

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

ORDER WR 2022-0147-EXEC

**In the Matter of the Petitions for Reconsideration of the Adoption of the
August 2021 Emergency Curtailment and Reporting Regulation for the
Sacramento-San Joaquin Delta Watershed**

from

**Banta-Carbona Irrigation District, Byron-Bethany Irrigation District, Central
Delta Water Agency & South Delta Water Agency, Patterson Irrigation District,
San Joaquin River Exchange Contractors Water Authority, Turlock Irrigation
District, Turlock Irrigation District & Modesto Irrigation District, and West
Stanislaus Irrigation District**

**and of the August 2021 Curtailment and Reporting Orders for the
Sacramento-San Joaquin Delta Watershed**

from

**Banta-Carbona Irrigation District, Byron-Bethany Irrigation District, Central
Delta Water Agency & South Delta Water Agency, City and County of San
Francisco, Merced Irrigation District, Oakdale Irrigation District & South San
Joaquin Irrigation District, Patterson Irrigation District, Turlock Irrigation
District, Turlock Irrigation District & Modesto Irrigation District, and West
Stanislaus Irrigation District**

ORDER DENYING RECONSIDERATION

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BY THE EXECUTIVE DIRECTOR

1.0 INTRODUCTION

On August 3, 2021, the State Water Resources Control Board (State Water Board or Board) adopted an emergency curtailment and reporting regulation for the Sacramento-San Joaquin Delta (Delta) watershed in response to ongoing drought conditions and associated water supply shortages. Pursuant to the emergency regulation, on August 20, 2021, the State Water Board issued initial orders imposing curtailment and reporting requirements to all water right holders and claimants in the Delta watershed. The following entities (collectively, petitioners) filed timely petitions for reconsideration of the emergency regulation and/or the initial curtailment orders:

- Banta-Carbona Irrigation District (BCID)
- Byron-Bethany Irrigation District (BBID)
- Central Delta Water Agency (CDWA) and South Delta Water Agency (SDWA) on behalf of all landowners within the CDWA and SDWA
- City and County of San Francisco (CCSF) on behalf of the San Francisco Public Utilities Commission (SFPUC)
- Merced Irrigation District (Merced ID)
- Oakdale Irrigation District (OID) and South San Joaquin Irrigation District (SSJID)
- Patterson Irrigation District (PID)
- San Joaquin River Exchange Contractors Water Authority (SJRECWA)
- Turlock Irrigation District (TID)
- Turlock Irrigation District (TID) and Modesto Irrigation District (MID)
- West Stanislaus Irrigation District (WSID)

SJRECWA petitioned for reconsideration of the emergency regulation only; CCSF, Merced ID, and OID and SSJID petitioned for reconsideration of the initial curtailment orders only; and BCID, BBID, CDWA and SDWA, PID, TID, TID and MID, and WSID petitioned for reconsideration of both the emergency regulation and the initial curtailment orders.

The petitions raise a variety of issues, most of which are addressed below. As explained in section 3.1, the regulation is not a water right decision or order that is subject to reconsideration by the Board. Accordingly, the petitions for reconsideration of the regulation are dismissed. In addition, as explained in the remainder of section 3.0 of this order, the issues raised in all of the petitions for reconsideration either lack merit or

have been addressed through corrections to the methodology used by the Division of Water Rights (Division) to determine water unavailability for purposes of curtailments in the Delta watershed. Accordingly, the petitions for reconsideration are denied. To the extent that any issues are not addressed in this order, they are not substantial issues that merit reconsideration.¹

2.0 FACTUAL, LEGAL, AND PROCEDURAL BACKGROUND

2.1 Drought Conditions

California and the Delta watershed have experienced extremely dry conditions over the last three years, 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 current drought conditions, water supply in many parts of California, including the Delta watershed, has been 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 system in light of severely limited water availability in the Delta watershed.

Drought conditions have continued to persist statewide. Despite large storms in October and December 2021, precipitation patterns remained well below normal, resulting in the driest January through March period on record. Currently, reservoir storage levels in the Delta watershed are significantly below average for most reservoirs despite early season precipitation and are expected to continue to decline until significant additional precipitation returns. As of April 25, 2022, storage volumes in major reservoirs are below average with Lake Shasta at 47 percent and Lake Oroville at 69 percent of average to date. Precipitation events in April improved conditions in some reservoirs, such as Folsom Lake, which is currently at 102 percent of average storage levels.

¹ State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Water Code section 1122 directs the State Water Board to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. However, as set forth in section 2.9, below, failure to act within the 90-day period does not divest the Board of jurisdiction to act upon the petition.

2.2 Governor's Drought Proclamations

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 those 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 9 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.

2.3 Description of the Delta Watershed

The Delta watershed includes supplies from both the Sacramento and San Joaquin Rivers. These river systems, including their tributaries, drain water from approximately 40 percent of California's land area, supporting a variety of beneficial uses of water. The Delta is one of the most important ecosystems in California, as well as the hub of California's water supply system. The Delta and its tributaries provide essential habitat to a vast array of aquatic, terrestrial, and avian wildlife. Water from the Delta watershed provides a portion of the supplies to more than two-thirds of Californians, supports industry, and is used to irrigate millions of acres of farmland. Given the importance of the water supplies in the Delta watershed for multiple beneficial uses and the extreme shortages in water supplies, urgent action was needed to immediately curtail water users when water supplies were not available under their priority of right.

The Department of Water Resources' (DWR) State Water Project and the U.S. Bureau of Reclamation's (Reclamation) Central Valley Project (collectively Projects) are responsible for providing salinity control and meeting environmental flows in the Delta, as well as specific requirements for flows and temperature management on Delta tributaries where Project reservoirs and other facilities are located (see section 2.7.4). Currently, many Project reservoir storage levels are below average, creating significant concerns for salinity control, municipal water supplies, and other environmental needs if dry conditions continue. Concerns for reservoir storage levels are compounded when diversions occur under water rights even though supplies are not adequate to satisfy their priority of right, resulting in the need for additional releases of stored water from Project reservoirs in order to repel salinity intrusion from the ocean and meet other flow-dependent water quality requirements.

2.4 Water Unavailability Methodology

The Division developed a methodology for identifying when available data indicates that natural and abandoned water supplies are unavailable for direct diversion or diversion to storage for consumptive use by water right holders and claimants in the Delta watershed under their priority of right (Water Unavailability Methodology or Methodology). The Water Unavailability Methodology is used to inform curtailment of water rights and claims in the Delta watershed pursuant to an emergency regulation (see section 2.5). Since its initial release, the Methodology has been updated to address public comments and to make other needed improvements and will continue to be updated as new information becomes available.

2.4.1 Development Process

On May 12, 2021, the State Water Board first released its Water Unavailability Methodology for the Delta watershed focused on water unavailability for post-1914 appropriative water rights, which was described in a report, and Technical Appendices A and B. The results of implementation of the Methodology are displayed in a spreadsheet and an online interactive visualization tool. State Water Board staff received and reviewed numerous public comments on the Methodology, including comments received during a staff-led workshop on May 21, 2021, and in writing by the comment deadline on May 25, 2021. As part of an informational item at the June 1, 2021 Board meeting, staff presented an update to the Water Unavailability Methodology, which included staff's response to comments received. On June 15, 2021, the State Water Board released an updated report, technical appendices, and spreadsheet, based on public comments and further evaluation by staff. In addition, a new Appendix C was added to summarize the substantive technical, factual, and legal comments received to date.

On July 23, 2021, the State Water Board released an updated version of the Methodology to address water unavailability for more senior water right claimants, including pre-1914 appropriative and riparian claimants. The July 23, 2021 version of the report was incorporated by reference into the emergency regulation that became effective on August 19, 2021 (see section 2.5). Since that time, four revised versions of the report describing the Methodology have been released. Most of the revisions to the report did not reflect changes to the Methodology that was described in the July 23, 2021 report, but some minor refinements to the Methodology have been made since then. These refinements include: exclusion of the Goose Lake subwatershed due to disconnection; adjustment of the subwatershed boundary delineation for certain subwatersheds; allocation of abandoned instream flows to non-riparian water right holders and claimants only; application of return flow factors to direct diversion demand only; use of appropriate timesteps in between monthly and weekly to determine curtailments in response to precipitation and runoff events; and curtailment of non-riparian rights only when no water is available at the diverter's priority of right. The spatial refinements served to improve the accuracy of the Methodology in certain

portions of the watershed, while the temporal refinement has enabled the temporary suspension of curtailments for a greater number of diverters during sub-monthly precipitation and runoff events.

Subsequent updates to the Water Unavailability Methodology resources were released on August 20, September 27, November 15, 2021, and April 19, 2022. With the August 20, 2021 update, Technical Appendix D (Appendix D) was added to provide additional explanation of the assumptions used to evaluate water unavailability in the Legal Delta. The November 15, 2021 update considered public input provided during a staff-led workshop on October 20, 2021, to discuss changes to the Methodology that are applicable during the wet season. The April 19, 2022 update included additional refinements and considered input provided in the petitions for reconsideration that are the subject of this order.

2.4.2 Content of the Water Unavailability Methodology

The Water Unavailability Methodology compares the best available estimates for supply and demand within the Sacramento and San Joaquin River watersheds and within delineated subwatersheds to determine if supply may be insufficient to meet certain priorities of right. These comparisons are presented visually using interactive graphs and in spreadsheet format.

The approach and major assumptions for the Water Unavailability Methodology are described in a report and associated technical appendices. Technical Appendix A describes the Water Unavailability Methodology Spreadsheet, including the input data sources, computational steps, and outputs used to develop the water unavailability visualizations and inform curtailments. Technical Appendix B describes the process used to collect and quality control the demand datasets. Appendix C summarizes the substantive technical, factual, or legal comments regarding the Water Unavailability Methodology that were received prior to the release of the July 23, 2021 version of the report, as well as any relevant sections of the report where those comments have been addressed. Appendix D was included to respond to comments received regarding the hydrologic complexities of the Legal Delta and to provide additional explanation regarding the assumptions used in the Methodology with regard to freshwater residence time in the Legal Delta and the exclusion of tidal inflows as a source of supply.

2.4.2.1 Supply Data

The supply analysis accounts for the availability of natural and abandoned flows within the Delta watershed for diversion by water right holders and claimants under their priority of right. This analysis does not account for the availability of imported water supplies from other watersheds, or releases of previously stored water for downstream uses because those supplies are not available to other users under their own water rights. The Methodology incorporates the use of past and projected future full natural flow estimates. Supply data is derived from multiple sources which vary by location,

timescale, and temporal resolution. The Methodology also includes assumptions for return flows and abandoned instream flows that are available for diversion.

2.4.2.2 ***Demand Data***

The Methodology evaluates demands for natural and abandoned flows by basis of water right. It is not intended to account for demands for previously stored water, imported supplies, and contractual demands. The analysis to date has relied on demand estimates derived from annual reports of water diversion and use submitted by diverters.² Water demand used in the Methodology is based on the total monthly diversion amount reported for each water right record, including direct diversions and diversions to storage. The Methodology primarily relies on data reported for calendar year 2018, which was a below normal water year in both the Sacramento and San Joaquin River watersheds and is assumed to more closely resemble demands during a dry year like 2021.

Water demand data originates from self-reported diversion and use information that contains inaccuracies and inconsistencies because it is not systemically verified for accuracy. As a result, State Water Board staff conducted a review and quality control effort to identify and correct apparent errors. The demand dataset used in the Methodology represents the Board's current best estimate of demand based on available information.

2.4.2.3 ***Supply-Demand Analysis***

The Methodology evaluates supply and demand on both a subwatershed level (e.g., a single tributary like the Feather River) and a watershed-wide level (the Sacramento River and San Joaquin River watersheds). This allows for water unavailability to be determined based on physical supplies within a headwater stream and for the accounting of senior demands that may have priority to divert that supply further downstream.

Supply and demand are first compared at a subwatershed level for those subwatersheds that are not downstream of any other subwatershed (i.e., "headwater" subwatersheds). Demands within these headwater subwatersheds can only be met by supply originating within the subwatershed itself; thus, any excess demand unmet by local supplies in these areas is removed from the watershed-wide analysis. Though water may be physically available within a headwater subwatershed, it may be needed to meet the demand of senior users downstream that may have the right to some of the water originating in the headwater subwatershed. The Methodology accounts for this in the watershed-wide analysis for the Sacramento and San Joaquin River watersheds.

² Water right holders and claimants are required to file annual reports of water diversion and use to the State Water Board electronically through the Electronic Water Rights Information Management System (eWRIMS) Report Management System.

The watershed-wide analysis also includes water rights that divert within the Legal Delta. Appropriative water rights in the Legal Delta have access to water from both the Sacramento and San Joaquin Rivers. To account for this, the Methodology prorates appropriative demands within the Legal Delta based on the monthly proportion of connected supply available from each watershed. Appropriative rights in the Legal Delta are curtailed only if both the Sacramento River and San Joaquin River watershed analyses show that water is unavailable at their priority of right. The Methodology only accounts for freshwater flows from the Sacramento and San Joaquin Rivers as available supplies and does not include any tidal flows because saline water entering the Delta is assumed to be of insufficient quality for agricultural and municipal purposes. Additionally, the Methodology applies a freshwater residence time of one month given the extremely dry conditions that have persisted for an extended period of time and the supplementation of flows in the Legal Delta with previously stored Project water.

2.5 Emergency Regulation

Water Code section 1058.5 authorizes the State Water Board to adopt emergency regulations in certain drought years or when the Governor proclaims a drought state of emergency to prevent the unreasonable use of water, to require curtailment of diversions when water is not available under the diverter's priority of right, or to require monitoring and reporting of diversion or use. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to one year and may be renewed. (Wat. Code, § 1058, subd. (c).)

2.5.1 Development Process

On July 23, 2021, the State Water Board released an initial draft of an emergency curtailment and reporting regulation for the Delta watershed for public review and comment. The draft text of the regulation was posted on the State Water Board's website and distributed via the Board's email distribution list. Written comments were due on July 29, 2021, before the draft emergency regulation was scheduled to be considered for adoption by the State Water Board at its August 3, 2021 meeting. State Water Board staff provided information concerning the draft regulation and received oral comments during a public workshop held on July 27, 2021. The State Water Board received several comment letters on the proposed emergency regulation, which included comments from BCID, BBID, CDWA, Merced ID, SDWA, and SJRECWA.

2.5.2 Adoption and Approval

Government Code section 11346.1, subdivision (a)(2) requires that, at least five working days prior to the submission of a proposed emergency action to the Office of Administrative Law (OAL), the adopting agency must provide notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. The State Water Board provided notice of the proposed emergency rulemaking to parties interested in regulations and drought information on July 30, 2021. With the July 30, 2021 notice of proposed emergency rulemaking, the State Water

Board released a finding of emergency, informative digest, fiscal impact statement, and draft regulation text that had been revised in response to the oral and written comments on the July 23 initial draft of the regulation. The Board made additional, non-substantive clarifying changes to the emergency regulation text prior to and during the State Water Board's adoption meeting on August 3, 2021.

On August 3, 2021, the State Water Board adopted the emergency curtailment and reporting regulation in response to ongoing drought conditions and associated water supply shortages in the Delta watershed. On August 9, 2021, the emergency regulation and supporting information were submitted to OAL for review and a second comment period pursuant to Government Code section 11349.6. The State Water Board and OAL received comment letters from five stakeholders, including CDWA and SDWA. The emergency regulation was approved by OAL and became effective upon filing with the Secretary of State on August 19, 2021. The regulation is codified in sections 876.1 through 879.2 of title 23 of the California Code of Regulations.

2.5.3 Content of the Emergency Regulation

2.5.3.1 *Purpose of the Regulation*

The purpose of the emergency regulation is to improve the State Water Board's ability to quickly and effectively implement and enforce curtailments in response to severe water shortages in the Delta watershed. In the resolution adopting the regulation, the Board found that there was an urgent need to curtail diversions by water right holders and claimants when water is unavailable under their priority of right to protect senior water rights and prevent the unauthorized diversion of previously stored water needed for salinity control in the Delta, human health and safety needs, and ecosystem protection. (State Water Board Resolution No. 2021-0028, ¶¶ 5, 12.)

