

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2024-0001-EXEC

In the Matter of the Petition for Reconsideration of
Blue Mountain Minerals

Regarding Denial of Human Health and Safety Exemption from
Curtailment - Statements of Water Diversion and Use S010009
and S013224

SOURCE: Lord and Vine Springs

COUNTY: Tuolumne

ORDER DENYING RECONSIDERATION¹

BY THE EXECUTIVE DIRECTOR²:

1.0 INTRODUCTION

This Order addresses the Petition for Reconsideration of Blue Mountain Minerals (BMM) regarding the Deputy Director for the Division of Water Rights' (Deputy Director) October 31, 2022 denial of a Petition to Increase Human Health and Safety Diversions,

¹ The State Water Resources Control Board (State Water Board or Board) is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1222.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-00612 at p. 2, fn. 1; see *California Correctional Peace Officers Ass'n v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147-1148, 1150-51; State Water Board Order WQ 98-05-UST at pp. 3-4.)

² State Water Board Resolution 2012-0061 delegates to the Executive Director the authority to conduct and supervise the activities of the State Water Board, subject to exceptions not applicable here. This Order falls within the scope of the authority delegated under Resolution 2012-0061.

3.0 LEGAL AND FACTUAL BACKGROUND

3.1 Water Rights associated with Statements of Water Diversion and Use S010009 and S013224

BMM holds water right claims⁴ associated with Statements of Water Diversion and Use (Statements) S010009 and S013224 (collectively, Water Right Claims); both are pre-1914 water right claims for the diversion of water from the Lord and Vine Springs in Tuolumne County, California. The Water Right Claims do not authorize storage. The purpose of use for both Water Right Claims is to control fugitive dust emissions from process equipment and hauling trucks, water truck tank filling, and other mining operations.

3.2 Drought Emergency Regulation

California and the Delta watershed were experiencing extremely dry conditions, with water years 2020, 2021, and 2022 constituting the driest three-year period on record based on precipitation. The combination of unusually low precipitation, warm temperatures, and dry soils resulted in unprecedented low runoff from the Sierra-Cascade snowpack, leading to significant reductions in available water supplies for various purposes. Due to drought conditions, water supply in many parts of California, including the Delta watershed, was insufficient to meet a significant portion of water demand of water right holders and claimants. These conditions resulted in the need for immediate action to effectively and efficiently administer and enforce the State's water rights priority system in light of severely limited water availability in the Delta watershed.

⁴ Water right claims initiated prior to December 19, 1914, are not subject to the State Water Board's permitting authority and in most cases the State Water Board has not investigated or independently substantiated them, including BMM's water right claims. This order makes no findings regarding the validity of BMM's pre-1914 water right claims.

On April 21, 2021, Governor Gavin Newsom issued a Proclamation of a State of Emergency (proclamation) 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 for 41 counties, including Stanislaus and Tuolumne Counties and others in the Delta watershed, in response to emergency drought conditions. The May 10, 2021 proclamation directed the State Water Board to consider adoption of 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. On July 8, 2021, the Governor expanded the emergency declaration to nine additional counties and called upon Californians to voluntarily reduce their water use by 15 percent. On October 19, 2021, the Governor issued a proclamation that extended the drought emergency statewide.

On August 3, 2021, the State Water Board adopted the Delta emergency regulation in response to ongoing drought conditions and associated water supply shortages in the Delta watershed. (Resolution No. 2021-0028.) On August 9, 2021, the emergency regulation and supporting information were submitted to Office of Administrative Law (OAL) for review and an additional comment period pursuant to Government Code section 11349.6. The emergency regulation was approved by OAL and became effective for one year upon filing with the Secretary of State on August 19, 2021. The regulation was codified in sections 876.1 through 879.2 of title 23 of the California Code of Regulations.

On August 3, 2021, the State Water Board revised and readopted the Delta emergency regulation in response to ongoing drought conditions and associated water supply shortages in the Delta watershed. (Resolution No. 2022-0028.) The emergency regulation was approved by OAL and became effective for one additional year upon filing with the Secretary of State on August 12, 2022.

