian River and Dry Creek and includes both the East and West Forks of the Russian River.
- (j) “Upper Russian River Watershed” refers to the area located in Mendocino and Sonoma Counties that drains towards the confluence of Dry Creek and the Russian River.

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.

§ 877.2 Emergency Curtailments Due to Lack of Water Availability in the Lower Russian River Watershed

- (a) This section applies to water diversions in the Lower Russian River Watershed.
- (b) After the effective date of this regulation, when flows in the Lower Russian River Watershed are insufficient to support all diversions, the Deputy Director may issue curtailment orders to water right holders, requiring the curtailment of water diversion and use.

(c) In determining the extent to which water is available under a diverter's priority of right or when rescinding curtailment orders, the Deputy Director shall consider:

(1) Relevant available information regarding date of priority, including but not limited to claims of first use in statements of water diversion and use, judicial and State Water Board decisions and orders, and other information contained in the Division of Water Rights files;

(2) Monthly water right demand projections based on reports of water diversion and use for permits and licenses, or statements of water diversion and use, from 2017 through 2019.

(3) Water availability projections based on one or more of the following:

(A) Outputs from a United States Geological Survey's Precipitation Runoff Modeling System model, calibrated by State Water Board staff to estimate current or historical natural cumulative runoff throughout the watershed, as well as forecasts of monthly supplies;

(B) Climatic estimates of precipitation and temperature from the Parameter-elevation Regressions on Independent Slopes Model, commonly referred to as PRISM;

(C) Historical periods of comparable conditions with respect to daily temperatures, precipitation, or surface flows;

(D) Outputs from the Santa Rosa Plain Hydrologic Model developed by United States Geological Survey; or

(E) Stream gage data, where available.

(4) The Deputy Director may also consider additional pertinent and reliable information when determining water right priorities, water availability, and demand projections.

- (5) Evaluation of available supplies against demands may be performed at the downstream outlet of the Lower Russian River, or at a smaller sub-watershed scale using the Drought Water Rights Allocation Tool or comparable tool.
- (d) Water users and water right holders are responsible for checking the State Water Board's drought announcements website and signing up for the email distribution list referenced in subdivision (e)(2) to receive updated water supply forecasts. It is anticipated that forecasts of water supplies available to meet water rights demands will be updated on a monthly basis until cumulative rainfall of greater than 0.5 inches occurs as measured at Healdsburg, California. Following this precipitation event, it is anticipated that forecasts of supplies will be updated on a weekly basis until rescission of all curtailment orders under this section.
- (e) (1) Initial curtailment orders will be sent 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 curtailment order(s) to all diverters exercising the water right(s) covered by the curtailment order(s).
- (2) The State Water Board has established an email distribution list that water right holders may join to receive drought notices, water supply forecasts, 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 curtailment orders.
- (f) Rescission of curtailment orders shall be announced using the email distribution list and web page described in subdivision (e).

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; *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

§ 877.3 Emergency Curtailment Where Insufficient Flows are Available in the Upper Russian River Watershed

- (a) This section applies to water diversions in the Upper Russian River Watershed.

(b) (1) The Deputy Director may issue a curtailment order upon a determination that the conditions in subdivision (c) are occurring. Curtailment orders shall be effective the day after issuance.

(2) If maintaining minimum flows required for the protection of minimum human health and safety needs, fish and wildlife, or further preserving stored water in Lake Mendocino for human health and safety needs would require curtailment of uses otherwise exempt from curtailment under this article, then the Deputy Director shall consider whether those uses should be allowed to continue based on the most current information available regarding fish populations, human health and safety needs, and the alternatives available to protect both human health and safety and threatened or endangered fish. Curtailment of water uses under this subdivision (b)(2) and any updates regarding such curtailments shall be noticed as described in subdivision (d).

(c) When storage levels in Lake Mendocino are below those specified in section 877.4, and Sonoma County Water Agency is making Supplemental Storage Releases to satisfy Inbasin Uses, diversion of water within the Upper Russian River Watershed that does not meet an exemption identified in section 878 or section 878.1 constitutes an unreasonable use of water and is prohibited.

(1) Inbasin Uses are defined as diversions from the Mainstem of the Upper Russian River to meet minimum human health and safety needs, Reach Losses, and minimum flows required for protection of fish and wildlife as required by a water right permit or license term, including any enforceable modifications of the foregoing. Export diversions, deliveries scheduled by the Flood Control District pursuant to License 13898, and Reach Losses associated with those exports and deliveries are specifically excluded from the definition of Inbasin Uses.