2.5.3.2 *Authorizes Curtailment in Order of Priority*

Pursuant to section 876.1, subdivision (b) of the emergency regulation, the Deputy Director for the Division of Water Rights (Deputy Director) is authorized 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. Before issuing curtailment orders to water right holders and claimants in the Legal Delta, the Deputy Director must consult with and obtain the concurrence of the Delta Watermaster.³ Section 876.1, subdivision (c) established a procedure whereby initial curtailment or reporting orders were mailed to

³ The Delta Watermaster is an independent officer of the State, reporting jointly to the State Water Board and the Delta Stewardship Council. Water Code section 85230 authorizes the Delta Watermaster to oversee the day-to-day administration of water rights, and when necessary, to take enforcement action, related to water diversions within the Legal Delta portion of the Delta watershed.

all water right holders and claimants in the watershed. The orders either required curtailment or instructed water right holders and claimants that notification of potential future curtailments (and suspension of curtailments) would be provided by email and posting to the State Water Board's drought webpage. Recipients were required to either sign up for the State Water Board's Delta Drought email distribution list or check the Board's webpage regularly. (Cal. Code Regs., tit. 23, § 876.1, subd. (c).)

2.5.3.3 *Specifies How to Determine Water Unavailability*

Section 876.1, subdivision (d) of the regulation directs the Deputy Director to consider certain information in determining whether water is unavailable under a water right holder's or claimant's priority of right and whether to order curtailment of water diversions under specific water rights or claims. The information that the Deputy Director is directed to consider includes: relevant available information regarding date of priority; monthly water right demand projections based on reports of water use for permits and licenses, or Statements of Water Diversion and Use (Statements) from 2018, 2019, or 2020; monthly water right demand projections based on information submitted in response to reporting requirements; water supply projections from DWR's California Cooperative Snow Surveys Bulletin 120 and the California Nevada River Forecast Center; and any information concerning stream system disconnection where curtailing diversions would not make water available to senior water right holders downstream. (Cal. Code Regs., tit. 23, § 876.1, subds. (d)(1)-(d)(5).)

The emergency regulation authorizes the Deputy Director to evaluate available water supplies against demands for purposes of determining whether to issue curtailments using the Water Unavailability Methodology, as described in the July 23, 2021 report on the Methodology, or comparable tools. The regulation also authorizes evaluation of available supplies against demands at the Sacramento and San Joaquin River watershed scale (U.S. Geological Survey Hydrologic Unit Code level 4), or subwatershed scale (Hydrologic Unit Code level 8). (Cal. Code Regs., tit. 23, § 876.1, subd. (d)(7).) The regulation directs the Deputy Director to suspend curtailments, in order of water right priority, when water availability increases or is projected to increase due to precipitation and runoff events or reductions in demand. In determining whether to suspend curtailments, and the geographic scope and duration of any suspensions, the Deputy Director is directed to consider the best available information, such as water supply forecasts from DWR and other similarly reliable sources. (*Id.*, § 876.1, subd. (g).)

2.5.3.4 *Authorizes Exceptions to Curtailment*

Under the emergency regulation, an exception to curtailment may be authorized if: (1) the water right or claim is used only for a non-consumptive use, as described in section 878 of the regulation; 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 section 878.1 of the regulation. Water right holders and claimants who seek 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 may continue after issuance of a curtailment order without further approval from the Deputy Director, provided that a certification has been submitted. Before diverting more than 55 gallons per person per day for minimum human health and safety needs, a diverter must 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) specifies 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.

In accordance with section 876.1, subdivision (e) of the emergency regulation, an exception to curtailment may also be authorized if a proposal has been submitted and approved by the Deputy Director indicating curtailment is not appropriate for a particular diverter in a specific stream system as demonstrated by verifiable circumstances. Water users may also propose alternative water sharing agreements that would achieve the purposes of the curtailment process. The Deputy Director may approve an alternative water sharing agreement, provided that the Deputy Director finds that implementing the agreement will not injure legal users of water who are not parties to the agreement or unreasonably affect fish and wildlife. (Cal. Code Regs., tit. 23, § 878.2.) Before making any determinations regarding proposals that curtailment is inappropriate within the Legal Delta, or alternative water sharing agreements among diverters in the Legal Delta, the Deputy Director will consult with the Delta Watermaster.

2.5.3.5 *Authorizes Reporting Requirements*

Section 879, subdivision (d)(1) of the regulation requires water right holders and claimants in the Delta watershed to certify that they would take actions needed to comply with initial curtailment or reporting orders issued under the emergency regulation. Specifically, recipients of orders issued under the emergency regulation were required to certify that they are aware of the process by which the State Water Board notifies right holders and claimants in the Delta watershed of the updated status of curtailments and that they are aware of what exceptions apply to curtailment, as well as the process for obtaining applicable exceptions.

Additionally, the emergency regulation authorizes additional reporting requirements for water right holders and claimants whose water right or claim has a total authorized face value or recent annual reported diversion amount of one thousand acre-feet or greater. (Cal. Code Regs., tit. 23, § 879, subd. (d)(2).) The Deputy Director is authorized to require reporting on the following information: prior diversions, unless otherwise reported in annual reports of water diversion and use, including direct diversions and diversions to storage; and demand projections for subsequent months through October

1, 2022, including direct diversions and diversions to storage. Before imposing any of these reporting requirements on water right holders and claimants in the Legal Delta, the Deputy Director will consult with and obtain the concurrence of the Delta Watermaster.

2.6 Issuance of Curtailment and Reporting Orders

On August 20, 2021, the Deputy Director issued initial orders imposing water right curtailment and reporting requirements to all water right holders and claimants in the Delta watershed. The orders were mailed to approximately 6,600 water right holders and claimants and applied to nearly 17,000 water rights and claims.

The initial orders required water right holders and claimants to certify electronically that they would comply with the order and regularly monitor for changes in curtailments by subscribing to the Board's Delta Drought email distribution list or frequently checking the Delta Drought webpage. Diverters were notified that future curtailment orders, including the suspension or reimposition of curtailments, would be issued electronically and would not be provided in hard copy.

2.6.1 Curtailments

Curtailment orders require recipients to cease diversions unless the diversion is subject to an authorized exception to curtailment as described by sections 878, 878.1, or 878.2 of the emergency regulation. In the August 20, 2021 initial curtailment orders, the State Water Board identified the priorities of water rights and claims of right that were curtailed for the remainder of August 2021 and for the month September 2021. The State Water Board has provided updates to curtailment status at least weekly since the initial curtailment orders were issued. Weekly updates provide water right holders and other interested persons with a general summary of curtailments and the bases for curtailment decisions, but ultimately diverters are responsible for checking the Board's website for the curtailment status of their water right or claim. The Deputy Director has consistently considered hydrologic forecasts and real-time conditions when evaluating curtailment decisions.

Based on the output of the Water Unavailability Methodology, a majority of the water rights and claims of right within the Delta watershed were curtailed from August 20, 2021 through August 31, 2021. The priorities of water rights and claims that were curtailed included all post-1914 appropriative water rights (including those within the Legal Delta), most pre-1914 appropriative water right claims, and some riparian water right claims in the Calaveras subwatershed. Water right holders and claimants within the Legal Delta and in the Sacramento River watershed with a priority date of 1900 or later and those in the San Joaquin River watershed with a priority date of 1910 or later were curtailed during the August 20 through August 31 (inclusive) time period. With the exception of a subset of Project rights with points of diversion in the Legal Delta, in-Delta diverters have not been curtailed since August 31, 2021.

Due to changes in available water supplies and demands following the irrigation season, some curtailments were suspended beginning in September 2021. In the Sacramento River watershed, drainage from rice fields temporarily increased available water supplies and resulted in the suspension of some curtailments on the Sacramento Valley Floor. This did not apply to rights and claims in the San Joaquin River watershed where rice field drainage does not occur. Curtailments that applied in September remained the same for the duration of the month. The majority of water right holders and claimants have not been curtailed since September.

Curtailments in the fall and winter months were dynamic due to storm events in October and December. In early October, curtailments were gradually suspended due to anticipated water supply forecasts until October 19, 2021, when all curtailments were suspended. All curtailments remained suspended through November 18, 2021. In late November and early December, curtailments were gradually reimposed on some tributaries due to a decrease in runoff from precipitation events. However, on December 10, 2021, all curtailments were suspended in response to increased precipitation and remained suspended through January 10, 2022. Historically warm and dry conditions in January and February 2022 resulted in the reimposition of some curtailments during those months.

Beginning in March 2022, curtailments were issued based on only watershed-wide conditions, not the analysis of water unavailability at the subwatershed scale. This resulted in only a subset of water rights associated with the Projects being curtailed. Although the Water Unavailability Methodology indicated that local water supplies were insufficient to satisfy all water rights in multiple subwatersheds, curtailing those users had the potential to affect several rim reservoirs that generally have more junior rights. Consistent with the Board's direction to consider opportunities and needs to replenish stored water supplies, the Deputy Director determined in the exercise of his discretion under section 876.1, subdivision (d) of the emergency regulation that curtailments should be issued using only the watershed-wide analysis. Water unavailability continued to be evaluated using this approach through April 2022.

2.6.2 Enhanced Reporting Requirements

As described in section 2.5.3.5, the emergency regulation includes provisions for requiring enhanced reporting of water diversion information. The initial curtailment orders required holders of water rights and claims with an authorized face-value or reported annual diversion amount of 5,000 acre-feet or more in 2018 or 2019 to submit monthly reporting of water diversion and use information for prior months and projected demand for future months. The enhanced reporting requirements apply to approximately 735 water rights and claims.

2.7 Water Right Priority System

California's water right system is one of the most complex in the nation, incorporating both riparian and appropriative rights to surface water. The water right priority system,

based on the “priority date” of each water right, forms the basis for determining which users may divert, and how much, when there is insufficient water in the stream for all users. When the amount of water available in a surface water source is not sufficient to support the needs of all water right holders, junior appropriators must cease diversion in favor of more senior rights.

2.7.1 Riparian Water Rights

A riparian water right is a right to directly divert and use the natural flow of water on land contiguous to a natural watercourse. (*Millview County Water Dist. v. State Water Resources Control Board* (2014) 229 Cal.App.4th 879, 888.) Riparian water right claims are unquantified, allowing the diverter to take water from the natural flow of the watercourse for any immediate reasonable and beneficial use on the subject land. In times of water supply shortage, all riparian users are required to share the shortage on a correlative basis; that is, each riparian water user is required to reduce its use proportionally so that the available supply is divided among all riparian claims. (*Id.* at pp. 889–890.) A riparian claim does not entitle a water user to divert water to storage or divert water that is foreign in time (e.g., released from storage) or source (e.g., imported from another watershed). (*People v. Shirokow* (1980) 26 Cal.3d 301, 307, fn. 7; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 738, 743, 771.)

2.7.2 Appropriative Water Rights

An appropriative water right is required for use of water on non-riparian land or seasonal storage of water for later beneficial use. Rather than land ownership, an appropriative right is acquired through the actual diversion and beneficial use of water that is surplus to the needs of riparian right holders and senior appropriators. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 101.) Unlike riparian water right holders, appropriative water right holders may appropriate abandoned water that is foreign in time or source, although they may not compel foreign water to continue to be abandoned. (*Bloss v. Rahilly* (1940) 16 Cal.2d 70, 74–76, 80.) Abandoned water is water that has been used or dedicated for a specific purpose for which it is no longer needed, such as water dedicated for instream use for a specific reach or return flow from agricultural uses.

Appropriative rights can be divided into two categories – pre-1914 appropriative rights and post-1914 appropriative rights – depending on whether they were initiated before or after the December 19, 1914 effective date of the Water Commission Act, which established a water right permitting system that was originally administered by the Water Commission and is now administered by the State Water Board. Before the Water Commission Act went into effect, a pre-1914 appropriative water right could be acquired by diverting water and applying it to beneficial use. An appropriator could establish a claim to the amount of water reasonably necessary to serve a particular purpose by manifesting the intent to appropriate the water and beginning construction of the requisite diversion facilities. (*Haight v. Costanich* (1920) 184 Cal. 426, 431–432; *Millview County Water Dist. v. State Water Resources Control Board*, *supra*, 229

Cal.App.4th at p. 890.) An appropriator also had the option of establishing an appropriative claim by following procedures set forth in the Civil Code for posting and recording a notice of appropriation. (*Id.* at pp. 890–891.) In either case, a pre-1914 appropriative right was perfected through the diversion and use of water with due diligence, and the right was limited to the amount of water actually applied to beneficial use. (*Ibid.*)

After the Water Commission Act went into effect, the initiation and acquisition of an appropriative water right required a water right permit. (*Millview County Water Dist. v. State Water Resources Control Board, supra*, 229 Cal.App.4th. at p. 889.) Once the Board confirms that water has been diverted and used in accordance with a permit, the Board may issue a water right license, which confirms that the appropriative right has been perfected. (Wat. Code, §§ 1605, 1610.) Water right permits and licenses quantify the amount of water authorized to be diverted and used. (*Id.*, §§ 1455, 1610, 1610.5.)

Appropriative water rights follow a rule of “first in time, first in right,” in which older, more senior appropriators are entitled to satisfy their reasonable needs before more junior appropriators are entitled to any water. (*Millview County Water Dist. v. State Water Resources Control Board, supra*, 229 Cal.App.4th at p. 890.) In general, appropriative water right holders are junior to riparian claimants. Accordingly, when natural flows are insufficient to satisfy all of the demands on a stream system, riparians are entitled to satisfy their reasonable demands before appropriators may divert, and senior appropriators may satisfy their demands before junior appropriators. To the extent that natural flows are insufficient to satisfy all of the riparian demands, riparian right holders must curtail their diversions proportionately. (*Ibid*; *Stanford Vina Irrigation Company v. State* (2020) 50 Cal.App.5th 976, 994.)

2.7.3 Exceptions to the Rule of Priority

As a general rule, water rights must be administered in accordance with the water right priority system. (*El Dorado Irrigation District v. State Water Resources Control Board, supra*, 142 Cal.App.4th at pp. 961–962.) The rule of priority is not absolute, however, and other legal principles that govern the exercise and administration of water rights may justify a departure from the rule of priority, depending on the circumstances.

One example of a legal principle that may conflict with the rule of priority is the rule of reasonableness, set forth in article X, section 2, of the California Constitution and section 100 of the Water Code. The rule of reasonableness establishes that all water use must be reasonable and in the public interest, limits all water rights to the amount of water reasonably required for the beneficial use to be served, and prohibits the waste or unreasonable use of water. (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1479–1480.) What constitutes reasonable water use is not defined, and is subject to change. What is reasonable depends on the circumstances, and must be determined in the context of statewide considerations of paramount importance, including the need to conserve water. (*Id.* at p. 1479.) The rule of reasonableness is

the overriding principle governing the use of water in California, and if strict application of the rule of priority would lead to the unreasonable use of water, the prohibition against unreasonable use prevails. (*El Dorado Irrigation District v. State Water Resources Control Board*, *supra*, 229 Cal.App.4th at pp. 965–966; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1243.)

Other legal principles that may justify a departure from the rule of priority include the common law public trust doctrine, which protects public uses of navigable water bodies, and Water Code section 106, which establishes the policy that domestic use of water is the highest use, and the next highest use is irrigation. (*El Dorado Irrigation District v. State Water Resources Control Board*, *supra*, 142 Cal.App.4th at p. 966.)

2.7.4 Projects' Obligations to Meet Water Quality Objectives

Pursuant to State Water Board Decision 1641, the Projects are required to bypass natural and abandoned flows and to release stored water to the extent necessary to meet water quality and flow objectives included in the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan) that are designed to protect municipal, agricultural, and fish and wildlife beneficial uses. Currently, the Projects hold primary responsibility for meeting the flow-dependent water quality objectives contained in the Bay-Delta Plan.

