

CHANGE SHEET #3 – BOARD MEETING ITEM #5

CONSIDERATION OF A PROPOSED RESOLUTION TO ADOPT
AN EMERGENCY CURTAILMENT AND REPORTING REGULATION FOR THE
SACRAMENTO-SAN JOAQUIN DELTA (DELTA) WATERSHED

Changes in ~~bold strikethrough~~ are new deletions to the draft resolution released on July 23, 2021.

Changes in **bold underline** are new additions to the draft resolution released on July 23, 2021.

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2021-**

TO ADOPT AN EMERGENCY CURTAILMENT AND REPORTING REGULATION
FOR THE SACRAMENTO-SAN JOAQUIN DELTA (DELTA) WATERSHED

WHEREAS:

1. California and the entire western United States are facing a significant drought in the wake of one of the driest periods on record, driven by climate change and unprecedented hydrologic conditions. Water supply in many parts of California, including the Delta watershed, is insufficient to meet demands and requires urgent action to ensure the protection of health, safety, and the environment;
2. On April 21, 2021, Governor Gavin Newsom issued a [Proclamation of a State of Emergency for Mendocino and Sonoma counties](#), in response to drought conditions in the Russian River watershed. On May 10, 2021, Governor Newsom issued an expanded Proclamation of a State of Emergency for 41 counties, including those within the Sacramento-San Joaquin Delta (Delta) watershed ([May 2021 Proclamation](#)), in response to drought conditions. The May 2021 Proclamation finds that it is necessary to act expeditiously to mitigate the effects of drought conditions in the Delta watershed, both to ensure the protection of health, safety, and the environment and to prepare for potential sustained drought conditions. On July 8, 2021, the Governor [expanded the emergency declaration](#) to 9 additional counties and called upon Californians to voluntarily reduce their water use by 15 percent;

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3. The May 2021 Proclamation directs the State Water Resources Control Board (State Water Board or Board) to consider adopting an emergency regulation to curtail water diversions when water is not available at water right holders' priority of right or to protect releases of stored water in the Delta watershed. For purposes of approving an emergency regulation pursuant to this directive, the May 2021 Proclamation also suspends the California Environmental Quality Act (CEQA) in Public Resources Code, Division 13 (commencing with section 21000) and regulations adopted pursuant to that Division;
4. The Delta watershed has experienced two consecutive extremely dry years. Together, Water Years¹ 2020 and 2021 are expected to be the second driest two-year period on record, behind only 1976-77. As of July 20, 2021, cumulative precipitation for Water Year 2021 was approximately 47 percent of average across the Delta watershed, with precipitation in the Sacramento River watershed being 23.2 inches and precipitation in the San Joaquin River watershed being 18.3 inches. Earlier this year, the state also experienced unprecedented loss of snowmelt runoff, which was absorbed by dry soils or evaporated amid unusually warm temperatures before reaching streams and reservoirs. These conditions have resulted in reservoir storage levels that are significantly below average: as of July 20, 2021, storage levels in major reservoirs, specifically Shasta, Oroville, and Folsom reservoirs, are around 30 percent of capacity and below 50 percent of historical average storage conditions for that date;
5. There is an urgent need to address severe water shortages in the Delta watershed to protect water supplies necessary to meet human health and safety needs, preserve stored water needed to prevent salinity from the ocean from intruding into the Legal Delta and making water unusable for municipal, industrial, and agricultural purposes, and to minimize impacts to fish and wildlife. The Delta watershed is the state's largest surface water source, supplying two-thirds of Californians with at least some portion of their drinking water. It is also home to numerous fish, wildlife, and plant species listed as threatened, endangered, or special status under the state and federal Endangered Species Acts, as well as species that hold significant cultural importance to California tribes and are vital to the commercial and recreational fishing economy. Water quality within the Legal Delta relies on an intricate balance between freshwater flows and tidal actions. Leaving

¹ A water year is a 12-month period from October 1 to September 30 of the following year. For example, Water Year 2020 was from October 1, 2019 through September 30, 2020.