Section 876.1, subdivision (b), authorized the Deputy Director to issue orders requiring water right holders and claimants in the Delta watershed to curtail their diversions of

natural and abandoned flows in order of water right priority when water is unavailable at their priority of right.

Under the emergency regulation, an exception to curtailment could be authorized if: (1) the water right or claim is used only for a non-consumptive use, as described in section 878; or (2) water diverted under the water right or claim is the diverter's only source of water and it is needed to meet minimum human health and safety needs, as defined in sections 878.1 and 877.1. Water right holders and claimants seeking to continue diverting for non-consumptive uses or minimum human health and safety needs must submit a certification to the Deputy Director describing the nature of their use and compliance with the conditions outlined in the emergency regulation. Diversions for non-consumptive uses and minimum human health and safety needs not greater than 55 gallons per person per day under any valid basis of right could continue after issuance of a curtailment order without further approval from the Deputy Director, provided that a certification was submitted. Before diverting more than 55 gallons per person per day for minimum human health and safety needs, a diverter was required to submit a petition demonstrating compliance with the requirements of section 878.1, subdivisions (b)(2)(A)-(F) and obtain approval from the Deputy Director. Section 878.1, subdivision (g) specified that diversion and use within the Delta watershed that deprives water for minimum human health and safety needs, or which creates unacceptable risk of depriving water for minimum human health and safety needs, is an unreasonable use of water.

3.3 Correspondence During 2021 and 2022

On August 20, 2021, the Board issued an **Initial Order Imposing Water Right Curtailment and Reporting Requirements in the Sacramento-San Joaquin Delta Watershed**. This order notified all holders of water rights and water right claims in the Sacramento-San Joaquin Delta watershed that they may be required to curtail diversions based on hydrologic conditions, and of the requirement to monitor curtailment status, submit a compliance certification form and comply with monthly reporting requirements. The Order also notified diverters that exceptions to curtailment

could be authorized in accordance with the emergency regulation, including where water diverted under a curtailed right is the only source of water and is needed to serve minimum human health and safety uses.

On September 10, 2021, BMM submitted a Human Health and Safety petition for its Water Right Claims pursuant to section 878.1. Lauren Mitchell, BMM's representative, stated that BMM needed to use its diverted water to control fugitive dust emissions from its mining operations as required by its Tuolumne County Air Pollution Control District Permit (APCD) to Operate (#55-0001) and Tuolumne County Conditional Use Permit (02CUP-056). Ms. Mitchell also provided a copy of the two permits. Ms. Mitchell stated the water would only be used to refill water trucks and for this use BMM needed 4,000 gallons of water per day.

On November 9, 2021, the Division of Water Rights (Division) requested BMM provide substantiating information regarding their Human Health and Safety petition. On December 10, 2021, BMM responded by providing additional information and BMM's water usage. BMM stated that it has two wells on its property, but believes it is not feasible to purchase public water. BMM also indicated the results of its conservation efforts. Division staff responded on December 19, 2021, stating that BMM must state the steps that have been taken to obtain alternative water sources and how BMM has implemented water conservation efforts, rather than just the claimed results.

On April 20, 2022, after considering the information BMM had provided, Division staff responded to BMM with a non-approval letter with the following issues identified:

- BMM did not explain why it did not have access to a public water supply as an alternative source of water or why it could not use water from its existing wells to meet its claimed minimum health and safety needs.
- BMM had not demonstrated its effort to obtain alternative sources of water for its human health and safety needs.

On September 28, 2022, BMM responded to the Division with a letter addressing the issues identified in the non-approval letter. In its response BMM indicated it had

contacted the Tuolumne Utilities District (TUD) to access raw water, and that raw water access is 1.63 miles from BMM's location. BMM indicated that installing a water line from TUD would be cost-prohibitive. BMM also indicated that installing an additional well to access groundwater would cost upwards of \$58,000. BMM reiterated that APCD requires BMM to control fugitive dust and BMM relies on its Water Right Claims for effective dust control.

