

**CORRECTED VERSION
CERTIFICATION DATE INCORRECT**

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2014-0023**

TO ADOPT EMERGENCY REGULATIONS FOR CURTAILMENT OF DIVERSIONS DUE TO
INSUFFICIENT FLOW FOR SPECIFIC FISHERIES

WHEREAS:

1. On April 25, 2014, Governor Edmund G. Brown Jr. issued an executive order to strengthen the state's ability to manage water and habitat effectively in drought conditions and called on all Californians to redouble their efforts to conserve water. The executive order finds that the continuous severe drought conditions present urgent challenges across the state including water shortages in communities and for agricultural production, increased wildfire activity, degraded habitat for fish and wildlife, threat of saltwater contamination, and additional water scarcity if drought conditions continue into 2015;
2. The executive order refers to the [Governor's Proclamation No. 1-17-2014](#), issued on January 17, 2014, declaring a drought State of Emergency to exist in California due to severe drought conditions. The January Proclamation notes that the state is experiencing record dry conditions, with 2014 projected to become the driest year on record. Since January, state water officials indicate that reservoirs, rainfall totals and the snowpack remain critically low. Current electronic readings show the snowpack's statewide water content at just 16% of average. This follows two other dry or below average years, leaving reservoir storage at alarmingly low levels. The January Proclamation finds that dry conditions and lack of precipitation present urgent problems to drinking water supplies and cultivation of crops, which put farmer's long-term investments at risk. The conditions also threaten the survival of animals and plants that rely on California's rivers, including many species in danger of extinction. The January Proclamation also calls on all Californians to reduce their water usage by 20%;
3. Due to extreme drought conditions, there is not enough water for all users or uses in most streams, and diversions under junior water rights will need to be curtailed to preserve flows for senior water right holders. In addition, some streams that provide habitat and migration corridors for federally or state listed endangered species will not maintain the minimum flows for these species to survive unless water diverters curtail use;
4. Central Valley spring-run Chinook salmon (*Oncorhynchus tshawytscha*) (CV SR Salmon) and California Central Valley steelhead (*Oncorhynchus mykiss*) (CCV Steelhead) are listed as threatened. (16 U.S.C. § 1531 et seq.) Because of the fragile nature of the fisheries in these watersheds, regulatory action to protect this public trust resource is warranted;
5. The National Marine Fisheries Service, in conversation with Department of Fish and Wildlife and United States Fish and Wildlife Service, has identified the Sacramento River tributaries Mill, Deer and Antelope creeks as priority watersheds for sustaining the CV

SR Salmon and the CCV Steelhead. These streams contain migration, spawning, and rearing habitat for some of the last remaining naturally-produced populations of threatened CV SR Salmon and the CCV Steelhead. The National Marine Fisheries Service has identified minimum flows in Mill, Deer and Antelope creeks below which significant harm to the species would occur. These flows establish a minimum flow needed for passage of migrating fish to and from spawning and rearing grounds in the watersheds above major diversions in the lower watersheds;

6. The importance of Deer, Mill, and Antelope creeks to the survival and recovery of salmon and steelhead in the Northern California's Central Valley is significant. Of the 19 independent spring-run Chinook salmon populations that historically occurred in the Central Valley, the Deer, Mill, and Antelope creek populations are among the last of a small group of naturally-produced populations. Mill and Deer creeks are identified in the National Marine Fisheries' Services' Draft Central Valley Salmon and Steelhead Recovery Plan as Core 1 populations for CV SR Salmon and CCV Steelhead. Antelope Creek is a Core 1 population for CCV Steelhead and a Core 2 population for CV SR Salmon. Preserving and restoring Core 1 populations is the foundation of the recovery strategy because Core 1 populations are considered to have the greatest potential to support independent viable populations. Core 2 populations are assumed to have the potential to meet the moderate risk of extinction criteria and protecting these populations is also a priority of the recovery plan;
7. These three streams are unique in the Central Valley because they support naturally-produced populations of CV SR Salmon and CCV Steelhead, yet have no upstream water storage facilities that can be managed to buffer the effects of drought on stream flow and water temperature requirements for these fish species. Instead, all of the water management facilities and water use occur on downstream reaches near the confluence with the Sacramento River, and their careful management is needed this year to ensure CV SR Salmon and CCV Steelhead are able to successfully migrate upstream to spawning habitat and downstream to the Sacramento River;
8. The State Water Resources Control Board (State Water Board) has a duty to protect, where feasible, the state's public trust resources, including fisheries. (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.);
9. The State Water Board also has the authority under article X, section 2 of the California Constitution and Water Code section 100 to prevent the waste or unreasonable use, unreasonable method of use, or the unreasonable method of diversion of all waters of the State. Water Code section 275 directs the State Water Board to "take all appropriate proceedings or actions before executive, legislative, or judicial agencies . . ." to enforce the constitutional and statutory prohibition against waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, commonly referred to as the reasonable use doctrine. The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. Vallejo* (1935) 2 Cal.2d 351.) What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. (*Environmental Defense Fund, Inc. v. East Bay Mun. Utility Dist.* (1980) 26 Cal.3d 183, 194.);
10. The State Water Board has determined, based on the best available information that certain minimum flows are necessary in the identified watersheds, below which levels

serious harm and endangerment to the species may occur. The State Water Board recognizes that these drought emergency minimum flows do not represent optimal passage conditions for CV SR Salmon and CCV Steelhead. The State Water Board has identified the need for these drought emergency minimum flows during this drought period due to the lack of developed alternative water supplies to meet these emergency water supply conditions. Application of the reasonable use doctrine under these circumstances requires particularized consideration of the benefits of diverting water for current uses from the identified water bodies and the potential for harm to the protected species from such diversions under the current drought conditions. Having considered the available information, the Board finds that, during the current drought conditions, curtailment of diversions that would cause flows in these creeks to drop below these minimum passage levels is necessary to prevent the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion, of water. This finding is narrowly targeted only to diversions of water, under the current extraordinary drought conditions, needed to afford minimal protection to migrating CV SR Salmon and CCV Steelhead, and should not be construed as a finding concerning the reasonableness of these diversions in general;