During times of limited water supplies, meeting flow-dependent water quality requirements can require significant releases of previously stored water from Project reservoirs due to limited natural flows, as well as diversions by other water right holders when water is not available under their priority of right. These circumstances deplete reservoir storage, and in dry years when reservoir storage levels are critically low, create significant concerns for the Projects' ability to manage temperature below Project reservoirs, supply water needed to meet human health and safety needs, and maintain salinity control and meet water quality objectives in the Delta. As a result of these concerns, the Projects submitted and the Board approved, subject to terms and conditions, a temporary urgency change petition (TUCP) in water year 2021 to temporarily reduce their obligations to release water from storage to meet flow and water quality requirements in the Delta. On March 18, 2022, the Projects jointly filed an additional TUCP to modify their obligations from April 1 through June 30, 2022, due to continued dry conditions and limited water supplies. The Executive Director conditionally approved the TUCP on April 4, 2022.

2.7.5 Projects' Right to Stored Water

Seasonally stored water, including releases of previously stored water for downstream use, is not available for diversion or use by diverters other than the entity that stored the water, their contractors, or recipients of a transfer. Although the priorities of the Projects' water rights are junior to many downstream diverters, water right holders with rights to divert water below Project reservoirs are only entitled to divert natural and abandoned flows and are not entitled to divert water previously stored or imported by

the Projects that is released for use downstream, including water that is released for purposes of meeting water quality objectives. (*State Water Resources Control Bd. Cases, supra*, 136 Cal.App.4th at pp. 738, 743, 771–772; *El Dorado Irrigation District v. State Water Resources Control Board, supra*, 142 Cal.App.4th at p. 962.)

In times of shortage, the rule of priority applies to the competing demands for natural and abandoned flows. Where natural and abandoned flows are present but are insufficient to satisfy all water rights, the State Water Board may curtail diversions under junior water rights to protect senior water right holders and releases of stored water. Curtailments do not apply to the redirection of stored water authorized by a water right or contract. The emergency regulation allows the Board to more effectively protect releases of stored water by curtailing water right holders and claimants when natural or abandoned flows are not available for diversion under their priority of right.⁴

2.8 State Water Board Authority

Through legislation and judicial decisions, the scope of the State Water Board’s authority has broadened over time from the limited authority to issue permits to appropriate surplus water to the expansive authority to undertake comprehensive planning and allocation of the State’s water resources. (*National Audubon v. Superior Court* (1983) 33 Cal.3d 419, 443–444; *Light v. State Water Resources Control Board, supra*, 226 Cal.App.4th at pp. 1481–1482.) Under the Water Code, the Board is charged with “the orderly and efficient administration of the water resources of the state.” (Wat. Code, § 174.) In addition to regulating post-1914 appropriative rights, the Board is authorized to investigate the diversion and use of water and ascertain whether it has been appropriated in accordance with State law (Wat. Code, § 1051), conduct comprehensive adjudications of all of the rights to a stream system (Wat. Code, §§ 2500–2868), and take enforcement action against the unauthorized diversion of water, including water that is diverted under a claimed riparian or pre-1914 appropriative right that the Board determines is invalid. (Wat. Code, §§ 1052, 1055, 1831; *Millview County Water Dist. v. State Water Resources Control Board, supra*, 229 Cal.App.4th at pp. 893–895.)

The Board is also directed to take all appropriate actions to prevent the waste or unreasonable use of water. (Wat. Code, § 275.) In addition, the Board has a duty of continuing supervision over the appropriation of water, and an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible and in the public interest. (*National Audubon v. Superior Court, supra*, 33 Cal.3d at pp. 446–447.)

⁴ Curtailments issued under the emergency regulation are imposed separately from curtailment notices issued pursuant to standard permit term 91, which prohibits a subset of permittees and licensees in the Delta watershed from diverting water during periods when the Projects are releasing previously stored water or importing water from the Trinity River to meet water quality and flow standards.

To carry out its duties, the Board is authorized to “exercise the adjudicatory and regulatory functions of the state in the field of water resources” and “shall have any powers . . . that may be necessary or convenient for the exercise of its duties authorized by law” (Wat. Code, §§ 174, 186, subd. (a)), including the authority to promulgate any regulations it deems advisable in carrying out its powers and duties (*id.*, § 1058). Of particular relevance in this proceeding, Water Code section 1058.5 expressly authorizes the Board to adopt emergency regulations during drought conditions “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 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.” (*Id.*, § 1058.5, subd. (a)(1).) The Board may adopt emergency regulations pursuant to section 1058.5 in response to conditions that exist or are threatened to occur in a critically dry year immediately preceded by two or more consecutive below normal, dry, or critically dry years, or during a period for which the Governor has issued a proclamation of a state of emergency. (*Id.*, § 1058.5, subd. (a)(2).)

In *Stanford Vina Irrigation Company v. State*, *supra*, 50 Cal.App.5th 976, the Third District Court of Appeal affirmed the State Water Board’s authority to adopt a drought emergency regulation pursuant to Water Code section 1058.5 that establishes the conditions under which water diversions should be curtailed, and to implement the regulation through curtailment orders directed to diverters. The regulation in that case, which was adopted during the 2014–2015 drought, established minimum instream flows that were necessary to protect the migration of two threatened species of anadromous fish in three tributaries to the Sacramento River, including Deer Creek. The regulation established that it would be a waste or unreasonable use to continue diversions that would cause flows to drop below the minimum instream flows and authorized the Deputy Director to issue curtailment orders to the extent necessary to prevent diversions from reducing flows below the minimum levels.

Pursuant to the regulation, the Deputy Director issued several curtailment orders to diverters on Deer Creek, including Stanford Vina Irrigation Company (Stanford Vina), whose shareholders claimed to hold riparian and pre-1914 appropriative rights. Stanford Vina filed a lawsuit challenging the regulation and the curtailment orders, alleging among other things that the regulation and orders constituted an unconstitutional taking of Stanford Vina’s water rights without compensation. The superior court ruled against Stanford Vina, and Stanford Vina appealed.

Preliminarily, the Court of Appeal explained that different standards applied to its review of the emergency regulation and its review of the curtailment orders, respectively, because the regulation was a quasi-legislative formulation of a rule to be applied to future cases, and the subsequent curtailment orders were quasi-adjudicative applications of the regulation to the facts. (*Stanford Vina Irrigation Company v. State*,

supra, 50 Cal.App.5th at pp. 996–997.) The Court explained further that the issue of whether the regulation was within the scope of the State Water Board’s authority was a legal issue that is reviewed *de novo*, but in determining whether the regulation was validly adopted, the Court’s review is limited to a determination of whether the Board’s action was “arbitrary, capricious, or entirely lacking in evidentiary support,” and whether the Board followed the procedure and gave the notices required by law. (*Ibid*; see also *United States v. State Water Resources Control Bd.*, *supra*, 182 Cal.App.3d at pp. 112–113.) The Court concluded that the regulation was within the scope of the Board’s authority to enact regulations to prevent the unreasonable use of water, including the Board’s authority to enact emergency regulations under Water Code section 1058.5. (*Id.* at pp. 999–1004.) In addition, the Court concluded that the Board’s determination that diversions from the three tributaries would be unreasonable if they threatened to reduce instream flows below the minimum levels necessary to protect fish migration was not arbitrary, capricious, or entirely lacking in evidentiary support. (*Id.* at pp. 1004–1005.)

With respect to the curtailment orders, the Court explained that quasi-adjudicative decisions are reviewed under the substantial evidence standard, unless they substantially affect a fundamentally vested right, in which case the independent judgment standard applies. (*Stanford Vina Irrigation Company v. State*, *supra*, 50 Cal.App.5th at pp. 995–996.) The Court concluded that Stanford Vina did not have a fundamentally vested right to use water in a manner that the emergency regulation defined as unreasonable, and therefore the Court reviewed the administrative record for the curtailment orders to determine whether the Board’s findings were supported by substantial evidence, and whether the Board had committed any errors of law. (*Id.* at pp. 996–99, 1006.) Because the regulation established that diversions should be curtailed if they would cause instream flows to drop below certain levels, the only factual issue germane to the validity of the curtailment orders was whether those circumstances existed. As to that issue, the Court determined that substantial evidence supported the Board’s findings that Stanford Vina’s diversions would have caused or threatened to cause flows to drop below the required minimum levels. (*Id.* at pp. 1005–1006.) Finally, the Court addressed numerous legal arguments advanced by Stanford Vina, and determined that the Board had not committed any errors of law. In rejecting Stanford Vina’s argument that the Board’s curtailment actions constituted an unlawful taking of Stanford Vina’s water rights, the Court reasoned that the regulation was a valid exercise of the State’s police power, and Stanford Vina had no right to divert water in violation of the regulation. (*Id.* at pp. 1006–1007.)

2.9 Petitions for Reconsideration

Water Code sections 1120 through 1126 provide for administrative reconsideration and judicial review of water right decisions and orders. Water Code section 1122 authorizes the State Water Board to reconsider all or part of a decision or order on the Board’s own motion or in response to a petition for reconsideration. Any petition must be filed no

later than 30 days from the date on which the Board adopted the decision or order. Similarly, the Board's authority to order reconsideration on its own motion expires 30 days after it has adopted the decision or order. Section 1122 directs the Board to act on a petition for reconsideration no later than 90 days from the date on which the board adopted the decision or order. If the State Water Board fails to act within 90 days, 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. (See *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147–1151.)

Any interested person may file a petition for reconsideration of a water rights decision or order on any of the following grounds:

- a) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- b) The decision or order is not supported by substantial evidence;
- c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- d) Error in law.

(Cal. Code Regs., tit. 23, § 768.)

A petition must specify the specific State Water Board action for which the petitioner requests reconsideration, "the reason the action was inappropriate or improper," and "the specific action which petitioner requests" as well as contain "a statement that copies of the petition and accompanying materials have been sent to all interested parties." (Cal. Code Regs., tit. 23, § 769, subs. (a)(2), (4)–(6).) Additionally, "a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition." (*Id.*, subd. (c).)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board's regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subs. (a)(2)(A)–(C).) The State Water Board may elect to hold a hearing on the petition for reconsideration. (Wat. Code, § 1123.)

Water Code sections 1120 through 1126 provide for administrative reconsideration and judicial review of quasi-judicial water right decisions and orders, not quasi-legislative approvals, such as the adoption of a regulation. (State Water Board Order WR 2014-0028, p. 1, fn. 2 ["Water Code section 1122 does not provide for reconsideration of quasi-legislative actions."]; see also Wat. Code, § 1126, subs. (b) & (c) [providing for judicial review of water right decisions or orders pursuant to section 1094.5 of the Code of Civil Procedure]; *Stanford Vina Ranch Irrigation Company v.*

State, supra, 50 Cal.App.5th at pp. 996–997 [interpreting section 1126 to require judicial review pursuant to section 1094.5 of all quasi-adjudicative decisions relating to state water law].)

3.0 DISCUSSION

3.1 The Regulation Is Not Subject to Reconsideration

As set forth in section 2.9, above, the emergency regulation is not subject to reconsideration by the State Water Board pursuant to Water Code section 1122. For this reason, the petitions for reconsideration of the regulation should be dismissed. Many of the petitions for reconsideration of the regulation raise issues, however, that overlap with the petitions for reconsideration of the curtailment orders. For this reason, the issues raised in petitions for reconsideration of the regulation are addressed below.

3.2 Petitioners Were Afforded a Fair Hearing

3.2.1 An Evidentiary Hearing Was Not Required

Many of the petitioners contend that they were deprived of a fair hearing and due process of law because the State Water Board did not hold an evidentiary hearing to determine whether water was available before issuing the curtailment orders. Petitioners argue that due process required an evidentiary hearing because water rights are property rights, and they should have been given the opportunity to review the evidence relied upon to determine water unavailability, cross-examine witnesses, and present their own evidence. Most of the petitioners argue that the Board should have held an evidentiary hearing before issuing curtailment orders, but SJRECWA argues that the Board should provide a post-deprivation hearing for users who want to challenge water availability or priority determinations.

These arguments lack merit because the regulation established the methodology for determining water unavailability, and the Board was not required to hold an evidentiary hearing before adopting the regulation. As stated above, Water Code section 1058.5 expressly authorizes the Board to adopt emergency regulations to prevent the waste or unreasonable use of water, or “to require curtailment of diversions when water is not available under the diverter’s priority of right” The Administrative Procedure Act (APA), which governs the development and adoption of emergency regulations, requires public notice and the opportunity to comment on the proposed regulation and supporting analyses, unless delaying action to allow public comment would be contrary to the public interest because the emergency situation poses an immediate risk of serious harm. (Gov. Code, §§ 11346.1, 11346.5, 11349.6.) The APA does not require an evidentiary hearing. (*Ibid*; *Western Oil & Gas Ass’n v. Air Resources Board* (1984) 37 Cal.3d 502, 525–529 [stating that constitutional due process requirements do not apply to rulemaking proceedings, and holding that quasi-legislative hearings conducted in accordance with the APA were fair].)

In this case, the Board complied with the APA and provided additional opportunities for public participation. The Board issued a notice of the proposed regulation and held a public meeting to consider adoption of the regulation. Interested parties had the opportunity to review the proposed regulation and supporting documentation and provide written comments to both the Board and OAL. They also had the opportunity to appear and make oral comments during the public Board meeting. In addition, the Board provided interested parties opportunities to review and comment on the Methodology, and to participate in a public workshop on the Methodology, before the formal rulemaking process began. (State Water Board Resolution No. 2021-0028, ¶ 10.)

In *Stanford Vina Irrigation Company v. State*, *supra*, 50 Cal.App.5th 976, the Court of Appeal rejected the argument that the Board was required to hold an evidentiary hearing before promulgating an emergency curtailment regulation. As described in section 2.8, above, that case involved Stanford Vina's challenge to an emergency regulation that authorized the curtailment of diversions that would cause instream flows to drop below specified minimum levels needed to protect fish migration. The regulation established that the diversion of flows needed to meet the minimum instream flow requirements would constitute a waste and unreasonable use. Stanford Vina argued that it was deprived of due process because the Board did not hold an evidentiary hearing before determining the reasonableness of its diversion and use of water. The Court held, however, that the Board was not required to hold an evidentiary hearing before promulgating a regulation defining diversions of water under certain emergency circumstances as per se unreasonable. (*Id.* at pp. 1003–1004.) The Court also noted that the Board had followed the statutory procedures applicable to adoption of emergency regulations, including notice, the opportunity to comment, and a public hearing. (*Id.* at pp. 1004–1005.)

With respect to the curtailment orders issued to Stanford Vina, the Court explained that the only factual issue relevant to their validity was whether the conditions justifying curtailments established by the regulation existed, namely whether Stanford Vina's diversions did in fact threaten to reduce flows below the minimum instream flows required by the regulation. (*Id.* at p. 1006.) Stanford Vina did not challenge the sufficiency of the evidence on that issue. Implicit in the Court's decision is the determination that the Board was not required to hold an evidentiary hearing before issuing the curtailment orders to Stanford Vina. (See also *Doe v. California Dept. of Justice* (2009) 173 Cal.App.4th 1095, 1113 [due process did not require an evidentiary hearing to establish a fact that was not material under statutory scheme].)

Consistent with the holding in *Stanford Vina*, the Board was not required to hold an evidentiary hearing before adopting the emergency regulation at issue here. Like the regulation challenged in *Stanford Vina*, the regulation involved in this case establishes the circumstances when diversions should be curtailed, namely when water is unavailable at a diverter's priority of right, as determined using the Methodology or a

comparable tool. Although the current regulation establishes a different method for determining water unavailability than the regulation involved in *Stanford Vina*, it does not follow that the Board was required to hold an evidentiary hearing before adopting the current regulation.