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freshwater storage unprotected could result in severe salinity intrusion in the Legal Delta, rendering this critical water source unusable for humans and ecosystems alike;

6. Further, there is a need to ensure continued minimum human health and safety needs are met, notwithstanding the shortage conditions. The California Water Code declares water supplies for consumption, sanitation, and cooking as a human right (Wat. Code, § 106.3); identifies domestic use as the highest water use (Wat. Code, § 106); and provides water suppliers with authority to declare a water shortage emergency to allow sufficient water for human consumption, sanitation, and fire protection (Wat. Code, § 350). Additional efforts are needed in the Delta watershed this year to ensure that water right holders and claimants without other means to access basic health and safety supplies are able to continue to access water for these uses under critical drought conditions;
7. Water agencies across California have taken actions in response to the dry conditions, including reducing or eliminating contract water deliveries and implementing mandatory and voluntary conservation efforts. The Central Valley Project (CVP) and the State Water Project (SWP), the state's two major water supply projects operating reservoirs throughout the Delta watershed, have announced severe reductions in contract deliveries. In 2021, the U.S. Bureau of Reclamation (Reclamation), which operates the CVP, has made no allocation to agricultural service contractors and a 25 percent allocation, or the amount needed for minimum health and safety, to municipal and industrial contractors. The Department of Water Resources (DWR), which operates the SWP, has made a five percent allocation for both municipal and agricultural contractors. In addition to water supply reductions and conservation efforts, water users have requested and received approvals for temporary changes to regulatory requirements to extend limited supplies. Many water users have also pursued water transfers and purchases from willing sellers to make up for reduced supplies;
8. On March 22, 2021, the State Water Board sent [letters regarding ongoing dry conditions in most California watersheds](#) to all water right holders and claimants in the state regarding ongoing dry conditions in most California watersheds. These letters encouraged water right holders and claimants to plan and prepare for potential water shortages later this year. The letters also notified water right holders and claimants that accurate and timely reporting of water use data will help to provide critical information needed to manage the state's water resources;

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9. On June 15, 2021, the State Water Board sent [Notices of Water Unavailability](#) to all 4,300 post-1914 appropriative water right holders in the Delta watershed and warned approximately 2,300 water users with more senior water right claims that continued drought later this summer could also impact their ability to divert. These notices were based on the output of the Water Unavailability Methodology for the Delta Watershed ([Water Unavailability Methodology](#) or Methodology), developed by compiling water rights demand data and comparing those demands against available supplies. The comparison of available and forecasted supplies against water rights demands allows for a determination of the water rights that face insufficient supplies during times of shortage;
10. Prior to sending the June 15 Notices of Water Unavailability, the Methodology upon which the notices were based was subject to a 14-day public review and comment period, including a [public workshop](#) on May 21, 2021, to explain the Methodology and receive public comments. Board staff also presented the Methodology at the June 1, 2021 Board Meeting as part of an Informational Item. The State Water Board has updated the Methodology twice, in response to public comments, in addition to updates made in response to feedback from the prior drought. On July 23, 2021, the State Water Board sent additional Notices of Water Unavailability to some senior water right claimants in the Delta watershed based on the Methodology showing insufficient supply to meet all demands;
11. As appropriate, State Water Board staff may further update the July 23, 2021 Methodology to reflect best available information. Notice of any such updates will be provided through the Board’s Delta Drought email distribution list and posting on the Board’s drought website;
12. During the dire drought conditions currently being experienced in the Delta watershed, it is imperative that water right holders and claimants who do not have water available at their priority of right and do not have a need or obligation to provide water for minimum human health and safety uses cease diversions of water that is needed for more senior rights and to prevent unauthorized diversion of previously stored water needed for salinity control, human health and safety supplies, and minimal ecosystem protections;
13. Water Code section 1058.5 provides the State Water Board the authority to adopt emergency regulations in certain drought years or when the Governor proclaims a drought state of emergency in order to “prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to

