

**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, 877.1, 877.2, 877.3,
877.4, 877.5, 877.6, 878,
878.1, 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 Matter Number: 2021-0630-01

OAL Matter Type: Emergency (E)

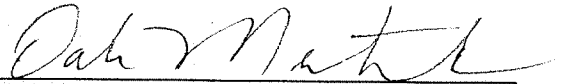
The proposed emergency regulation would provide the State Water Resources Control Board's Division of Water Rights and users within the Russian River watershed a methodology for determining the extent to which water is unavailable for diversion at water users' priority of right. It would also authorize 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 would provide the State Water Resources Control 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 regulations also: define non-consumptive uses and minimum human health and safety needs; provide a pathway to allow for continued diversions for non-consumptive uses; provide procedures for authorizing continued diversion to meet minimum human health and safety needs; and establish reporting requirements for water right holders issued a curtailment notice.

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 7/12/2021 and, pursuant to Water Code section 1058.5(c), will expire on 7/12/2022. The Certificate of Compliance for this action is due no later than 7/11/2022.

Date: July 12, 2021



Dale P. Mentink
Senior Attorney

Original: Eileen Sobeck, Executive
Director
Copy: Andrew Deeringer

For: Kenneth J. Pogue
Director

EMERGENCY

STATE OF CALIFORNIA—OFFICE OF ADMINISTRATIVE LAW
NOTICE PUBLICATION/REGULATORY ACTION SUBMISSION
STD. 400 (REV. 10/2019)

For use by Secretary of State only

ENDORSED - FILED
In the office of the Secretary of State
of the State of California

JUL 12 2021

1:18 PM

OAL FILE NUMBERS	NOTICE FILE NUMBER: Z-	REGULATORY ACTION NUMBER 2021	EMERGENCY NUMBER -0630-01E
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For use by Office of Administrative Law (OAL) only

2021 JUN 30 P 1:47

OFFICE OF ADMINISTRATIVE LAW

NOTICE

REGULATIONS

AGENCY WITH RULEMAKING AUTHORITY
State Water Resources Control Board

AGENCY FILE NUMBER (if any)

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

1. SUBJECT OF NOTICE Diversion Curtailment, Russian River Watershed		TITLE(S) 23	FIRST SECTION AFFECTED 877	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON Andrew Deeringer		TELEPHONE NUMBER (916) 539-2132
5. AGENCY CONTACT PERSON Andrew Deeringer		TELEPHONE NUMBER (916) 539-2132		FAX NUMBER (Optional)
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B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Emergency Actions to Protect Water Supplies and Threatened and Endangered Fish in the Russian River Watershed	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.)
23	877, 877.1, 877.2, 877.3, 877.4, 877.5, 877.6, 878, 878.1, 879, 879.1, and 879.2

3. TYPE OF FILING	ADOPT	AMEND	REPEAL
<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"/> Resubmission of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4)	<input type="checkbox"/> Resubmission 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)

Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) Effective on filing with Secretary of State \$100 Changes Without Regulatory Effect Effective other (Specify)

6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY

Department of Finance (Form STD. 399) (SAM §6680) Fair Political Practices Commission State Fire Marshal

7. CONTACT PERSON

Andrew Deeringer

TELEPHONE NUMBER (916) 539-2132

FAX NUMBER (Optional)

E-MAIL ADDRESS (Optional) Andrew.Deeringer@waterboards

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: Eileen Sobeck

DATE: June 30, 2021

TYPED NAME AND TITLE OF SIGNATORY: Eileen Sobeck, Executive Director, State Water Resources Control Board

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JUL 12 2021

Office of Administrative Law

**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. Use of the Drought Water Rights Allocation Tool will be in accordance with the formulations document for the Drought Water Rights Allocation Tool (March 2, 2020) and Drought Water Right Curtailment Analysis for California's Eel River (November 20, 2017), which are hereby incorporated by reference.
- (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