The holding in *Stanford Vina* also supports the conclusion that the Board was not required to hold an evidentiary hearing either before or after issuing curtailment orders because the factual issues raised by petitioners pertain to the regulation. Specifically, the Board was not required to hold an evidentiary hearing to determine the validity of the Methodology, or to determine water unavailability generally, because the regulation determined that the Deputy Director could determine water unavailability using the Methodology or a comparable tool, after considering certain categories of information concerning water supply and demand. Thus, the only factual issues potentially relevant to the validity of the curtailment orders is whether the Deputy Director did in fact determine water unavailability using the Methodology or a comparable tool, and whether the Deputy Director duly consider the information required. The curtailment orders document the Deputy Director's compliance with the regulation in determining water unavailability, and petitioners do not contend that the Deputy Director failed to determine water unavailability using the Methodology or a comparable tool or failed to consider the information required.⁵ Instead, petitioners challenge the validity of the Methodology for purposes of determining water unavailability. This amounts to a challenge to the regulation, not the curtailment orders, and as stated above the Board was not required to hold an evidentiary hearing before adopting the regulation.

SJRECWA makes a related but different argument that the regulation deprives diverters of due process and the right to compensation because it allows for enforcement and prosecution actions without an opportunity for an evidentiary hearing. This argument lacks merit for the simple reason that the regulation does not modify the procedures for enforcement actions. Section 879.2 of the regulation provides that a violation of a curtailment order is subject to enforcement action but does not purport to modify the procedures governing enforcement actions, including notice and the opportunity for a hearing.

⁵ OID and SSJID contend that the curtailment orders violated the regulation because they relied on a different version of the Methodology than was incorporated by reference into the emergency regulation. However, the regulation authorizes reliance on the Methodology or a comparable tool. As explained in greater detail in section 3.4.1, below, all of the updates to the Methodology since the regulation became effective have been relatively minor, and therefore the updated versions of the Methodology upon which the Deputy Director has relied to determine water unavailability constitute a comparable tool within the meaning of the regulation. OID and SSJID do not allege otherwise. Accordingly, an evidentiary hearing on this issue was not warranted.

3.2.2 The Reconsideration Process Is Consistent with Due Process Requirements

BCID, CDWA, and SDWA argue that they will be deprived of due process because their only recourse is a discretionary petition for reconsideration by the Board, and they allege that the Board has an inherent conflict because it adopted the regulation and issued the curtailment orders. Contrary to this argument, the fact that the Board adopted the regulation does not present a conflict of interest or deprive petitioners of due process. Absent a financial conflict of interest, agency decision-makers are presumed to be impartial, conscientious, intellectually disciplined, and capable of judging a controversy fairly based on the facts. (*Withrow v. Larkin* (1975) 421 U.S. 35, 47, 55; *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.) The presumption of impartiality can only be overcome with evidence of actual bias, or circumstances that create an unacceptable risk of bias. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.*, *supra*, 45 Cal.4th at p. 741.)

As authorized by Water Code section 1122 and sections 768–771 of its regulations, the Board has a longstanding practice of reconsidering water right decisions and orders, including decisions and orders issued under delegated authority, such as the curtailment orders, as well as decisions and orders issued by the Board itself.⁶ This practice does not present an unacceptable risk of bias, and no basis exists for petitioners’ implication that the Board or its Executive Director is incapable of fairly considering the petitions for reconsideration of the curtailment orders by virtue of the fact that the Board adopted the regulation authorizing curtailments. Accordingly, the reconsideration process did not violate due process requirements.

3.2.3 Petitioners Received Adequate Notice

TID and MID assert that the initial curtailment orders improperly shifted the burden of providing notice to water right holders because the orders required water right holders and claimants to receive notification of subsequent modifications to the curtailment status of their water rights electronically through the State Water Board’s Delta Drought email distribution list and through posting on the State Water Board’s website. TID and MID argue that the Board was required to provide actual notice because the curtailments affect water rights, which are property rights.

TID and MID’s argument lacks merit because actual notice can be provided electronically. Contrary to TID and MID’s apparent assumption, sending a hard copy of a notice by U.S. mail is not the only means to provide actual notice. In this case, the Deputy Director required water right holders and claimants to receive notice of changes to curtailments electronically due to the large number of parties involved and the need

⁶ As explained in section 3.1, above, the adoption of the regulation is not a water right decision or order subject to reconsideration.

to notify them of curtailment updates as quickly as possible. State Water Board staff have been available to answer questions and assist with matters pertaining to curtailments since the Deputy Director issued the initial curtailment orders, and no one, including petitioners, has indicated that they had difficulty receiving electronic notice of curtailment updates, or failed to receive actual notice.

3.3 The Board Acted within Its Jurisdiction

3.3.1 The Board Has Authority to Curtail Pre-1914 and Riparian Rights

Many of the petitioners contend that the regulation and the curtailment orders are based on errors in law because the State Water Board lacks jurisdiction to curtail riparian and pre-1914 appropriative rights.

Contrary to this contention, the plain language of Water Code section 1058.5 authorizes the Board to adopt emergency regulations to, among other things “require curtailment of diversions when water is unavailable under the diverter’s priority of right” The statutory language is broad and does not provide an exception for diversions pursuant to riparian or pre-1914 appropriative rights. Consistent with the plain language of the statute, the Court of Appeal confirmed that the Board’s regulatory authority under section 1058.5 extends to riparian and pre-1914 appropriative rights in *Stanford Vina Ranch Irrigation Company v. State*, *supra*, 50 Cal.App.5th at pp. 1002–1003. Although the Court’s opinion focused on the Board’s authority to regulate riparian and pre-1914 appropriative rights under the reasonable use doctrine, the Court also pointed to the Board’s authority under section 1058.5. (*Ibid.*) Likewise, the regulation challenged here is based on 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].)

BBID argues that the authorization contained in section 1058.5 “to require curtailment of diversions when water is not available under the diverter’s priority of right” is ambiguous in light of the “general rule” that the Board does not have authority to regulate riparian and pre-1914 appropriative rights. Notwithstanding this argument, however, the language of section 1058.5 is not ambiguous, and the Board does have authority to regulate riparian and pre-1914 appropriative rights. (See *Light v. State Water Resources Control Board*, *supra*, 226 Cal.App.4th at p. 1487 [“While [riparian and pre-1914 appropriators] cannot be required to obtain permits as a condition of exercising their right to divert, that does not mean their use of California’s waters is free from Board regulation.”].)

BBID also argues that the legislative history for Senate Bill 104 (2013–2014 Reg. Sess.), which amended Water Code section 1058.5, supports BBID’s interpretation of the statute. In support of this argument, BBID cites to the Assembly Floor Analysis,

which described the amendments to section 1058.5, including the addition of the provision that explicitly authorizes the Board to adopt emergency regulations requiring curtailment of water diversions when water is unavailable at a diverter's priority of water right. (Assem. Budget & Fiscal Review Com., Rep. on Sen. Bill No. 104 (2013–2014 Reg. Sess.) 2014.) Because the Assembly Floor Analysis does not include an express statement of intent to allow the Board to curtail riparian and pre-1914 rights, BBID concludes that there is no support in the legislative history to allow curtailment of riparian and pre-1914 rights. BBID also points to several statements in the Assembly Floor Analysis concerning the need to enforce existing water rights laws during droughts, including water rights laws concerning priority, as evidence of legislative intent not to expand the Board's enforcement authority.

Contrary to these arguments, however, the Assembly Floor Analysis does not give any indication that the Legislature intended to preclude the Board from exercising its enhanced regulatory authority under section 1058.5 to require riparian and pre-1914 appropriators to curtail their diversions in accordance with existing laws and the water right priority system. The absence of an express statement of intent to allow curtailment of riparian and pre-1914 appropriative rights does not establish that the Legislature intended to exempt those rights from curtailment. In short, the Assembly Floor Analysis does not provide any support for BBID's interpretation of section 1058.5, which would read a significant exception to curtailments into the statute, notwithstanding the plain statutory language, which contains no such exception.

Several petitioners also argue that the State Water Board lacks authority to regulate riparian and pre-1914 appropriative right holders without first determining the validity of those rights. In support of this argument, they cite *Young v. State Water Resources Control Board* (2013) 219 Cal.App.4th 397 and *Millview County Water District v. State Water Resources Control Board*, *supra*, 229 Cal.App.4th 879. In those cases, the Third and First District Courts of Appeal, respectively, rejected the argument that the Board lacks jurisdiction to determine whether a claimed riparian or pre-1914 appropriative right is valid in the context of a proceeding to determine whether to issue a cease and desist order (CDO) pursuant to Water Code section 1831 to prevent the unauthorized diversion or use of water. In both cases, the Court of Appeal recognized that the Board necessarily must have the authority to make a threshold determination concerning the validity and extent of a claimed riparian or pre-1914 appropriative right in order to exercise its authority under Water Code section 1831. (*Young v. State Water Resources Control Board*, *supra*, 219 Cal.App.4th at pp. 405–406; *Millview County Water Dist. v. State Water Resources Control Board*, *supra*, 220 Cal.App.4th at p. 894.)

Although the Court in *Young* stated *in dictum* that the Board lacks authority to regulate riparian and pre-1914 appropriative rights, the holding in both *Young* and *Millview* concerned the Board's authority under section 1831 to issue a CDO to prevent the unauthorized diversion or use of water. The Court did not address the Board's authority under Water Code section 1058.5 in either case. Moreover, it does not follow from the

holding that the Board *may* make a threshold determination concerning the validity of a riparian or pre-1914 appropriative right in an enforcement proceeding, that the Board *must* make a threshold determination concerning the validity of a riparian or pre-1914 appropriative right before curtailing the right pursuant to section 1058.5 based on a lack of water availability under the claimed priority of right.

3.3.2 The Board Has Jurisdiction to Order Curtailments in Adjudicated Watersheds

SJRECWA contends that the courts retained exclusive jurisdiction over adjudicated streams, including Butte, Mill, and Deer Creeks, and the State Water Board does not have jurisdiction to determine water availability or “dictate how water may or may not be used” on those streams. OID and SSJID make a similar contention that the curtailment orders issued to OID and SSJID improperly intruded on the Stanislaus River adjudication because the orders were based on a determination that some claimants in the Delta hold rights that are senior to OID and SSJID. OID and SSJID argue that the orders effectively modified the 1923 Stanislaus River decree by adding claimants and determining their water right priorities relative to OID, SSJID, and the other parties to the adjudication.

Preliminarily, it is unclear how SJRECWA or its member districts would be affected by curtailments in any adjudicated streams, including Butte, Mill, or Deer Creeks in particular. SJRECWA and its member districts do not have water rights that authorize the diversion and use of water from Butte, Mill, or Deer Creeks, nor does Reclamation, which provides substitute water supplies to SJRECWA and its members pursuant to contract. Moreover, petitioners did not cite to any legal authority to support the contention that the courts retain exclusive jurisdiction over adjudicated watersheds. As a general rule, the courts and the State Water Board have concurrent jurisdiction over water rights, and an adjudication of all or some of the rights to a particular stream system does not serve as a shield against State Water Board regulation. (See *Stanford Vina Irrigation Company v. State*, *supra*, 50 Cal.App.5th at p. 1007 [prior judicial decree apportioning water between parties did not preclude the Board from adopting regulations and issuing curtailment orders to prevent unreasonable water use]; *In re Waters of Long Valley Creek Stream System* (1979) 25 Cal.3d 339, 359–360 [prior judicial decree involving limited number of water right claimants did not preclude the Board from conducting comprehensive, statutory stream adjudication]; see also *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 426, 450–451 [discussing concurrent jurisdiction].)

The Butte Creek and Stanislaus River decrees, cited by petitioners, do not purport to retain exclusive jurisdiction, or to preclude the State Water Board from exercising concurrent jurisdiction over the rights adjudicated in those cases. In addition, the curtailment orders are not inconsistent with those decrees, which determine the quantities, priorities, and other parameters of the adjudicated rights, but are silent on the State Water Board’s authority to curtail those rights when water supplies are insufficient

to satisfy all demands, either within those subwatersheds or within the larger Sacramento and San Joaquin River watersheds. SJRECWA cites to a single sentence in the decree for the Butte Creek adjudication, which provides that the court retained jurisdiction to enforce its judgments, orders, and decrees; to determine disputes regarding changes in “method or point of diversions, or in character or place of use of water . . . ;” and to modify its judgment and decree as to the quantities of water awarded. (*In the Matter of the Determination of the Rights of the Various Claimants to the Waters of that Portion of Butte Creek and Its Tributaries Situate above the Western Dam near Nelson, in Butte County, California* (Super. Ct. Butte County, 1942, No. 18917) p. 77.) It does not follow that the Board does not have concurrent jurisdiction to administer water rights in Butte Creek in a manner consistent with the decree and the court’s retained jurisdiction. The same is true in other adjudicated watersheds, and petitioners have not cited any legal authority to the contrary.

3.4 Consistency with the APA

3.4.1 The Regulation Does Not Authorize Reliance on an Underground Regulation

Several petitioners contend that the regulation violates the APA because it authorizes the Deputy Director and Delta Watermaster to determine water unavailability using the Water Unavailability Methodology for the Delta Watershed or “comparable tools.” They argue that the regulation effectively authorizes the Deputy Director and Delta Watermaster to adopt underground regulations because it authorizes them to disregard the Methodology and develop their own methodology with “whatever factual and legal assumptions they may choose.” Similarly, OID and SSJID argue that the curtailment orders violated the regulation because they relied on a different version of the Methodology than the version that was documented by the July 23, 2021 report that was incorporated by reference into the emergency regulation.

Contrary to petitioners’ contention, the regulation does not authorize the Deputy Director or Delta Watermaster to rely on an underground regulation. Instead, the regulation allows for needed flexibility without affording the Deputy Director or Delta Watermaster unfettered discretion to rely on a wholly new methodology for determining water unavailability. In promulgating the emergency regulation, the Board anticipated that the Methodology might need to be adjusted or improved and made an allowance for that possibility. The Board anticipated the need for future refinements to the Methodology due both to the short time frame during which the Methodology was developed as a result of the emergency drought conditions and the fact that it was prepared for implementation during the dry season knowing, as stated in the Methodology report itself, that updates would be required in order to make it applicable during the wet season. For example, during the 2021 dry season, a monthly timestep was used to evaluate supply and demand. This was appropriate as precipitation is, by nature, limited during the dry season; however, supply forecasts become much more variable during the wet season as more significant precipitation events occur. This results in

greater uncertainty in monthly supply estimates. Therefore, the Methodology was updated for the wet season to allow the flexibility for a sub-monthly timestep to be used in order to best represent expected conditions. Other changes to the Methodology are summarized in the introduction to each version of the Methodology report. The most recent version, dated April 19, 2022, lists these changes on pages 1 and 2.

The regulatory requirement that any alternative tools for determining water unavailability be “comparable” to the Methodology that was documented in the July 23, 2021 report that was incorporated by reference in the regulation precludes use of “whatever factual and legal assumptions” the Deputy Director or Delta Watermaster may choose. Accordingly, the Deputy Director and Delta Watermaster have used the version of the Methodology referenced by the regulation, with only modest modifications. Because all of the revisions to the Methodology have been minor,⁷ the version of the Methodology used when the curtailment orders were issued, as well as all of the subsequent Methodology updates to date, are comparable to the version that existed when the Board adopted the emergency regulation, and was incorporated by reference in the regulation. Therefore, reliance on the updated versions of the Methodology was consistent with the language and intent of the emergency regulation.

3.4.2 Appendix D Is Not an Underground Regulation

CDWA and SDWA contend that Appendix D to the Methodology report constitutes a prohibited underground regulation because it is a standard of general application, but it was not included with the emergency regulation or the rulemaking package submitted to OAL. BBID advances the related contention that Appendix D should not be considered substantial evidence supporting the emergency regulation because Appendix D was not

⁷ A single minor refinement was made to the Methodology between July 23, 2021 (the date of the Methodology report incorporated by reference in the regulation) and August 20, 2021 (the date initial curtailment orders were issued), which was the exclusion of demand within the Goose Lake subwatershed due to its disconnection from the lower watersheds, such that curtailing diversions would not make water available to serve senior downstream water rights or claims. Other minor refinements made to the Methodology since the July 23, 2021 and August 20, 2021 versions of the Methodology included: (1) adjustment of the subwatershed boundary delineation for certain subwatersheds previously representing headwater and valley floor portions of the larger watershed; (2) allocation of abandoned instream flows to non-riparian water right holders and claimants only; (3) application of return flow factors to direct diversion demand only; (4) use of appropriate timesteps in between monthly and weekly to determine curtailments in response to precipitation events; and (5) curtailment of non-riparian rights only when no water is available at the diverter’s priority of right. The use of updated data inputs to the Methodology, such as up-to-date supply information from one of the sources listed in the emergency regulation, is consistent with flexibility that was already part of the Methodology, and therefore does not constitute an update to the Methodology itself.

provided to the parties until August 20, 2021, after the resolution regarding the emergency regulation had been adopted. CDWA, SDWA, and BCID also argue that the Deputy Director's reliance on the legal conclusions in Appendix D to support curtailment orders was not supported by substantial evidence because Appendix D was not developed through a public process, was not the subject of a hearing, and its conclusions were not subject to challenge or cross-examination. In addition to these procedural issues, petitioners raise issues concerning the technical merits of Appendix D, which are discussed in section 3.7.5 below.