11. Given the essential nature of water in sustaining human life, and particularly in light of the declaration in Water Code section 106.3 of water supplies for consumption, sanitation and cooking as a human right, the statutory declaration of domestic use as the highest use in Water Code sections 106, and the statutory declaration that public water suppliers may declare a water shortage emergency to allow sufficient water for human consumption, sanitation, and fire protection (Wat. Code § 350 et seq.), the State Water Board has determined that, under the circumstances being addressed by the regulation, diversion under a higher priority for any other use when supplies required for minimum health and safety needs cannot be met is a waste and unreasonable use under the California Constitution, Article X, § 2.;
12. Furthermore, given the need to act quickly and with reasonable assurance that domestic and municipal supplies required for minimum health and safety needs are met, the data indicating that basic human needs require between 37 and 50 gallons per day, the regulatory guidance at California Code of Regulations, title 23, section 697 that under normal operating assumptions a domestic use for a fully plumbed building should generally encompass 55 to 75 gallons per person per day, and the overall small impact that small diversions tend to make on other uses, it has been determined that diversions for domestic and municipal use of less than 50 gallons per person, per day, not exceeding 4,500 gallons per day of direct diversion or 10 acre-feet per year of storage may continue after issuance of a curtailment order without further approval from the Deputy Director, subject to the conditions outlined in the regulation. All other diversions for minimum health and safety needs will be considered by the Deputy Director upon request of the diverter, or appropriate regulatory agency where a single diverter's operations could not alone alleviate the identified emergency;
13. The regulation would provide that diversions from Mill, Deer and Antelope creeks are unreasonable if those diversions would cause flows to drop below the specified minimums. Under the regulation, such diversions would be curtailed as appropriate to maintain those minimum flows, with the exception of diversions necessary for minimum health and safety needs. Diversions for minimum health and safety needs may not be curtailed, notwithstanding a lower seniority than other, curtailed rights. The diversion or

use of water in violation of this regulation would be an unreasonable diversion or use and a violation of Water Code section 100;

14. On May 13 and 14, 2014, the State Water Board issued public notice that the State Water Board would consider the adoption of the regulation at the Board's regularly-scheduled May 20, 2014 public meeting, in accordance with applicable State laws and regulations. The State Water Board also distributed for public review and comment a Finding of Emergency that complies with State laws and regulations;
15. The State Water Board proposes to adopt the emergency regulation in accordance with title 2, division 3, chapter 3.5 of the Government Code (commencing with section 11340). On April 25, 2014, the Governor suspended the review required by the California Environmental Quality Act to allow the State Water Board to adopt emergency regulations pursuant to Water Code section 1058.5, as it deems necessary to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water, to promote water recycling or water conservation, and to require curtailment of diversions when water is not available under the diverter's priority of right;
16. It appears that voluntary agreements between diverters and the National Marine Fisheries Service and the Department of Fish and Wildlife in Mill and Antelope Creeks have been entered into and that they cover a significant percentage of the water diverted in the watersheds. It also appears that further agreements in Mill and Antelope Creeks are imminent. Diverters may terminate these agreements at any time. However, while they are in effect, they have the potential to provide comparable protection to the fisheries as the flows in proposed section 877;
17. It also appears that voluntary agreements between diverters and the National Marine Fisheries Service and the Department of Fish and Wildlife in Deer Creek are possible in the near future. Such an agreement would also have the potential to provide comparable protection to the fisheries as the flows in proposed section 877;
18. As discussed above, the State Water Board is adopting emergency regulations because of the emergency drought conditions, the need for prompt action, and the unique attributes of these three tributaries. The vehicle of adopting emergency regulations to identify a minimum flow requirement for fisheries protection and health and safety requirements is an appropriate approach in these limited circumstances, but this approach is not the Board's preferred alternative to identify, balance, and implement instream flow requirements. The Board reaffirms its preference for undertaking adjudicative water right proceedings to assign responsibility for meeting instream flows;
19. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to the Executive Director and to the Division of Water Rights Deputy Director. The State Water Board has delegated authority to the Executive Director and to the Division of Water Rights Deputy Director; and

THEREFORE BE IT RESOLVED THAT:

1. The State Water Resources Control Board adopts Title 23, Division 3, Chapter 2, Article 24, Sections 877 through 879.2 as appended to this resolution as an emergency regulation;

2. The State Water Board staff submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director or designee may make such changes; and
4. The State Water Board delegates to the Division Deputy Director the authority to act on requests for approvals pursuant to the regulation.

CERTIFICATION


The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 21, 2014.

AYE: Chair Felicia Marcus
 Vice Chair Frances Spivy-Weber
 Board Member Tam M. Doduc
 Board Member Steven Moore
 Board Member Dorene D'Adamo

NAY: None

ABSENT: None

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

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 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.

(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.

§ 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.

§ 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.

§ 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. 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.

§ 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.

§ 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.

§ 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.