On October 31, 2022, the Deputy Director denied BMM's human health and safety petition. The Deputy Director's letter stated as the basis for the denial that BMM's business operations do not qualify as minimum health and safety needs under the State Water Board's Delta emergency regulation. (Letter from Erik Ekdahl to Lauren Mitchell, October 31, 2022, citing Cal. Code regs., tit. 23, § 877.1, subdivision (h).). The Deputy Director's letter concluded that:

the need for water to control dust and exhaust emissions is a result of BMM's business practices, rather than an independently-occurring human health and safety issue that BMM can only alleviate through the continued diversion and use of water notwithstanding curtailment. The human health and safety need can be addressed through cessation of the activities that create the emissions when BMM does not have a right to divert due to applicable curtailment of its water right claims, or through procurement of water from a non-curtailed source or groundwater.

(Letter from Erik Ekdahl to Lauren Mitchell, October 31, 2022.)

On November 30, 2022, BMM submitted a petition for reconsideration contending the denial of its petition to increase human health and safety diversions was inappropriate for the following reasons:

- BMM is one of the largest employers in Tuolumne County, providing well-paying jobs with benefits.
- BMM is an essential business in northern California, providing soil additives to growers throughout the central and northern valley.

- BMM has permit requirements imposed by APCD to control fugitive dust emissions.
- BMM has reached out to TUD regarding the feasibility of installing a connecting water line to its property. TUD stated that BMM's usage could adversely impact TUD's water distribution system.
- BMM has concerns that additional wells or increased pumping from its existing well could diminish the output of its spring. This may affect the amount of available groundwater for a family living on BMM's property, including water needed to raise goats for vegetation control, i.e., fire protection.
- The curtailments are not appropriate due to topography and location of the facility.
- BMM claims its claimed 1852 priority water rights are exempt from water curtailments by the State Water Board.

4.0 DISCUSSION

4.1 Exception to Curtailment for Minimum Human Health and Safety Needs

Section 878.1 allowed for approval of exceptions to certain curtailments to ensure minimum human health and safety needs were met notwithstanding otherwise applicable curtailment of the underlying water right. Section 877.1, subdivision (h) further defined what constituted "minimum human health and safety needs." BMM requested an exception to curtailment so it could continue to divert more than 55 gallons per capita per day (GPCD), pursuant to section 878.1, subdivision (b)(2), which provided that:

[t]o the extent that a diversion for minimum human health and safety needs requires more than 55 gallons per person per day, or cannot be quantified on the basis of gallons per person per day, continued diversion of water notwithstanding curtailment of the applicable water right requires submission of a petition demonstrating compliance with the requirements of subdivisions (b)(1)(B)-(E) above and (b)(2)(A)-(F) below, and approval by the Deputy Director. The Deputy Director may condition approval of the petition on implementation of additional conservation measures and reporting requirements.

(Section 878.1, subd. (b)(2).) Section 878.1, subdivision (b)(2) also specified what information must be provided to support a request to continue diversions to meet minimum human health and safety needs with amounts of water greater than 55, or that cannot be quantified on the basis of GPCD.

4.2 Blue Mountain Minerals Fugitive Dust Emissions – Business Operations

In its petition for reconsideration BMM reiterated the need to control fugitive dust emissions as required by the APCD. BMM operates truck wash stations, road paving/watering, and water sprays as ways to control fugitive dust emissions. The Deputy Director noted in the October 31, 2022, denial letter that the fugitive dust emissions were generated by BMM’s business operations rather than an independently occurring source. These business operations include the use of haul trucks on dirt roads and maintaining storage piles. BMM did not identify how fugitive dust emissions may have been generated without its business operations. BMM restated that its business is an “essential business” but failed to explain how its operations are necessary for minimum human health and safety needs such that continued diversion of water notwithstanding curtailment is likewise necessary. Based on the information provided, the Deputy Director reasonably concluded that fugitive dust emissions would cease to be generated if business/mining operations did not occur, making diversions of water unnecessary to control those emissions.

4.3 Tuolumne Water District Public Water Supply and Groundwater Well

BMM stated that it does not have access to a public water supply, as the nearest public water system supply (TUD) is 1.63 miles away. BMM indicated that it contacted TUD but was awaiting a response on the feasibility of tying into TUD’s water line. BMM has not provided TUD’s response on the feasibility of connecting a water line. Additionally, BMM did not provide substantiating information on other alternative water sources such as purchasing water off their property and a potential water storage tank on its property.