The contention that Appendix D constitutes an underground regulation lacks merit because Appendix D does not change the Methodology. Instead, Appendix D provides background information to support assumptions regarding freshwater residence time and tidal inflows contained in the version of the Methodology that was incorporated by reference in the emergency regulation. Specifically, Appendix D provides information to support the assumption in the Methodology that the residence time of freshwater inflow to the Legal Delta is one month or less and the assumption that the water quality of tidal inflows was not suitable for consumptive uses and, therefore, should not be considered part of the available supply. These assumptions were present in the Methodology since the summary report was first released for public comment on May 12, 2021, and were first explicitly described in the July 23, 2021 version of the summary report. Petitioners have had the opportunity to comment on those assumptions. In fact, Appendix D was added in response to comments on the Methodology to better explain the basis for those assumptions. In short, Appendix D is informational in nature. It is comprised of data and analysis that supports assumptions in the version of the Methodology that predated adoption of the regulation. Notwithstanding CDWA and SDWA's allegations to the contrary, Appendix D does not itself constitute a "methodology" or "standard of general application." Accordingly, Appendix D is not an underground regulation.

Although Appendix D was not provided to interested parties before the regulation was adopted, Appendix D should be considered part of the administrative record for the curtailment orders because it was provided to interested parties before the Deputy Director issued the initial curtailment orders on August 20, 2021.

3.4.3 Finding of Emergency is Supported by Substantial Evidence

Several petitioners argue that the finding of emergency was deficient and failed to describe specific facts that demonstrate the existence of an emergency. Petitioners assert that although the finding of emergency included recitals regarding certain facts, those recitals are not findings of fact but are instead conclusions or references to facts and evidence relied upon by the Governor in adopting a drought-related Proclamation of a State of Emergency applicable to the Delta watershed. Petitioners further claim that the Board failed to explain why the existing laws pertaining to the water right priority system and existing enforcement mechanisms were not sufficient without the regulation. Petitioners argue that the finding of emergency failed to describe the need for immediate action or how the curtailment orders will address the specific emergency.

This issue pertains to the validity of the regulation, which is not subject to reconsideration, as stated above. Moreover, contrary to the petitioners' claims, the finding of emergency adequately demonstrated the existence of an emergency by describing the drought situation and the need for the regulation in accordance with Government Code section 11346.1. The finding of emergency described how reduced precipitation and low runoff efficiency impacted water supplies in the Delta watershed in recent years, resulting in the emergency drought conditions experienced statewide in 2021. The finding of emergency also explained that, without the emergency regulation, the state's system for curtailing most diversions and enforcing those curtailments would not have provided for timely and effective implementation of the water right priority system during the current drought when numerous water diversions require curtailment and enforcement in a short period of time. Enforcing the priority system for the nearly 17,000 water rights and claims in the Delta watershed would not have been feasible without the authority provided under emergency regulation.

Furthermore, the finding of emergency was supported by the informative digest, which described how the curtailment orders would address the specific emergency. The informative digest explained that curtailment orders issued under the emergency regulation would allow the Board to more effectively protect senior diverters, protect releases of previously stored water, ensure continued access to water supplies for minimum human health and safety needs, and obtain information from water users related to current and projected diversion and use to inform water unavailability determinations.

More specifically, OID and SSJID argue that general dry conditions and low reservoir levels in other parts of the state are not facts sufficient to demonstrate an emergency on the Stanislaus River where storage levels are relatively higher, on a historic average basis, than storage levels throughout the state. TID and MID make the same argument as it applies to the Tuolumne River. In making this argument, petitioners ignore the fact that those tributaries are part of the Delta watershed. The finding of emergency described the emergency conditions experienced within the Delta watershed as a whole and those findings apply to the Stanislaus and Tuolumne Rivers regardless of how average storage levels compare to other parts of the state. Nonetheless, the finding of emergency identified that New Melones Reservoir on the Stanislaus River and New Don Pedro Reservoir on the Tuolumne River were both below average storage levels for July 1, 2021.

BBID argues that in adopting the emergency regulation, the State Water Board did not consider the effects of DWR's Emergency Drought Salinity Barrier, which was installed across West False River to control salinity intrusion into the central and south Delta. BBID claims that it is unclear whether the emergency regulation was reasonably necessary to prevent salinity intrusion because the existence of the Drought Salinity Barrier was not acknowledged by the Board. Although the Drought Salinity Barrier was put in place to address salinity concerns, its presence does not improve other conditions

that made the emergency regulation necessary, such as the lack of water supply to meet the needs of all diverters. For these reasons, the emergency regulation was necessary in addition to the Drought Salinity Barrier, which was constructed around the same time. This idea is reinforced by the fact that both actions were ordered to be considered by the appropriate state agencies in the Governor's May 10, 2021 Proclamation of a State of Emergency. Arguments by petitioners alleging that Appendix D failed to consider the benefits of the Drought Salinity Barrier are addressed in section 3.7.5.3.

3.5 Issues Pertaining to the Methodology Generally

3.5.1 Curtailments Were Supported by the Methodology

Several petitioners argue that the curtailment orders were not supported by substantial evidence and that the State Water Board did not specify the information relied upon to make findings to support issuance of the curtailment orders. Petitioners argue that the evidence necessary to support a determination of water unavailability under a diverter's priority of right is not identified in the curtailment order or the Methodology, and that a curtailment decision cannot be reached without appropriate evidence.

As explained in section 3.2.1, above, the regulation authorized the Deputy Director to determine water unavailability using the Methodology or a comparable tool, after considering certain categories of information concerning water supply and demand. Thus, the only factual issues relevant to the validity of the curtailment orders is whether the Deputy Director did in fact determine water unavailability using the Methodology or a comparable tool, and whether the Deputy Director duly considered the information required. The initial orders specify that curtailments were based on consideration of the information described in section 876.1, subdivision (d) of the emergency regulation and evaluation of available supply and demand data using the Water Unavailability Methodology. Moreover, the initial curtailment orders must be considered alongside other pertinent information and cannot be considered stand-alone documents. The orders make clear that curtailments were based on the Water Unavailability Methodology, which is extensively documented in a report, technical appendices, spreadsheet, and visualization tool that have been publicly available on the Board's website since the initial release of the Methodology on May 12, 2021.⁸ It was not necessary that the curtailment orders describe the specific evidence used to determine curtailments because that information was incorporated into the orders by reference and made publicly available on the Board's website at the same time the curtailment orders were issued.

In the initial curtailment orders, the Deputy Director notified water right holders and claimants that future curtailment orders, including communications that may change the curtailment status of their rights or claims, would be distributed electronically through

⁸ Appendix D was first released on August 20, 2021.

email notifications and web postings. Since the initial curtailment orders were issued on August 20, 2021, changes to curtailments, as well as the bases for changes in curtailments, have been described in emails sent to subscribers to the Board's Delta Drought list and postings on the Delta Drought webpage. Additionally, the spreadsheets that contain the data and analyses used to implement the Methodology and inform curtailment decisions are publicly available so that interested parties can understand, and independently assess, the Board's determination of water unavailability. The Deputy Director has been transparent about the information he relied upon when making findings of water unavailability to inform curtailment decisions.

In sum, the results of the Methodology and the underlying data and analysis constitute substantial evidence of water unavailability at various priorities of right. Accordingly, the regulatory authorization to use the Methodology to determine water unavailability to inform the decision whether and at what priorities to curtail water rights and claims was not arbitrary, capricious, or lacking in evidentiary support. In addition, the documentation of the use of the Methodology that accompanied the initial and subsequent curtailments, including the data inputs to the Methodology and the results, constituted substantial evidence that water unavailability had been determined in accordance with the regulation. Specific arguments by petitioners pertaining to alleged deficiencies in the Methodology are addressed in subsequent sections of this order.

3.5.2 Suspension of Curtailments Was Supported by the Methodology

BCID, CDWA, and SDWA contend that the regulation is not supported by substantial evidence because it fails to provide substantial evidence regarding when to suspend curtailments. In support of this contention, they argue that section 876.1, subdivision (g) of the regulation delegates to the Deputy Director the authority to determine when increased water availability warrants a suspension without clarifying the methodology or other general standards or criteria that will govern the Deputy Director's determination. Similarly, OID and SSJID contend that the curtailment orders are not supported by substantial evidence because they do not set forth the conditions, standards, or criteria pursuant to which the Deputy Director will suspend curtailments.

As explained above, the regulation is not subject to reconsideration. In addition, the arbitrary and capricious standard applies to review of the regulation, not the substantial evidence standard. Moreover, petitioners have misinterpreted section 876.1 of the regulation, which does not afford the Deputy Director unfettered discretion to determine whether to suspend curtailments. Section 876.1, subdivision (g) must be read in conjunction with the other subdivisions of section 876.1, including subdivision (d), which specifies the information that the Deputy Director must consider in determining whether water is unavailable under a water right holder's or claimant's priority of right and whether to order curtailments. Subdivision (d) also authorizes the Deputy Director to evaluate available supplies against demands using the Water Unavailability Methodology or a comparable tool.

Section 876.1, subdivision (g) directs the Deputy Director to suspend curtailments when water availability increases or is projected to increase due to precipitation and runoff events or due to reductions in demand and directs the Deputy Director to consider the best available information to determine the geographic scope and duration of suspensions. Subdivision (g) also directs the Deputy Director to consider reliable and publicly available information that supports suspension, extension of suspension, or reimposition of curtailments, and to issue an update explaining any decisions at least monthly. The decision whether to impose, suspend, or reimpose curtailments requires an evaluation of water unavailability, and it would make no sense to interpret subdivision (g) to authorize the Deputy Director to evaluate water unavailability differently for purposes of suspension of curtailments. Instead, subdivisions (d) and (g) should be read together to require the same information and tools to be used to evaluate water unavailability for purposes of both the imposition and the suspension of curtailments.

The regulation establishes the information and tools that the Deputy Director must use to evaluate water availability for purposes of suspending curtailments, and therefore OID and SSJID's contention that the curtailment orders should have established standards for suspending curtailments lacks merit. More importantly, the Deputy Director has suspended curtailments in accordance with the regulation, using the same information and tools used to determine water unavailability for purposes of curtailment. Specifically, the Deputy Director has considered the information specified in section 876.1, subdivision (d) of the regulation and relied on the Water Unavailability Methodology, as discussed in greater detail in section 3.5.1, above. As directed by the Board, the Deputy Director has monitored hydrology and weather conditions closely and updated curtailments and suspensions quickly based on changing hydrology and demand. (See State Water Board Resolution No. 2021-0028, p. 5, ¶ 7.) Based on those observations, the Deputy Director temporarily suspended curtailments from October 19 to November 18, 2021, and then progressively reimposed curtailments on November 19, 24, and December 1, 2021. Curtailments were suspended again from December 11, 2021, to January 10, 2022. On January 11, 2022, curtailments were reimposed for a small number of water rights and watersheds, and on February 2, curtailments were expanded to include seven subwatersheds. On March 2, 2022, curtailments were suspended again for all but eight State Water Project and Central Valley Project water right permits in the Upper San Joaquin River, Stanislaus River, and South Delta.

The data, sources, and spreadsheets used to assess water unavailability and determine whether to impose or suspend curtailments have been made public so that diverters and other interested parties can understand, and independently assess, the Board's determination of water unavailability within their watershed and at their priority of right. The assessment is generally biased in favor of suspending curtailments. (Water Unavailability Methodology for the Delta Watershed Report (November 15, 2021) pp. 1, 7, 60–61.)

3.5.3 Evaluation of Water Unavailability at Each Point of Diversion Was Not Required

BCID, CDWA, and SDWA contend that the curtailment orders were not supported by substantial evidence because the determination that water was unavailable to some water right holders and claimants was based on basin-wide conditions without any evidence as to any of the petitioners' specific points of diversion.

The emergency regulation authorizes water unavailability to be evaluated at the watershed or subwatershed scale for purposes of determining whether to curtail diversions, and therefore the failure to evaluate water unavailability at each point of diversion is not a valid basis for challenging the curtailment orders. Moreover, for the following reasons, the regulatory authorization to determine water unavailability at the watershed or subwatershed scale was not arbitrary, capricious, or lacking in evidentiary support.

Section 876.1, subdivision (d)(7) provides that evaluation of available supplies against demands may be performed at the Sacramento and San Joaquin River watershed scale (Hydrologic Unit Code level 4), or at the subwatershed scale (Hydrologic Unit Code level 8). Curtailments were based on the Water Unavailability Methodology, which uses the watershed scale (Hydrologic Unit Code level 4) and subwatershed scale (Hydrologic Unit Code level 8 or 10), consistent with the regulation. Evaluation of water unavailability at finer resolutions than this is not feasible due to the lack of full natural flow data to support higher resolution curtailments, because a modeling tool does not currently exist that can evaluate water unavailability at a finer scale, and because such a tool would require significant time to develop. (Water Unavailability Methodology for the Delta Watershed Report (November 15, 2021) pp. 12–13, 52.)

The regulation authorizes the use of the Water Unavailability Methodology, which evaluates water unavailability at the watershed and subwatershed scale for these reasons. There are approximately 17,000 water rights in the Delta watershed potentially subject to curtailment with approximately 15,000 points of diversion. To add to the complexity, water can be diverted under some water rights at multiple points of diversion or points of redirection, and the diversion of water at some points of diversion is authorized under multiple water rights with different priority dates. In short, the development of a model capable of determining water unavailability at every point of diversion in the Delta watershed would be a significant undertaking.

Although the emergency regulation does not require an evaluation of water unavailability at each point of diversion, section 876.1, subdivision (e) of the regulation allows a water right holder or claimant to obtain an exception to curtailment by submitting information that curtailment would not be appropriate based on the unique circumstances of their diversion, including potentially the location of their point of diversion. BCID, CDWA, and SDWA did not seek an exception under subdivision (e), but at least one other diverter, the East Bay Municipal Utility District (EBMUD), obtained

an exception to curtailment pursuant to the flexibility afforded by subdivision (e). Specifically, on February 4, 2022, the Assistant Deputy Director (acting on behalf of the Deputy Director) approved EBMUD's request for an exception to subwatershed curtailment of its Camanche Reservoir storage permit this winter and spring based on evidence, in the form of existing agreements, that curtailment of its permit was not necessary to protect downstream senior water rights from injury.

Finally, it merits note that, although water unavailability was not evaluated at each point of diversion, the Methodology does evaluate water unavailability for individual water rights because the Methodology allocates supply to projected demand based on water right priority. The Methodology first subtracts the projected demand of the senior-most water rights from the projected full natural flow estimate for a given watershed. If the supply is adequate to satisfy those rights, it moves on to the next junior right, and so on until it reaches a right where no water is available for that right, at which point that right and all junior rights are curtailed.⁹ Identification of that water right establishes a priority cutoff date for the purpose of curtailing the remaining junior diverters.

3.5.4 Individualized Determinations of Injury Were Not Required

BCID, CDWA, and SDWA also contend that the curtailment orders were based on errors of law because they were not supported by any evidence that curtailments were necessary to avoid injury to senior water rights. In support of this contention, petitioners cite to cases that held that a senior water right holder was not entitled to relief against a junior water right holder to the extent that the junior right holder diverted water that was surplus to the senior right holder's needs.