(2) Supplemental Storage Releases are defined as water released from Lake Mendocino which is in excess of inflows to Lake Mendocino, as calculated on a daily basis, to satisfy Inbasin Uses.

(3) Reach Losses are defined as water that is lost from the Mainstem of the Upper Russian River due to riparian habitat, evaporative losses, or percolation to groundwater.

(d) (1) Initial curtailment orders will be sent 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 curtailment order(s) to all diverters exercising the water right(s) covered by the curtailment order(s).

(2) The State Water Board has established an email distribution list that water right holders may join to receive drought notices, water supply forecasts, 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 curtailment orders.

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; *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.

§ 877.4 Lake Mendocino Storage Levels

Curtailment orders for diversions in the Upper Russian River Watershed shall not be issued unless storage levels in Lake Mendocino fall below the following levels prior to the specified dates:

- (a) 29,315 acre-feet before July 1.
- (b) 27,825 acre-feet before July 15.
- (c) 26,109 acre-feet before August 1.
- (d) 24,614 acre-feet before August 15.
- (e) 22,745 acre-feet before September 1.
- (f) 21,251 acre-feet before September 15.
- (g) 20,000 acre-feet on any date while the regulation is in effect.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 109, 275, 1058.5, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224; *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

§ 877.5 Rescission of Curtailment Orders in Upper Russian River Watershed

- (a) Following issuance of curtailment orders pursuant to section 877.3, the Deputy Director will notify water right holders of the extent to which curtailment orders will be rescinded following a determination by the Deputy Director that Sonoma County Water Agency is no longer making Supplemental Storage Releases to satisfy Inbasin Uses and natural or abandoned flows are available.

- (b) In determining the extent to which water is available under a diverter's priority of right when rescinding curtailment orders, the Deputy Director shall consider:
 - (1) Relevant available information regarding date of priority, including but not limited to claims of first use in statements of water diversion and use, judicial and State Water Board decisions and orders, and other information contained in the Division of Water Rights files;

 - (2) Monthly water right demand projections based on reports of water diversion and use for permits and licenses, or statements of water diversion and use, from 2017 through 2019.

 - (3) Water availability projections based on one or more of the following:
 - (A) Outputs from a United States Geological Survey's Precipitation Runoff Modeling System model, calibrated by State Water Board staff to estimate current or historical natural cumulative runoff throughout the watershed, as well as forecasts of monthly supplies.

 - (B) Climatic estimates of precipitation and temperature from the Parameter-elevation Regressions on Independent Slopes Model, commonly referred to as PRISM.

 - (C) Historical periods of comparable conditions with respect to daily temperatures, precipitation, or surface flows.

 - (D) Outputs from the Santa Rosa Plain Hydrologic Model developed by United States Geological Survey; or

(E) Stream gage data, where available.

(4) The Deputy Director may also consider additional pertinent and reliable information when determining water right priorities, water availability and demand projections.

(5) Evaluation of available supplies against demands may be performed at the downstream outlet of either the Upper Russian River or the Lower Russian River, or at a smaller sub-watershed scale using the Drought Water Rights Allocation Tool or comparable tool.

(c) Water users and water right holders are responsible for checking the State Water Board's drought announcements website and signing up for the email distribution list referenced in section 877.3, subdivision (e)(2), to receive updated water supply forecasts. It is anticipated that forecasts of water supplies available to meet water rights demands will be updated on a monthly basis until cumulative rainfall of greater than 0.5 inches occurs as measured at Ukiah Municipal Airport precipitation stations within the watershed. Following this precipitation event, it is anticipated that forecasts of supplies will be updated on a weekly basis until rescission of all curtailment orders under this section.

(d) Rescission of a curtailment order shall be announced using the email distribution list and web page described in section 877.3, subdivision (e)(2).

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; *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.

§ 877.6 Rediversion of Water Previously Stored in Lake Mendocino

(a) Rediversion by the Flood Control District of previously stored water released from Lake Mendocino shall be an unreasonable use of water and subject to the enforcement provisions described in section 879.2 unless such rediversion meets the requirements of this section.

