

**State of California
Office of Administrative Law**

In re:
State Water Resources Control Board

Regulatory Action:

Title 23, California Code of Regulations

Adopt sections: 875, 875.1, 875.2, 875.3,
875.4, 875.5, 875.6, 875.7,
875.8, 875.9

Amend sections:

Repeal sections:

NOTICE OF APPROVAL OF EMERGENCY
REGULATORY ACTION

Government Code Sections 11346.1 and
11349.6

OAL Matter Number: 2022-0719-01

OAL Matter Type: Emergency Readopt (EE)

This emergency action readopts, with amendments, regulations concerning Klamath River Watershed drought requirements. The regulations authorize curtailments of diversions where flows are insufficient to protect fish. They allow for diversions for non-consumptive uses, minimum human health and safety needs, and livestock watering as specified. The regulations establish a process for determining whether flows in the watershed are insufficient to support all water rights and the order of priority for curtailments as well as curtailment order reporting requirements, special rules during fall migration of Chinook and coho salmon, and provisions regarding penalties for violations of curtailment orders.

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 7/29/2022 and, pursuant to Water Code section 1058.5(c), will expire on 8/1/2023. The Certificate of Compliance for this action is due no later than 7/31/2023.

Date: July 29, 2022



Dale Mentink
Assistant Chief Counsel

For: Kenneth J. Pogue
Director

Original: Eileen Sobeck, Executive
Director

Copy: Marianna Aue

EMERGENCY

For use by Secretary of State only

STD. 400 (REV. 10/2019)

OAL FILE NUMBERS	NOTICE FILE NUMBER Z-	REGULATORY ACTION NUMBER 2022-0719-01	EMERGENCY NUMBER EE
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	
AGENCY WITH RULEMAKING AUTHORITY State Water Resources Control Board			

FILED
 in the office of the Secretary of State
 of the State of California

JUL 29 2022

At 1:56 O'Clock P M.

By _____
 Deputy Secretary of State

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

1. SUBJECT OF NOTICE Drought Emergency Regulation - Klamath	TITLE(S) 23	FIRST SECTION AFFECTED 875	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other	4. AGENCY CONTACT PERSON Marianna Aue	TELEPHONE NUMBER (916) 224-8483	FAX NUMBER (Optional)
OAL USE ONLY <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) Klamath River Watershed Drought Requirements	1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S) 2021-0820-05E
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2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)	ADOPT Article 23.5, sections 875.4, 875.8, 875.9
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)	AMEND Article 23.5, sections 875, 875.1, 875.2, 875.5, 875.6, 875.7
TITLE(S) Title 23	REPEAL 875.3

Readoption of all originally adopted sections *DM per agency request 7/29/22*

3. TYPE OF FILING	<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))	<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"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)	<input checked="" type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input checked="" type="checkbox"/> Other (Specify) Water Code, § 1058.5	<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only
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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 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 Marianna Aue	TELEPHONE NUMBER (916) 224-8483	FAX NUMBER (Optional)	E-MAIL ADDRESS (Optional) maue@waterboards.ca.gov
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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 Eileen Sobeck, Executive Director	DATE
TYPED NAME AND TITLE OF SIGNATORY Eileen Sobeck, Executive Director	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

JUL 29 2022

Office of Administrative Law

**Establishment of Minimum Instream Flow Requirements, Curtailment Authority,
and Information Order Authority in the Klamath Watershed**

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In Title 23, Division 3, Chapter 2, re-adopt Sections 875.4, 875.8, and 875.9 and amend Article 23.5, Sections 875, 875.1, 875.2, 875.3, 875.5, 875.6, and 875.7 to read:

Article 23.5. Klamath River Watershed Drought Emergency Requirements

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

- (a) To prevent the diversion of water that would unreasonably interfere with an emergency minimum level of protection for commercially and culturally significant fall-run Chinook salmon, ~~and~~ threatened Southern Oregon/Northern California Coast coho salmon, and culturally significant steelhead, surface water and groundwater shall not be diverted from the watersheds listed below at a diversion point or for the benefit of a place of use that is subject to a curtailment order, during the effective period of the curtailment order under this article, except as provided under sections 875.1, 875.2, or 875.3.
- (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), within the constraints detailed in this article. Curtailment orders shall be effective the day after issuance. Where flows are sufficient to support some but not all diversions, curtailment orders shall be issued, suspended, reinstated, and rescinded in order of water right priority provided in section 875.5. In determining which diversions should be subject to curtailment, the Deputy Director shall consider the need to provide reasonable assurance that the drought emergency minimum flows will be met. If maintaining the flows described in subdivision (c) would require curtailment of uses described in section 875.2 or 875.3, then the Executive Director may determine whether or not those diversions should be allowed to continue based on the most current information available regarding fish populations, human health and safety needs, livestock needs, and the alternatives available to protect ~~both~~ human public health and safety, livestock, and fish populations.
- (c) Drought Emergency Minimum Flows are as specified below.
 - (1) Scott River. The Scott River enters the Klamath River at United States Geological Survey River Mile 145.1.