Contrary to this contention, the State Water Board's regulatory authority to curtail diversions in a drought does not require an individualized finding of injury before each water right may be curtailed. Water Code section 1058.5 expressly authorizes the Board to adopt emergency regulations during a drought to prevent the waste or unreasonable use of water, or to require curtailment of water diversions when water is not available under a diverter's priority of right. In accordance with this authority, the emergency regulation authorizes curtailments based on the Methodology, which evaluates the availability of water supplies relative to estimated demands. No legal authority exists for the proposition that the Deputy Director was required to make an affirmative finding of injury before curtailing individual water rights based on a lack of water availability within a subwatershed or within the larger Sacramento or San Joaquin River watersheds. The cases cited by petitioners are inapposite because they

⁹ Previous versions of the Methodology determined the priority date for curtailment by identifying the water right in the subwatershed junior to the last water right that could have its full demand met with the available supply. In February 2022, the criterion was modified to exclude from curtailment the last water right that could be fully or partially met with available supply. (Water Unavailability Methodology for the Delta Watershed Report, Technical Appendix A (February 18, 2022) p. A-30.)

concerned a water right holder's entitlement to injunctive relief or compensation from another water right holder; they did not concern the State Water Board's authority to curtail diversions in a drought emergency.

The contention that a finding of injury was required to support curtailments is similar to petitioners' contention that water unavailability should have been determined at each point of diversion. Both contentions, if valid, would effectively preclude the Board from responding to the severe water shortages in the Delta watershed during the ongoing drought emergency in a timely manner. In a watershed as large and complex as the Delta watershed, the exigencies of the drought emergency do not permit a time-intensive analysis of whether diversions under each individual water right would cause injury to senior water right holders based on the location and other unique circumstances of the right.

Consistent with legal authority and practical limitations, the regulation does not require a finding of injury before issuing curtailment orders. As pointed out above, however, section 876.1, subdivision (e) of the regulation does allow water right holders to seek an exception to curtailment based on the unique circumstances of their diversion, and at least one water right holder has obtained an exception based on evidence that curtailment of its right was not necessary to protect downstream senior water rights from injury.

It also bears emphasis that in most cases diversions under rights that have been curtailed due to a lack of water availability would in fact have caused injury, either to senior water right holders or to the Projects, due to their unique obligation to release water from storage to the extent necessary to meet flow-dependent water quality requirements in the Delta. As explained in sections 2.7.4 and 2.7.5, above, the Projects have a paramount right to their stored water supplies, but when water supplies are limited, meeting flow-dependent water quality requirements can require significant amounts of stored water releases from Project reservoirs due to a lack of natural flows, as well as diversions by other water right holders when water is not available under their priorities of right. Standard permit Term 91 addresses this situation by requiring permittees who are subject to the term to curtail their diversions when the Projects are releasing supplemental Project water, which is defined as water imported by the Projects, or released from storage in Project reservoirs, that exceeds Project exports, inbasin deliveries, and carriage water. (See *El Dorado Irrigation District v. State Water Resources Control Board*, *supra*, 142 Cal.App.4th at pp. 950–951 [describing standard permit Term 91].) Term 91 is only included in a relatively small subset of junior water right permits, however, and curtailments pursuant to Term 91 have not been sufficient to avoid the need for large releases of supplemental Project water during the ongoing drought. In 2021, permittees subject to Term 91 were required to curtail their diversions

from April 29 until October 26.¹⁰ In addition, curtailments pursuant to the emergency regulation were imposed beginning on August 20, 2021. Nonetheless, significant quantities of supplemental Project water continued to be released from storage between August 20 and October 19 when curtailments were suspended. The fact that supplemental Project water was released when curtailments issued pursuant to the emergency regulation were in effect indicates that diversions under those curtailed rights during that time period would have resulted in injury to the Projects by requiring even more supplemental Project water to be released to compensate for those diversions.

3.6 Issues Pertaining to Demand Data

3.6.1 Reliance on Water Right Records Was Appropriate

OID and SSJID argue that the emergency regulation was improper because the emergency regulation grants the Deputy Director authority to determine the validity and priority of other water rights relative to their Stanislaus River decreed rights without an investigation, administrative hearing, court hearing, determination, or decree. They assert that a proper determination of the priorities of claims should be conducted pursuant to Water Code section 2500 *et seq.*, which specifies the requirements and procedures for conducting a comprehensive, statutory stream adjudication. They also argue that the curtailment orders were not supported by substantial evidence because the Board did not investigate all of the riparian water right claims in the Delta that serve non-contiguous parcels to determine whether the riparian rights were retained at the time of severance from a waterway.

Preliminarily, the regulation is not subject to reconsideration, as explained above. In addition, petitioners ignore Water Code section 1058.5, which does not require the State Water Board to conduct a statutory stream adjudication before requiring curtailments during a drought emergency. Moreover, the Methodology's reliance on water rights records to estimate demand was not arbitrary, capricious, or lacking in evidentiary support. These records were the best information available concerning demand within the watershed. Although the claims of right and diversions are self-reported, they were sufficiently reliable to inform curtailments during an emergency. Annual reports filed by permittees and licensees are submitted under penalty of perjury, and Statement filers must attest that the information submitted is true to the best of their knowledge and belief. Making a willful misstatement is a misdemeanor, subject to a \$1,000 fine or imprisonment. (Wat. Code, § 5107, subd. (a).) As described in the Methodology report, the Division also conducted an extensive quality control effort of the records that represent approximately 90 percent of the amount of water reported to

¹⁰ The Board maintains a web page (www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/term_91) that includes current and past Term 91 curtailment notices and supplemental Project water calculations.

have been diverted. (Water Unavailability Methodology for the Delta Watershed Report (July 23, 2021) pp. 38–40.)

It also merits note that, due to the length of time required to conduct one, a statutory adjudication is the wrong tool to assess the validity and priority of water rights during a drought emergency, as it would effectively preclude management, through curtailments, of the water right system. The most recent adjudication completed was for San Gregorio Creek Stream System, a coastal stream without any large storage facilities that supports a relatively small rural population then discharges to the Pacific Ocean. That proceeding was initiated in accordance with Water Code section 2525 pursuant to a petition filed on March 26, 1979. It was completed ten years later through the adoption of an Order of Determination on April 20, 1989. It did not go into effect, however, until it was approved by the San Mateo Superior Court on January 29, 1993 (Decree No. 355792). More recently, Madera Irrigation District filed a petition for a statutory adjudication of the Fresno River on October 18, 2018. That petition was granted two years later on October 20, 2020. (State Water Board Resolution No. 2020-0040.) While the planning work has begun, the investigatory phase of the Fresno River adjudication remains on hold during the current drought emergency. Although it might be possible to expedite a statutory stream adjudication, it would not be possible to conduct an adjudication as part of a timely response to a drought emergency.

Contrary to petitioners' argument concerning riparian claims associated with non-contiguous parcels in the Delta, assuming the validity of riparian claims of right for purposes of estimating riparian demand in the Delta was not arbitrary, capricious, or lacking evidentiary support. As stated above, Statement filers must attest that the information they report is true to the best of their knowledge and belief, and willful statements are a misdemeanor. In addition, the Board cannot assume that non-contiguous parcels are not riparian. (See, e.g., *Modesto Irrigation District v. Tanaka* (2020) 48 Cal.App.5th 898, 900–901 [holding that severed parcel retained riparian right based on intent of the parties when the grant deed was executed as evidenced by language in the deed and the circumstances at the time of sale].) And, finally, conducting time-intensive investigations of non-contiguous parcels to determine whether riparian rights were retained at the time of severance from a waterway was not feasible in the limited amount of time available to respond to the drought emergency.

In summary, given the time frames involved with conducting a statutory adjudication, or numerous investigations of riparian claims associated with non-contiguous parcels within the Delta, the Methodology's reliance on existing records as the best available information for determining demand for purposes of curtailments was appropriate.

3.6.2 Demand Data Was Supported by Substantial Evidence

BBID and CCSF contend that the curtailment orders were not supported by substantial evidence because the Water Unavailability Methodology relies on inaccurate demand data. Specifically, BBID argues that the Methodology overestimates demand due to: (1)

the use of 2018 diversion data to represent 2021 demand; (2) the inclusion of allegedly duplicative demands in the Delta; and (3) the mischaracterization of San Joaquin River Exchange Contractor demands. BBID argues that demand depends on a variety of factors, and instead of assuming that 2018 diversions were representative of 2021 demand, the Board should have used 2021 actual diversion and projected demand data. Similarly, CCSF argues that unverified, self-reported diversion data from 2018 and 2019 is unreliable and reliance on that data likely resulted in an inaccurate overestimation of 2021 demand. CCSF and Merced ID argue that self-reported diversions are unreliable because many diverters have not complied with a requirement to install monitoring devices. CCSF also asserts that the State Water Board has recognized that Statements are unreliable and therefore not a proper factual basis for determining demand for curtailment orders. In support of this assertion, CCSF cites State Water Board Order WR 2016-0015 and a February 5, 2021 draft report entitled Water Rights Drought Effort Review (WARDER report), prepared by the State Water Board's Office of Public Participation and the Division.

The reliance on 2018 diversion data to represent 2021 demand is not a valid basis for challenging the curtailment orders because the emergency regulation authorizes water unavailability to be evaluated using the Methodology, which uses a demand dataset based on 2018 self-reported diversions, as described in section 2.4.2.2 above. Moreover, for the following reasons, the regulatory authorization to determine demand using the Methodology and the underlying 2018 diversion data was not arbitrary, capricious, or lacking in evidentiary support. As described in the Methodology report, duplicative reporting has been eliminated to the extent feasible, and San Joaquin River Exchange Contractor demand was adjusted to zero before the Deputy Director issued curtailment orders.

The 2018 and 2019 reported data used in accordance with the Methodology to determine water unavailability for purposes of the curtailment orders were the best available information for the initial demand dataset as they were from the most current years available. Calendar years 2020 and 2021 were not used because the full datasets were not yet available and quality control of the data was not possible in time to complete the analysis. (Water Unavailability Methodology for the Delta Watershed Report, section 2.2.) In addition, the fact that 2018 was less dry than 2021 does not mean that 2018 diversion data was not a reliable source of information for purposes of estimating 2021 demand. In a critically dry year like 2021, demands may not be met due to the lack of water supply, but that does not mean that the demand is less. In addition, demands for water in drier years may be even higher due to drier soils and other factors.

To reduce the overestimation of demand, reports filed by the largest diverters (representing 90 percent of the water diverted in the Delta watershed) were reviewed to identify potential inaccuracies in the diversion data. During the review process, several types of data errors were identified and corrected if an appropriate correction was

discernable. Those corrections included: correction of diversion data entry and reporting issues, such as incorrect units of measurement and decimal placement errors; removal of duplicate diversion values, such as the same diversions reported under multiple water right records; removal of non-consumptive diversions improperly appearing as consumptive; and correction of diversion values where reported diversion exceeded the water right's face value. (Water Unavailability Methodology for the Delta Watershed Report, section 2.2.2; and Technical Appendix B.)

Division and Delta Watermaster staff also examined specific annual reports submitted by some smaller diverters identified by BBID, including the Statements filed by claimants Tuscany Research Institute, CCRC Farms LLC, and Andrew Solari, for duplicative reporting. Staff found that BBID's assertion that the claimants submitted duplicative reports is incorrect. Although the reporting of identical annual diversion amounts in multiple Statement reports filed by the same or related parties may be indicative of duplicative reporting, staff determined that the identical annual diversion volumes identified by BBID resulted from the even division of total estimated water consumption across multiple diversion points that serve the same place of use. Supplemental file attachments to the 2018 and 2019 annual diversion reports for several of the identified Statements state that "for the purposes of these reports, the amount of acreage irrigated, water used and water diverted associated with each of those points of diversion has been evenly split among them." Looking ahead, even though checking every record for duplicative reporting and other discrepancies is not feasible given the volume of reports and the exigency of the drought emergency, Division staff are directed to continue to correct for duplicative reporting when it is identified, if found to be cumulatively significant.

In addition, Division staff are currently evaluating the water diversion and use information submitted in response to enhanced reporting requirements. Projected demand data is being compared to the 2018 diversion information contained in the demand dataset to identify any instances where the demand dataset may be overestimating demands. This comparison of 2018 diversion information and the enhanced reporting of projected demand is conducted on a monthly basis and consulted prior to curtailment implementation. (Water Unavailability Methodology for the Delta Watershed Report (April 19, 2022) p. 39.)

Contrary to CCSF's argument, the reliance on self-reported 2018 diversions for purposes of estimating 2021 demand was not inconsistent with the State Water Board's decision in Order 2016-0015. In that proceeding, the Board dismissed enforcement actions against BBID and West Side Irrigation District because the Prosecution Team had not met its burden of proving that the two irrigation districts had diverted water when it was unavailable under their priorities of right. Specifically, the Board faulted the Prosecution Team for relying on forecasted water supply and demand data when measured flow data and self-reported diversion data became available before the enforcement hearing. (State Water Board Order WR 2016-0015, p. 14.) The Board did

not determine that self-reported diversion data is unreliable and should not be used to support curtailment orders. Rather, the Board stated that the Prosecution Team *should* have used self-reported diversion data because it was available and more reliable than projected demand data. (*Id.* at pp. 13, 14.)

Order WR 2016-0015 is also distinguishable from this proceeding because it involved enforcement actions with a higher standard of proof. In the enforcement proceeding, the Prosecution Team had the burden of proving by a preponderance of the evidence that water was unavailable to the diverters involved. (State Water Board Order WR 2016-0015, pp. 11–12.) With respect to the instant curtailments, by contrast, the substantial evidence standard applies, and the issue is whether water unavailability was determined in accordance with the regulation. In addition, the Board’s decision to dismiss the enforcement actions in Order WR 2016-0015 was based on other issues in the Prosecution Team’s water unavailability analysis that have been addressed in the Water Unavailability Methodology, including the elimination of unmet demand in tributary watersheds from the demand dataset and the inclusion of the San Joaquin River Exchange Contractors’ demands when their demands likely were met with water imported from the Sacramento River. (*Id.* at p. 15.)

CCSF’s reliance on the WARDER report is also misplaced. That report is a compilation of stakeholder comments and recommendations concerning the Division’s response to the drought and does not necessarily reflect the views of the Board. Moreover, the report noted some of the problems with estimating demand based on annual diversion and use reports but did not address whether those reports were sufficiently reliable to be used to estimate demand for purposes of curtailment orders.

BBID argues that the San Joaquin River Exchange Contractors’ demand is mischaracterized because the Water Unavailability Methodology report states that their demand will be excluded from the water unavailability analysis, provided that their demand is met with water imported from the Sacramento River, but the July 2021 version of the Water Unavailability Methodology spreadsheet improperly included San Joaquin River Exchange Contractor demands. However, Division staff identified and corrected the error before the August 20, 2021 curtailment orders were issued. The Water Unavailability Methodology spreadsheet used to implement the Methodology is updated with every curtailment status update and copies of the spreadsheets are available upon request.

3.7 Issues Pertaining to Supply Data

3.7.1 Riparian Right Holders Have a Right to Natural Flow Above Reservoirs

In their petition, OID and SSJID argue that when the curtailment orders were issued, there was no natural flow available for riparian diverters in the Delta because any water that reached the Delta had been released from storage by upstream diverters to meet downstream obligations. According to the petitioners, on that basis, appropriators in the

Delta should have been entitled to divert because they are senior to the Projects. In connection with this argument, petitioners also assert that the Deputy Director's determination of connectivity between petitioners' point of diversion on the Stanislaus River and points in the Delta was not supported by substantial evidence.

Petitioners' allegation that no natural flow was available to satisfy riparian demand in the Delta is entirely unsubstantiated and contradicted by the Methodology. In addition, the Methodology calculates water unavailability in accordance with the priority system. To the extent that petitioners are arguing that water availability for Delta riparians should be based on the amount of natural flow physically present after upstream appropriators have diverted natural flows, petitioners' argument is inconsistent with the priority system. In most cases, riparian diverters have senior priority to natural flow. If natural flow to which a downstream riparian diverter was entitled was present above a reservoir, the reservoir operator would not have the right to directly divert this water. Instead, they would be required to pass the water through the reservoir.