- (b) The Flood Control District shall schedule all deliveries of water pursuant to License 13898 at least one week in advance of release of the water.
- (c) The timing of rediversion activities relative to release of water shall be based on a travel time of water along the Russian River agreed upon between the Flood Control District and Sonoma County Water Agency.
- (d) The Flood Control District shall provide a monthly schedule of rediversions by the first day of each month and shall confirm by noon on Friday of each week whether those diversions will occur in the following week or have changed.
- (e) No rediversions shall occur following September 1 unless Sonoma County Water Agency and the Flood Control District have jointly submitted an executed agreement to the Deputy Director specifying the amount of water stored in Lake Mendocino pursuant to License 13898, the amount of water that will remain stored in Lake Mendocino for use in 2022, and a methodology acceptable to the Deputy Director for determining how inflows to Lake Mendocino are attributed to the Flood Control District and SCWA's respective water rights.

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; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.

§ 878. Non-Consumptive Uses

Diversion and use described in this section under any valid basis of right may continue after issuance of a curtailment order without further approval from the Deputy Director, subject to the conditions set forth in this section. Diversions described in this section may not be required to curtail in response to a curtailment order under this article if their diversion and use of water does not decrease downstream flows. Any diverter wishing to continue diversion under this subdivision must submit to the Deputy Director a certification, under penalty of perjury, which describes the non-consumptive use and explains, with supporting evidence, how the diversion and use do not decrease downstream flows in the applicable watershed. The Deputy Director may request additional information or 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 for that basis of right. This section applies to:

- (a) Direct diversions solely for hydropower if discharges are returned to the Russian River or its tributaries and water is not held in storage.
- (b) Direct diversions dedicated to instream uses for the benefit of fish and wildlife pursuant to Water Code section 1707, including those that divert water to a different location for subsequent release, provided the location of release is hydraulically connected to the Russian River.
- (c) Direct diversions where the Deputy Director, the California Department of Fish and Wildlife, and the Executive Officer of the North Coast Regional Board have approved a substitution of releases of either stored water or groundwater into the Russian River or a tributary thereof for the benefit of fish and wildlife such that there is not a net decrease in stream flow as a result of the diversion at the next downstream USGS gage. The rate of releases made pursuant to this subdivision must be measured daily using a device or measurement method approved by the Deputy Director and provided to the Deputy Director on a monthly basis. Proposals involving the release of groundwater shall provide sufficient data and information to reasonably quantify any depletions of surface water caused by the groundwater pumping, the potential time lags of those depletions, and if additional groundwater releases beyond the diversion amounts are able to offset those depletions. The release of water does not have to be conducted by the owner of the water right proposed for the continued diversions, provided an agreement between the water right holder and the entity releasing the water is included in the proposal.
- (d) Other direct diversions solely for non-consumptive uses, if those diverters file with the Deputy Director a certification under penalty of perjury demonstrating that the diversion and use are non-consumptive and do not decrease downstream flows in the watershed.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 187, 275, 348, Water Code

§ 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 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 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 and sections 877.3, 877.4, 877.5, and 877.6 for diversions in the Upper Russian River Watershed.

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.

§ 879. Reporting

- (a) All water right holders issued a curtailment order under this article are required, within seven calendar days, 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 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.

Authority: Sections 1058, 1058.5, Water Code

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

§ 879.1. Conditions of permits, licenses and registrations

Compliance with this article, including any conditions of certification or approval of a petition under this article, shall constitute a condition of all water right permits, licenses, certificates and registrations for diversions in the Russian River Watershed.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1253, 1058.5, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

§ 879.2. Compliance and Enforcement

- (a) A diverter must comply with a curtailment order issued under this article, any conditions of certification or approval of a petition under this article, and any water right condition under this article, notwithstanding receipt of more than one curtailment order. To the extent of any conflict between applicable requirements, the diverter must comply with the requirements that are the most stringent.
- (b) Diversion or use of water in the Upper Russian River Watershed in violation of this article constitutes an unreasonable use of water and is subject to any and all enforcement proceedings authorized by law.
- (c) Diversion or use of water in the Lower Russian River Watershed in violation of this article is a trespass under Water Code section 1052 and shall constitute evidence of diversion or use in excess of a water user's rights.
- (d) All violations of this article shall be subject to any applicable penalties under Water Code section 1058.5. Nothing in this section shall be construed as limiting the enforceability of or penalties available under any other applicable provision of law.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1052, 1055, 1058.5, 1825, 1831, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.