BMM mentioned that an approximate 25% decrease in flow from an adjacent spring has occurred since it brought an abandoned well back into service. This is a result of an 8-hour pumping operation throughout each business day. BMM also states that this adjacent spring is a source of water for a family living on the property. A decrease in flow may affect the ability of the current family living on the property to raise goats for vegetation control, which may adversely affect fire protection around BMM's plant. However, it appears from BMM's request that this family has an independent source of water (spring) and BMM's petition for exemption from curtailment is not based on water needed to serve minimum human health and safety needs for this family under section 878.1.

4.4 Pre-1914 Rights Are Subject to Section 876.1

BMM stated that the State Water Board is inappropriately curtailing BMM's water rights because they are pre-1914 appropriative water rights. Section 876.1 provided that the Deputy Director may issue curtailment orders to water right holders and claimants in the Delta Watershed in order of water right priority. The Board adopted the Delta emergency regulation pursuant to Water Code section 1058.5. The plain language of Water Code section 1058.5 permits the Board to adopt emergency regulations to, among other things "prevent the ... unreasonable use ... of water, ... [and] require curtailment of diversions when water is unavailable under the diverter's priority of right" Consistent with the plain language of the statute, the Third District Court of Appeal has confirmed that the Board's regulatory authority under Water Code section 1058.5 extends to riparian and pre-1914 appropriative rights. (*Stanford Vina Irrigation Company v. State (Stanford Vina)* (2020) 50 Cal.App.5th 976.) Like the regulation that was the subject of the Third District Court of Appeal's decision in *Stanford Vina*, the Delta emergency regulation is supported by both Water Code section 1058.5 and the reasonable use doctrine. (See Cal. Code Regs., tit. 23, § 879.2, subd. (b) [providing that the diversion or use of water in violation of the regulation constitutes an unreasonable use of water]; State Water Board Resolution No. 2021-0028, pp. 2–4 [describing the

need for the regulation and stating that it is in furtherance of article X, section 2 of the California Constitution].)

4.5 Other Bases for Exemption to Curtailment

In its petition for reconsideration BMM for the first time raises the contention that curtailments are not appropriate due to topography and location of the facility. Section 876.1, subdivision (d)(5) allowed the Deputy Director to not curtail rights otherwise subject to curtailment where there is “relevant available information regarding stream system disconnection where curtailing diversions would not make water available to serve senior downstream water rights or claims....” BMM did not previously raise this contention, and BMM has not provided supporting documentation for this contention. Moreover, it is not a proper basis for granting reconsideration of the Deputy Director’s October 31, 2022 decision, which concerned BMM’s claim for exception to curtailment based on serving minimum human health and safety needs pursuant to section 878.1. (See section 768, subd. (c).) BMM is not precluded from raising this contention as an independent basis for an exception to curtailment in the event BMM is curtailed under a future curtailment regulation that contains language similar to section 876.1, subdivision (d)(5).

5.0 CONCLUSION

Section 878.1 identified specific criteria for the requested exception to curtailment, including that water diverted is needed to meet minimum human health and safety needs. As determined in the Deputy Director’s decision denying BMM’s petition to increase human health and safety diversions, BMM’s business operations do not qualify as minimum human health and safety needs under section 877.1, subdivision (h) because “the need for water to control dust and exhaust emissions is a result of BMM’s business practices, rather than an independently-occurring human health and safety issue that BMM can only alleviate through the continued diversion and use of water notwithstanding curtailment.” (Letter from Erik Ekdahl to Lauren Mitchell, October 31, 2022.) BMM did not provide information supporting a different conclusion.

BMM also did not provide substantiating information from TUD as to the feasibility of connecting a water line to BMM's property or showing that all other options to eliminate the fugitive dust emissions have been exhausted.

For these reasons, the Deputy Director correctly concluded that BMM's fugitive dust control needs could be addressed through cessation of the activities that create the emissions during times when BMM does not have a right to divert due to applicable curtailments, or through procuring water from another source, and on those bases appropriately denied BMM's request for an exception to curtailment under section 878.1.

ORDER

IT IS HEREBY ORDERED that BMM's Petition for Reconsideration is denied.

January 12, 2024

Dated



Eric Oppenheimer
Executive Director