In addition, the petitioners claim that the Deputy Director's determination of connectivity between their points of diversion and certain points in the Delta is unsupported by substantial evidence. The Methodology appropriately considers the potential for connectivity to exist between the Stanislaus River subwatershed and the Delta if sufficient flow is present. As described in section 3.3.2 above, the Board is not precluded by the Stanislaus River adjudication from the regulation of water rights throughout the larger watershed when conditions warrant.

Furthermore, it is worth noting that, contrary to the petitioners' allegation, the use of the Methodology to date has not resulted in any curtailment of non-Project diverters within the Stanislaus River subwatershed as a result of allocation of Stanislaus River subwatershed supplies to water right holders or claimants outside of the subwatershed. In fact, during August and September 2021, the Methodology assumed the Stanislaus River subwatershed to be disconnected from the larger San Joaquin River watershed due to riparian demand within the subwatershed exceeding supply. (See Water Unavailability Methodology for the Delta Watershed Report (July 23, 2021) p. 52.) From October 1, 2021, until March 1, 2022, curtailments in the Stanislaus River subwatershed were deeper than in lower subwatersheds in the larger San Joaquin River subwatershed because local supplies on the Stanislaus River were insufficient to meet the local demand; therefore, no curtailments were issued to Stanislaus River diverters during that time to make natural and abandoned flow from the Stanislaus River subwatershed available outside the subwatershed.

From March 1 until April 19, 2022, during which the Deputy Director chose to forgo the subwatershed analysis in favor of basing curtailments only on the watershed-wide analysis, as described in section 2.6.1, curtailments in the Stanislaus River subwatershed would have been greater if the subwatershed-scale analysis had

continued to be used as a basis for curtailment.¹¹ From April 19, 2022, to date, the watershed-wide analysis has continued to be relied upon exclusively to issue curtailments in the Delta watershed. During this period, curtailments have been greater in the Stanislaus River subwatershed than would have occurred as a result of only a subwatershed-scale analysis; however, only one right, a New Melones Project right, was affected. Therefore, neither the petitioners, nor any other non-Project water right holders or claimants in the Stanislaus River subwatershed, have been injured by the Methodology's assumption that connectivity may exist between the Stanislaus River subwatershed and the Delta under certain conditions, as such conditions have not arisen since the initial issuance of the curtailment and reporting orders on August 20, 2021.

3.7.2 Water Released from New Melones Reservoir May Be Used to Meet Delta Outflow Requirements

OID and SSJID also argue that releases from New Melones Reservoir are abandoned at Vernalis, making it available for downstream diversion, because the water cannot be used outside the Stanislaus River watershed. However, in *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 753–760, the Court of Appeal concluded that the Delta is within the area of origin that encompasses the Stanislaus River watershed. In addition, meeting Delta outflow requirements is a condition of Reclamation's water right permits for New Melones (although Reclamation may, in coordination with DWR, meet Delta outflow requirements with water from other sources). (State Water Board Decision 1641, p. 146.) Therefore, Reclamation may release water from New Melones to meet Delta outflow objectives, as occurred in 2021. Reclamation's intent to do so was explicitly documented in the July 23, 2021 version of the Methodology summary report incorporated by reference in the emergency regulation. (Water Unavailability Methodology for the Delta Watershed Report (July 23, 2021) pp. 7–8.)

3.7.3 Failure to Curtail Some Water Users During Non-Drought Years Does Not Preclude Action During Drought Years

CCSF argues that demand exceeds supply in September in all water year types and it is, therefore, not reasonable to issue curtailments due to a deficit of supply. To support this assertion, CCSF includes two figures comparing supply and demand in the San Joaquin River watershed; however, CCSF has misinterpreted what is represented by the graphs. CCSF seems to believe the graphs show 2018 supply against 2018 demand and likewise 2019 supply against 2019 demand. Instead, the graphs show 2021 past and forecasted supply against reported 2018 and 2019 demands, respectively. Therefore, the figures show that in 2021, demand exceeded forecasted supply in September, not in a non-drought year. Further, if the Board does not curtail

¹¹ During March and April 2022, the only rights curtailed in the Stanislaus River subwatershed were Project rights. The petitioners were not curtailed.

some water users during non-drought years when water may not be available at their priority of right, it does not preclude the Board from taking action during drought years. In particular, it does not preclude action during a declared drought emergency when the Governor has issued a proclamation specifically directing the Board to consider emergency regulations to curtail diversions when water is not available at the water right holder's priority of right.

3.7.4 Methodology's Treatment of Return and Abandoned Flows is Reasonable

The Methodology incorporates return and abandoned flows into the water unavailability analysis via adjustments to the demand and supply datasets, respectively. Return flow is incorporated into the analysis by applying a return flow factor to the total demand in the four subwatersheds that make up the Sacramento and San Joaquin Valley Floor regions, the regions where most diversions and return flows in the watershed occur. The application of these factors reduces the magnitude of demand and, as a result, the number of potential curtailments. Petitioners make several arguments regarding their incorporation. For the reasons explained below, the Methodology's estimates of return flows were not arbitrary, capricious, or lacking evidentiary support.

BBID claims that the Methodology incorrectly makes Delta return flows available to diverters upstream. Because of the spatial resolution of the analysis, at the subwatershed scale, return flows that occur in the Delta could reduce demand and ultimately free-up supply that is allocated to a diverter upstream within the subwatershed, either the Sacramento Valley Floor subwatershed or the San Joaquin Valley Floor subwatershed. Within the limited time available to act to address the drought emergency and limited data on return flows, development of a more refined spatial scale analysis of return flow factors was not feasible. The granularity of the subwatershed analysis used in the Methodology is an improvement over that used during the prior drought emergency in 2014 and 2015. Further improvements are under development but will take time and improved data.

BBID also argues that the Methodology does not account for return flows associated with the delivery of previously stored Project water. The return flows associated with demands met from previously stored water are considered in the Methodology. The CalSim results that were used to develop the return flow factors include the diversions and return flows from demands that were met from previously stored water. While the scaling is only done for diversions of natural and abandoned surface water flows, the factors for the scaling account for return flows from the various sources of applied water. Further, information indicates that these return flow factors should likely be lower than has been assumed to date. In late 2021, the Board received comments from Reclamation, described in the November 15, 2021 version of the Methodology summary report, indicating that Reclamation claims to retain control of return flows from its deliveries of stored water, and accordingly these return flows should not be incorporated into the water unavailability analysis, as they are not abandoned and available for

diversion by other parties. Reclamation also provided comments suggesting that return flow values used in the analysis may be too high, which was accompanied by field measurements in the Colusa Basin Drain and Sutter Bypass indicating that return flows in the Sacramento River watershed were lower than would be expected in a typical year. However, it was not clear how the return flow assumptions should be immediately modified to better account for these considerations, so the return flow factors were not modified.

Several petitioners also assert that the Board must ensure that riparian right holders are not diverting stored water to which they are not statutorily or otherwise entitled. To the extent that any riparian right holders divert stored water, the diversion is a compliance issue, not a problem with the Methodology, as the Methodology does not address stored water to which the party with the storage right retains a residual claim of control. The Methodology does incorporate abandoned flows from previously stored water, which also cannot lawfully be diverted under a riparian claim of right. In order to address this concern, the April 19, 2021 version of the Methodology was updated to allocate any portion of the abandoned flows in excess of full natural flow to non-riparian diverters only. In the Methodology, return flows that are returned to the stream on a natural pattern are assumed to be natural flows because they are effectively unused natural flows. Although some return flows also originate from water that was effectively stored and returns back to the stream on a pattern that is not natural, such as from rice field drainage in the fall, at this time, no feasible method has been developed to restrict any return flows that were stored prior to abandonment to non-riparian diverters only. It is also not clear that doing so would materially affect curtailments at the time that these return flows exist in the fall when demands for water are reducing.

3.7.5 One-Month Period of Analysis, or Residence Time, for the Legal Delta is Reasonable

The Legal Delta is an area of unique complexity within the Delta watershed due to its location at the meeting point of saline water flowing in with the tides through Suisun Bay and freshwater flowing out from multiple rivers, principally the Sacramento and San Joaquin Rivers. The waters mix in this region to create brackish, estuarine water. If freshwater inflows to the Legal Delta were to cease, water would still be present within the many waterways in the region whose bed elevation lies below sea level. However, this water would be highly saline and would be unusable for most beneficial uses of water within the Legal Delta, including agricultural or domestic uses.¹² For this reason, the Water Unavailability Methodology does not assess the availability of saline tidal

¹² Absent Project storage releases during extreme dry conditions, brackish water from Suisun Bay will migrate eastward into the Delta in the summer, damaging crops, soil, and other beneficial uses of the Delta as described in the 1978 Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh, pp. II-4 to II-16 and other reports and analyses produced over the last nearly 100 years.

inflows for diversion. Instead, it evaluates the availability of freshwater over a timestep that recognizes the slower speed at which water passes through the Legal Delta as compared to other portions of the watershed.

This timestep of analysis has been referred to as the freshwater “residence time” within the Legal Delta but should not be confused with the length of time an individual molecule of water may or may not remain present in the region. At any given time, the residence of “freshwater molecules” entering the Legal Delta occurs over a distribution, with some exiting the region much more quickly than others. Freshwater residence time would also vary throughout the year based on factors such as the magnitude of the tides, freshwater inflows, and diversions of water out of the Delta and tributaries. Prior to the issuance of the initial curtailment orders on August 20, 2021, the Board assessed these factors using the best available data, presented in Appendix D of the Methodology, and selected a reasonable timestep over which to analyze water unavailability in the Legal Delta during the curtailment period of one month. Since the issuance of the initial curtailment orders, implementation of the Methodology using the one-month timestep resulted in curtailment of Legal Delta diverters other than the Projects only from August 20 through August 31, 2021.¹³

Petitioners argue that the one-month timestep, or residence time, used for the Legal Delta was not supported. Generally, they argue that sources of water supply, such as tidal inflows, were improperly excluded; use of highly saline water was suitable for certain Delta beneficial uses; Delta diverters have a right to stored Project water releases intended to improve water quality in the region; certain factors mitigating a degree of Delta salinity had not been considered; water unavailability should be analyzed within a historical context, i.e., prior to the presence of rim reservoirs and deepened shipping channels; the analysis improperly assessed the geography and interconnections within the Delta; and other challenges to the analysis presented by the Board in Appendix D.

As is explained in section 2.8 above, the standard of review to determine whether an emergency regulation was validly adopted by the Board is limited to a determination of whether the Board’s action was “arbitrary, capricious, or entirely lacking in evidentiary support” and whether the Board followed the procedure and gave the notices required by law. The Board’s August 3, 2021 emergency regulation incorporated the Water Unavailability Methodology, which presented the assumption that Legal Delta residence time was one month or less under conditions present at the time. The report describes

¹³ BBID argues that in adopting the regulation the Board failed to consider the unique aspects of the Delta in violation of Water Code section 12200, which declares that the water quality problems in the Delta are unique. Contrary to this argument, however, the Water Unavailability Methodology for the Delta Watershed, which was developed specifically for the Sacramento-San Joaquin Delta watershed, takes into account the unique hydrodynamic qualities of the Delta.

that the assumption was based on the persistent extremely dry conditions and the supplementation of flows into the Legal Delta with previously stored water for many months. (Water Unavailability Methodology for the Delta Watershed Report (July 23, 2021) p. 53.) The report also notes that tidal inflows were not included as available supply in the analysis because of their insufficient quality for use for agricultural and municipal purposes. (*Ibid.*) As is explained in more detail in section 3.4.2, Appendix D was subsequently produced to “provide additional background” and “further technical support for [the] assumptions used in the Methodology.” (Water Unavailability Methodology for the Delta Watershed Report, Technical Appendix D, p. 1.) The basic facts provided in the July 23, 2021 version of the Methodology report, which was incorporated by reference in the emergency regulation, support the one-month residence time assumption and therefore the regulation and Methodology are not “arbitrary, capricious, or entirely lacking in evidentiary support.” The details provided in Appendix D are useful in assessing whether any of the specific arguments raised by petitioners sufficiently challenge that support.

Appendix D provides technical support for the assumption described in the Methodology that, by the time water rights or claims in the Legal Delta were curtailed at the end of August 2021, limited inflows of natural and abandoned freshwater to the Legal Delta had resulted in a complete consumption of the available inflow in one month or less for an extended period of at least several months. To support this assessment, Appendix D compared natural and abandoned Delta inflow in May, June, and July 2021 to the consumptive use in the Delta for those months, as calculated by DWR’s DAYFLOW Delta gross channel depletion estimates¹⁴ (GCD) (see Table 4). In May 2021, these inflows exceeded the consumptive use, resulting in some net outflow of this freshwater from the region. However, in June and July, the consumptive use exceeded the inflow of available freshwater. Given the conditions at the beginning of August and the absence of significant precipitation until October, it is reasonable to assume no holdover of freshwater from earlier months would have been present and available for use.

The Methodology report further cited the necessity of the Projects to release stored water to maintain water quality in the Legal Delta as evidence that a significant holdover of natural and abandoned freshwater from prior months did not exist in the region by late August 2021. During low flow conditions, the Projects must release stored water from upstream reservoirs to repel salinity from entering the Delta. If consumptive use in the Delta watershed exceeds the inflow of natural and abandoned flows, a greater volume of water must be released to maintain the salinity barrier. Appendix D shows that supplementation of natural Delta inflow grew from less than 1 thousand acre-feet per day in early May 2021 to frequently over 10 thousand acre-feet per day by July (see

¹⁴ DAYFLOW GCD are an estimate of consumptive use within the Delta. It accounts for return flows but does not include runoff from precipitation. For the summer months when precipitation is minimal, DAYFLOW GCD and net channel depletions are essentially equal.

Figure 7), indicating that by August 20, 2021, additional water was needed to maintain water quality in the Delta and a holdover of natural and abandoned inflow available for diversion from prior months did not exist.

Additionally, the Methodology report notes that tidal inflows were not considered as a source of water supply for the purpose of the Methodology due to their unsuitability for agricultural and municipal purposes. Appendix D provides technical support for this approach by summarizing the range of crop tolerance to high soil-water salinities and the salinity of water in Suisun Bay, which approaches the threshold at which even tolerant crops reach 100 percent yield reduction. When saline water from Suisun Bay mixes with a limited volume of freshwater such as what would have occurred in late August 2021 without previously stored Project water, the salinity could exceed 10,000 $\mu\text{s}/\text{cm}$ in the Delta. This level of salinity would result in 100 percent yield reductions in sensitive crops as well as some reductions even amongst tolerant crops, which are not generally grown in the region of the Legal Delta.

Some petitioners argue that the in-Delta diverters are entitled to the incidental water quality benefits of stored Project water released to meet water quality objectives and maintain salinity control at the Projects' export facilities in the southern Delta. The issue presented by curtailments in the Delta, however, is not whether Delta diverters are entitled to the incidental benefits of storage releases, but whether they are entitled to divert when natural and abandoned flows of suitable quality are not sufficient to satisfy their demands, and therefore their continued diversion would require the Projects to make additional storage releases to meet water quality objectives. Consistent with the legal authority discussed in section 2.7.5, above, Delta diverters are not entitled to divert Project storage releases under their riparian and appropriative rights. Moreover, during the current drought emergency, the Board determined that curtailments were necessary in the Delta watershed in order to protect stored water; therefore, it would be inconsistent for the Board to allow in-Delta diverters to divert this water in significant quantity (given the rate of consumptive use compared to natural and abandoned inflow described above). Delta diverters whose rights have not been curtailed have continued to benefit from the improved water quality in the Delta resulting from the stored Project water releases.¹⁵

¹⁵ Petitioners argue that the Board is collaterally estopped from denying Delta diverters the right to the incidental benefits of storage releases by virtue of the superior court's decision in *United States of America v. State Water Resources Control Board* (Super. Ct. S.F. City and County, 1984, JCCP No. 548). The court's judgment in that case was reversed on appeal (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 152), and therefore does not have preclusive effect. Regardless, any entitlement to the incidental water quality benefits of Project storage releases does not entitle Delta right holders to continue to divert when natural and abandoned flows of suitable water quality are not available under their priority of right.