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require curtailment of diversions when water is not available under the diverter’s priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports”;

14. Article X, section 2 of the California Constitution declares that the water resources of the state must be put to beneficial use to the fullest extent possible and the unreasonable use of water be prevented. Relevant to the current drought conditions, the California Supreme Court has clarified that “[w]hat may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567.) 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. City of Vallejo* (1935) 2 Cal.2d 351, 367.) This regulation is in furtherance of article X, section 2 during this drought emergency;
15. Adoption of an emergency regulation is necessary to address the immediate and dire water shortages in the Delta watershed. An emergency regulation will enable the State Water Board to act in a timely manner to enforce the water right priority system with respect to all water right holders and claimants and to protect critical water storage needed for minimum health and safety, salinity control in the Legal Delta, and some ecosystem protection;
16. The State Water Board is adopting the emergency regulation due to severe emergency drought conditions and the need for prompt action;
17. The regulation will rely upon the current Methodology, including any updates to that Methodology, for curtailment decisions, as well as more real-time publicly available and reliable information to support sub-monthly **and sub-watershed** suspension and re-imposition of curtailments due to precipitation and runoff events as appropriate. State Water Board staff will identify the specific sources used to support sub-monthly **and sub-watershed** curtailment decisions as part of its email and website updates on curtailments;
18. The regulation supports cooperative agreements among water right holders and claimants in the Delta watershed to share or forebear the use of available water and avoid curtailment. Such agreements must not result in injury to other water right holders and claimants or cause unreasonable harm to fish and wildlife. Such agreements are expected to achieve the overall objectives that would otherwise be served by curtailment;

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19. Emergency regulations adopted under Water Code section 1058.5 **may** remain in effect for up to one year; and
20. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to staff.

THEREFORE BE IT RESOLVED THAT:

1. The State Water Board adopts California Code of Regulations, Title 23, Division 3, Chapter 2, Article 24, Sections 876, 876.1, and 878.2, and amendments to Sections 877.1, 878, 878.1, 879, 879.1 and 879.2, as appended to this resolution as an emergency regulation;
2. State Water Board staff will 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, the Deputy Director for the Division of Water Rights, or their designee, may make such changes;
4. This regulation shall remain in effect for one year after filing with the Secretary of State unless: **(i)** the State Water Board determines that it is no longer necessary due to changed conditions, **(ii) the conditions specified in Water Code section 1058.5 subdivision (a)(2) are no longer in effect, in which case this regulation is deemed repealed,** or **unless(iii)** the State Water Board renews the regulation due to continued drought conditions as described in Water Code section 1058.5;
5. The State Water Board directs staff to process as expeditiously as possible any proposals for cooperative agreements which may be offered as alternatives to curtailments;
6. The State Water Board directs staff to publicly notice through the Board's email distribution list and posting on the drought website any changes to the Water Unavailability Methodology at least 24 hours prior to implementation. If those changes are substantial, State Water Board staff shall hold a workshop as soon as practical, which may be subsequent to implementation. Staff shall provide updates on the changes to the Water Unavailability Methodology during regularly scheduled Board Meetings; ~~and~~

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7. The State Water Board directs staff to engage with stakeholders by December 31, 2021, or as soon as practical to identify and explore other possible approaches that could be developed and implemented to address severe water supply shortages and related concerns, including reservoir storage, minimum health and safety supplies, and maintaining salinity control in the Legal Delta. Examples include, but are not limited to, a curtailment methodology similar to standard water right Term 91 that is currently included in more junior water right licenses and permits; **and**
8. **Except for purposes of enforcement of a curtailment order issued pursuant to this regulation, this regulation and any curtailment order issued hereunder shall not be cited as authority for, or evidence of, the validity or priority of any water right or claim affected or protected by this regulation. Given this, it would be inappropriate to consider compliance with the regulation to be an admission or waiver of any rights or claims of affected parties.**

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 August 3, 2021.

Jeanine Townsend
Clerk to the Board