(A) As measured in cubic feet per second at United States Geological Survey gage 11519500 located downstream of the city of Fort Jones at the northern end of Scott Valley (Scott River Mile 21):

Jan	Feb	Mar	Apr	May	June <u>1-23</u>	June <u>24-30</u>	July	Aug	Sept	Oct	Nov	Dec
200	200	200	150	150	125	<u>90</u>	50	30	33	40	60	150

(B) The California Department of Fish and Wildlife or the National Marine Fisheries Service may notify the Deputy Director that the pertinent life stage(s) of the pertinent species the flows are crafted to protect is not yet, or is no longer present at the time anticipated, or the California Department of Fish and Wildlife, after coordination with the National Marine Fisheries Service, may notify the Deputy Director that lower, alternative flows at the Fort Jones gage, or alternative flows at a different point or points in the watershed, provide equal or better protection for the pertinent species' relevant life stages. Using this information, as well as other information that could affect the need for curtailments to meet minimum flow needs for fisheries purposes, including weather forecasting, the need for flows to ramp up or down, the contributions of voluntary flow measures, and future flow needs, the Deputy Director may determine not to issue curtailment orders, to issue curtailment orders to a smaller priority grouping described in section 875.5, or to suspend curtailment orders already issued in order of priority as described in section 875.5, as applicable.

(2) Shasta River. The Shasta River enters the Klamath River at United States Geological Survey River Mile 179.5, at the junction of State Routes 263 and 96.

(A) As measured in cubic feet per second at United States Geological Survey gage 11517500 located near Yreka:

Jan	Feb	Mar <u>1-24</u>	Mar <u>25-31</u>	Apr	May	June	July	Aug	Sept <u>1-15</u>	Sept <u>16-30</u>	Oct	Nov	Dec
<u>435</u> <u>125</u>	<u>435</u> <u>125</u>	<u>435</u> <u>125</u>	<u>105</u>	70	50	50	50	50	50	<u>75</u>	425 105	450 <u>125</u>	450 <u>125</u>

(B) The California Department of Fish and Wildlife or the National Marine Fisheries Service may notify the Deputy Director that the pertinent life stage(s) of the pertinent species the flows are crafted to protect is not yet, or is no longer present at the time anticipated, or the California Department of Fish and Wildlife, after coordination with the National Marine Fisheries Service, may notify the Deputy Director that lower alternative flows at the Yreka gage, or alternative flows at a different point or points in the watershed, provide equal or better protection for the pertinent species' relevant life stages. Using this information, as well as other information that could affect the need for curtailments to meet minimum flow needs for fisheries purposes, including weather forecasting, the need for flows to ramp up or down, the contributions of voluntary flow measures, and future flow needs, the Deputy Director may determine not to issue curtailment orders, to issue curtailment orders to a smaller priority grouping described in section 875.5, or to suspend curtailment orders already issued in order of priority as described in section 875.5, as applicable.

(3) Compliance with the drought emergency minimum flows will be determined by the Deputy Director.

(d) Notice

(1) Initial curtailment orders will be sent to each water right holder, agent of record on file with the Division of Water Rights, or landowner, as applicable. The water right holder, agent of record on file with the Division of Water Rights, or landowner 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 the "Scott-Shasta Drought" email subscription and distribution list that water right holders, landowners, and other parties may join to receive drought-related notices and updates regarding curtailments in the Scott River and Shasta River watersheds. 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. The State Water Board's drought web-page is:

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

(3) Curtailment orders and subsequent addenda issued under any prior version of this article shall not require reissuance or further action to remain effective under this amended regulation. Upon the effective date of this regulation, any curtailment orders that reference drought emergency minimum flows are hereby amended for purposes of any

future implementation to include the drought emergency minimum flows currently included in subdivision (c). Likewise, any petitions, certifications, or approvals of exceptions to curtailment under sections 875.1, 875.2, 875.3, or Article 24, section 878.1 shall not require further action under this amended regulation to remain effective.

- (e) Suspension, reinstatement, or rescission of curtailment orders shall be announced using the email subscription and distribution list and web-page described in subdivision (d)(2).
- (f) Local Cooperative Solutions
 - (1) Local cooperative solutions by individuals or groups may be proposed by petition to the Deputy Director as an alternative means of reducing water use to meet or preserve drought emergency minimum flows, or to provide other fishery benefits (such as cold-water refugia, localized fish passage, or redd protection), in lieu of curtailment as described in this section.
 - (A) Petitions to implement local cooperative solutions that coordinate diversions, share water, strategically manage groundwater and/or surface water for fisheries benefits, reduce annual water use, or engage in similar activities may be submitted to the Deputy Director at any time.
 - (B) The Division of Water Rights and the Executive Director may coordinate with the California Department of Fish and Wildlife, National Marine Fisheries Service, the Scott River and Shasta River Watermaster District, the developers of any model or other information used as part of the petition, and others in evaluating local cooperative solutions.
 - (C) After or as part of approval of a petition, the Deputy Director shall not issue curtailment orders or shall suspend, rescind, or modify, as applicable, such orders already issued, affecting those rights relevant to the proposed cooperative solution so long as the Deputy Director finds that any continued diversions under the local cooperative solution are reasonable and do not result in unreasonable harm to other legal users of water.
 - (D) Deputy Director approval of a petition for a local cooperative solution may be subject to appropriate conditions, including monitoring and reporting requirements, to assure that no unreasonable injury to users of water will occur and that the terms and purpose of the petition or the associated underlying binding agreement will be met.

(E) The Deputy Director may rescind approval of a local cooperative solution and issue or reinstate curtailment orders for the relevant water rights in the order described in section 875.5, notwithstanding approval of the local cooperative solution, if monitoring or other reliable information indicates that parties are not meeting their obligations under the local cooperative solution or the agreement is not providing the benefits to anadromous fish outlined in the local cooperative solution, or based on an objection filed under (f)(2).

(2) Diversions covered by a local cooperative solution agreement approved by the Deputy Director pursuant to this section are subject to this article and violations of such an approved local cooperative solution 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 Water Board's drought webpage described in subdivision (d)(2). The Deputy Director may issue a decision under this article prior to providing such notice. Any interested person may file an objection to the petition or decision. The objection shall indicate the manner of service upon the petitioner. The State Water Board will consider any objection, and may hold a hearing thereon, after notice to all interested persons.

(3) The Division of Water Rights, California Department of Fish and Wildlife, ~~or National Marine Fisheries Service~~, Scott Valley and Shasta Valley Watermaster District, or North Coast Regional Water Quality Control Board may install and maintain additional gages in the Scott River and Shasta River watersheds. The gages, and may be used to evaluate compliance with the flow requirements defined in subdivisions (c)(1) and (c)(2) on a watershed or tributary scale using these gages, as needed. Diverters or other entities may also request to install and maintain a gage to support new flow requirement compliance points by submitting a written request with supporting data and information to the Deputy Director for approval.

(4) The Deputy Director may approve a petition to implement local cooperative solutions under this article as follows:

(A) For watershed-wide cooperative solutions: The Executive Director determines that a watershed-wide local cooperative solution will provide sufficient assurance that the flows in subdivision (c)(1) or (c)(2) are achieved for a specific time period, considering the amount of flow anticipated and the level of assurance that flows made available by agreements will be protected.

(B) For tributary-wide local cooperative solutions: ~~Regardless of whether the flows identified in subdivision (c)(1) and (c)(2) are being met,~~ The Deputy Director may approve the petition submitted under this article by a diverter or group of diverters that provides for tributary-wide benefits if either:

- (i) Sufficient information allows the Deputy Director to identify the appropriate contribution of the tributary to the flows identified in subdivision (c)(1) or (c)(2), and the Executive Director makes a finding that a local cooperative solution is sufficient to provide the pro-rata flow for that tributary. The Deputy Director may approve this solution regardless of whether the flows identified in subdivisions (c)(1) and (c)(2) are being met; or
- (ii) The California Department of Fish and Wildlife finds that the in-tributary or downstream benefits for anadromous fish are equal to or greater than the anticipated contribution to protections provided by the flows in subdivision (c)(1) or (c)(2). The Deputy Director may approve this solution regardless of whether the flows identified in subdivisions (c)(1) and (c)(2) are being met; or
- (iii) For livestock diversions that would otherwise be prohibited under Section 875.7, and are included on their own or as part of a proposal under (i) or (ii):
 - 1. The California Department of Fish and Wildlife finds that the proposal will adequately protect fishery resources, including consideration of whether the proposal allows sufficient water to provide for a natural hydrologic flow regime in the watershed, including pulse flows; whether redds are dewatered; whether the resulting flows support juvenile and adult salmon migration, incubation, and rearing; and whether the proposal results in a material decrease in available tributary or mainstem habitat; and
 - 2. The Deputy Director finds there is sufficient water available under the proposal for competing uses, including consideration of: storage for human health and safety and environmental needs; the risk that the proposal would result in additional curtailments; and the potential impact on the flows in subdivision (c)(1) or (c)(2) being met.