Appendix D provides additional support for the one-month timestep used in the Methodology by also describing the effects of tidal flux on water quality. This analysis showed that the action of the tides introduces a volume of water equal to the volume of the Legal Delta channels every 2 to 3 days, creating significant mixing of saline and freshwater. Given this, and the other factors described above, the one-month timestep of analysis used to support the issuance of curtailments to non-Project diverters within the Legal Delta for the period of August 20, 2021 through August 31, 2021, is appropriate, not “arbitrary, capricious, or entirely lacking in evidentiary support.” The April 19, 2022 version of the Methodology report describes that updates to Appendix D will be forthcoming, including additional opportunities for in-Delta water right holders and claimants to discuss the updates.

Arguments by petitioners challenging the analysis of Appendix D are discussed in greater detail below. While petitioners have raised various factors that affect water unavailability in the Legal Delta, none justify a change in the one-month approach used during the period of in-Delta, non-Project curtailments.

3.7.5.1 Sources of Supply Other Than Freshwater Inflow are Negligible

Petitioners argue that curtailing agricultural diversions in the Legal Delta may, in many instances, result in more consumptive use. Here, presumably, the petitioners refer to the potential for the consumptive use of water on lands in the Legal Delta below sea level to result, in some cases, in less water consumption than would have occurred as a result of the unrestrained growth of riparian vegetation. While it is possible that in some cases there may be less demand from irrigated agriculture than from uncontrolled riparian vegetation for lands below sea level, it is unclear to what extent that is the case or whether or how to modify the assumptions in the Methodology to reflect those differences given a lack of data on this issue. Further, as discussed above, return flow factors are likely too high for other reasons.

3.7.5.2 Existence of More Salinity-Tolerant Uses of Water Does Not Justify Increased Diversion of Stored Project Water

Petitioners argue that Appendix D’s consideration of the impacts of reduced water quality on agricultural production are not relevant to certain other uses, such as fish and wildlife habitat uses, tidal wetland uses, fire suppression, and incidental farming uses, such as dust control. Given the nature of water quality management in the Delta, an analysis based on one of these uses would not be reasonable. Stored Project water is released to maintain water quality in the Legal Delta suitable for agricultural and municipal use, which are the primary uses of water within the region. If the analysis were performed using a lesser water quality standard, it would not change the fact that stored Project water is released to meet the higher standard, and there would be no way to prevent in-Delta diverters from diverting the stored Project water to which they are not entitled.

3.7.5.3 Presence of the False River Salinity Barrier Does Not Justify a Change to the Analysis

Petitioners argue that the selection of the one-month timestep of analysis did not properly consider the effect of the June 2021 installation of the False River Salinity Barrier on freshwater residence time in the Legal Delta. This argument appears to be inconsistent with the argument that tidal inflows should be included as a source of supply. The barrier helps to protect the central and south portions of the Legal Delta from greater salinity intrusion, but it does not generate additional freshwater supply for the Delta as a whole or justify a change in the period of analysis.

3.7.5.4 Storage of Salts in the Delta

Petitioners also argue that irrigation of the Delta Lowlands creates a salt reservoir by removing salts from the tidal zone and storing them in the Delta Lowland soils. There is no quantitative information to support this assertion. Accordingly, this effect was not included in the analysis but is not considered to have a significant mitigating effect against salinity intrusion from Suisun Bay.

3.7.5.5 Legal Delta Conditions Need Not Be Evaluated Within Historical Setting

CDWA and SDWA argue that the analysis in Appendix D was flawed because it failed to evaluate the Delta within its historical context prior to the existence of the Projects. For example, they argue that the analysis failed to eliminate all Project facilities and operations, including dams; failed to consider the lack of winter and spring flushing flows that would occur in the absence of the Projects; failed to remove all exports and the resulting salinity intrusion and saline discharge to the San Joaquin River resulting from those exports; and failed to allocate salinity impacts from the deepening of ship channels, tidal wetlands, and other habitats on the parties responsible for these changes.

CDWA and SDWA do not cite any authority for the proposition that they are entitled to the level of water quality that existed in the Delta before the development of various projects within and upstream from the Delta. (See *Town of Antioch v. Williams Irr. Dist.* (1922) 188 Cal. 451, 465 [City of Antioch not entitled to compel junior upstream appropriators to curtail diversions to the extent necessary to prevent salinity intrusion at city's point of diversion].) Regarding the specific assertion that Appendix D failed to consider the salinity intrusion and saline discharge from certain Project exports, the CVP both improves and degrades water quality in the southern Delta. This represents a long-term problem that is not incorporated into the Methodology; however, because this factor is not incorporated in the Methodology, it does not serve to reduce the water available for diversion.

3.7.5.6 Appendix D Properly Analyzes Connections Between Regions

A petitioner asserts that Appendix D improperly breaks the Legal Delta into four regions and incorrectly represents the interconnections between those regions. Specifically, they argue that there is not, in actuality, a direct connection between the south Delta and Suisun Bay and that Sacramento River water would be available to meet

consumptive use in the south Delta. The analysis described in Appendix D uses regions developed by the U.S. Geological Survey and does not show a direct connection from Suisun Bay to the south Delta. Instead, it shows that more water is consumed in the south and central Delta than is contained in the Delta channels in these regions. When insufficient natural and abandoned flow from the Sacramento and San Joaquin Rivers enters the channels to meet the water demand, the only other source available is Suisun Bay.

3.7.5.7 ***Other Analytical Details Challenged Within Appendix D***

Additionally, petitioners allege that several other analytical details related to Appendix D were flawed. This includes the alleged improper conflation of exchange rate and residence time. Appendix D presents an exchange rate, representing the amount of time it would take for the tidal flux to equal the channel volume within each region of the Delta and the Delta as a whole. This rate is between approximately 2 and 3 days for each region. This information is presented to demonstrate the volume of tidal inflow and the degree of mixing with freshwater that occurs in the Legal Delta. The exchange rate is not conflated with residence time, as demonstrated by the fact that a residence time, or timestep of analysis, of one month was used, not 2 to 3 days.

A petitioner also alleges that Appendix D inappropriately uses GCD as opposed to Delta Channel Depletion (DCD) to estimate consumptive use because they believe GCD to generally overestimate Delta consumptive use and fail to incorporate agricultural return flows. Contrary to the Petitioner's claims, the GCD estimates for Delta depletions do include agricultural return flows. They do not include precipitation, which is negligible in the summer months. Further, the estimate of Delta depletion that is used in the Methodology is that which is used for the calculation of Net Delta Outflow Index in State Water Board Decision 1641 for compliance purposes.

Lastly, BBID cites volumetric fingerprinting analysis that is addressed in the August 20 and September 27, 2021 versions of Appendix D and was discussed at the October 20, 2021 workshop that concerned this topic, among others. The results of the modeling analysis show that molecules of water that entered the Delta more than a month prior remain in the channels in some concentration. As is described above, this is not the relevant metric for determining the timestep of the water unavailability analysis. For example, the analysis shows that water molecules that entered the Legal Delta as early as July to December 2020 may still constitute a small percentage of the water present on July 1, 2021. However, the analysis demonstrates that the majority of this water is no longer present in the Legal Delta. The continued presence of these water molecules is likely offset by the early departure of certain recently introduced water molecules, which the Methodology assumes remain present for up to a full month. Further, the model does not distinguish between stored water releases, which are not available for diversion other than by those with a contract for this water, and natural and abandoned flows. If increased diversions were permitted as a result of this analysis to allow the diversion of the natural and abandoned flow molecules that might remain in the Legal

Delta from a prior month, diverters would not be able to selectively divert those molecules and a subsequent run of the analysis would still show some portion of them present, allowing such an argument to be made continually without appropriate diminishment.

3.8 Consistency with the Water Right Priority System

3.8.1 Exceptions to Curtailment Were Substantiated

TID and MID argue that the curtailment exception for minimum health and safety needs contained in section 878.1 of the emergency regulation violates the rules of priority. As set forth in section 2.7.3, above, departure from the priority system is permitted to the extent necessary to comply with the reasonable use doctrine and prevent the unreasonable diversion or use of water. (Cal. Const., art. X, § 2; *El Dorado Irrigation Dist. v. State Water Resources Control Bd.* 142 Cal.App.4th at pp. 965–966.) Another legal principle that may justify a departure from the priority system is the policy, codified in Water Code section 106, that the use of water for domestic purposes is the highest use of water. (*El Dorado Irrigation Dist.* at p. 966.) In addition, the California Water Code declares water supplies for consumption, sanitation, and cooking as a human right. (Wat. Code, § 106.3.)

The exception to curtailment for minimum human health and safety needs is consistent with the foregoing authority. In adopting the emergency regulation, the Board determined that it was imperative during the dire drought conditions in the Delta watershed for water right holders that do not have water available at their priority of right and do not have a need to provide water for minimal health and safety use to cease diversions of water needed for more senior rights and to prevent the unauthorized diversion of previously stored water needed for salinity control, human health and safety supplies, and minimal ecosystem protection. (State Water Board Resolution No. 2021-0028, ¶¶ 6, 12, 15.) The Board expressly stated that the regulation was in furtherance of the reasonable use doctrine. (*Id.*, ¶ 14.) Likewise, the regulation itself establishes that diversions in violation of curtailments constitute an unreasonable use of water, unless an exception applies. (Cal. Code Regs., tit. 23, §§ 878.1, subd. (g), 879.2, subd. (b).) In summary, curtailments in accordance with the regulation, together with the human health and safety exception, are necessary to ensure compliance with the reasonableness doctrine. This limited exception to the rule of priority is permissible under the law.

BCID, CDWA, SDWA, OID, and SSJID make the related argument that section 878.1, subdivision (g) of the regulation is not supported by substantial evidence because the Methodology does not explain how rights will be curtailed to avoid depriving right holders of water needed for minimum human health and safety needs. Section 878.1, subdivision (g) provides that the diversion and use within the Delta watershed that deprives water for minimum human and health needs in 2021 or creates an unacceptable risk of depriving water for minimum human health and safety needs in

2022, is an unreasonable use, and directs the Deputy Director to implement curtailments to prevent such unreasonable use. Petitioners argue that the Methodology was designed to determine curtailments based on priority, not to avoid depriving human health and safety needs, and therefore subdivision (g) is not supported by any evidence.

The determination of reasonableness contained in section 878.1, subdivision (g) of the regulation is consistent with the policies prioritizing the use of water for human health and safety summarized above. To date, an explanation of how the human health and safety exception affects curtailments has not been necessary because the Methodology has not been adjusted to account for the additional demand associated with diversions that have continued pursuant to the human health and safety exception under rights that otherwise would have been curtailed. Accordingly, the exception for minimum human health and safety needs has not affected curtailments for senior right holders. In total, the human health and safety exceptions account for approximately 14,000 acre-feet per month. With the exception of SFPUC, most human health and safety exceptions were filed by smaller diverters. In an analysis done by State Water Board staff in February 2022, staff estimated that SFPUC's diversions under the human health and safety exception account for approximately 93 percent by volume of all human health and safety exceptions combined. If the Methodology is adjusted in the future to account for the demand associated with diversions pursuant to the exception, that change will be documented.

3.8.2 Assumption that Riparians are Senior to Appropriators Appropriate as a General Rule

SJRECWA maintains that the regulation is unlawful because it presumes that riparian rights are senior to appropriative rights, but large riparian parcels on the San Joaquin River are subordinate to pre-1914 appropriative rights held by the members of SJRECWA. Similarly, CCSF argues that the curtailment orders are not supported by substantial evidence because they are predicated on the assumption that all Delta riparian claimants are senior to all appropriative right holders and claimants. In particular, CCSF cites *Meridian v. San Francisco* (1939) 13 Cal.2d 424 in support of the claim that CCSF, MID, and TID have prescriptive rights against riparian claimants in the Lower San Joaquin River.

Preliminarily, this is not a valid basis for challenging the curtailment orders because the regulation provides that, absent evidence to the contrary, riparian claims are presumed to be senior to appropriative rights or claims. (Cal. Code Regs., tit. 23, § 876.1, subd. (d)(1).) The regulation acknowledges that there may be exceptions to the general rule. Accordingly, the regulation allows pre-1914 appropriative claimants to propose that curtailment of their claim of right is not appropriate because, for example, they are senior to riparian claimants. (*Id.*, § 876.1, subd. (e).)

The assumption that riparians are senior to appropriators, subject to exceptions, is not arbitrary, capricious, or lacking evidentiary support. Many cases have confirmed that, as a general rule, riparians are senior to appropriators. (See, e.g., *Millview County Water Dist. v. State Water Resources Control Board*, *supra*, 142 Cal.App.4th at p. 890; *El Dorado Irrigation District v. State Water Resources Control Board*, *supra*, 142 Cal.App.4th at p. 961 [citing *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82].) The Board did not have adequate information to determine which pre-1914 appropriative claims, if any, are senior to riparian claims, and adjust the Methodology accordingly. With respect to prescriptive claims in particular, the Methodology report explained that the Board did not have the time or resources, in the context of the drought emergency, to investigate whether any of the thousands of riparian claims in the Delta watershed have been rendered subordinate to pre-1914 appropriative rights through prescription. (Water Unavailability Methodology for the Delta Watershed Report (July 23, 2021) p. 7.) Information concerning a particular prescriptive claim, however, will be evaluated if it is submitted.

CCSF's reliance on the holding in *Meridian v. San Francisco*, *supra*, 13 Cal.2d 424 is unavailing for several reasons. In that case, the California Supreme Court affirmed the trial court's finding that CCSF had acquired a prescriptive right against the plaintiff, the owner of El Solyo Ranch, which had riparian rights to the San Joaquin River. (*Id.* at pp. 430, 440–441, 459–460.) However, CCSF's prescriptive right is limited to a right to divert water from the Tuolumne River for purposes of hydropower generation, the prescriptive claim is limited to water that is returned to the Tuolumne River after it is used for purposes of hydropower generation, and the prescriptive right only applies against El Solyo Ranch. (*Id.* at pp. 457, 459–460.) CCSF has not provided sufficient information concerning the extent to which CCSF's prescriptive right has or will be exercised, as differentiated from its other rights, to enable an adjustment to the Methodology, including the extent to which water diverted under CCSF's prescriptive right is returned to the Tuolumne River, and not exported for consumptive uses. In addition, CCSF has not provided any information concerning whether El Solyo Ranch's riparian rights still exist, and if so whether they were included in the demand dataset.¹⁶ If El Solyo Ranch's riparian demand was not included in the demand dataset, then the seniority of CCSF's prescriptive claim relative to El Solyo Ranch's riparian claim would not have affected the availability of water under CCSF's claim of right (or the availability of water under TID's and MID's prescriptive claims). If additional information concerning the exercise of CCSF's prescriptive claim of right and the status of El Solyo Ranch's

¹⁶ eWRIMS does not contain any records of riparian claims or any other rights held by El Solyo Ranch. In *Meridian*, the Court stated that El Solyo Ranch also held License No. 1280 (*id.* at p. 430), which according to eWRIMS is now held by El Solyo Irrigation District. This suggests that El Solyo Irrigation District is the successor-in-interest to El Solyo Ranch, but eWRIMS does not contain any records of riparian claims held by El Solyo Irrigation District.

riparian claim is provided in the future, the Methodology could be adjusted to increase the supply considered available to CCSF, MID, and TID.

OID, SSJID, TID, MID, and Merced ID contend that the curtailment orders are not supported by substantial evidence because they assume that diverters in the Legal Delta that claim hybrid riparian and pre-1914 appropriative rights are riparian, which harms appropriative diverters. Again, this is an issue that concerns the validity of the regulation, not the curtailment orders, because the Methodology treats diverters that claim both types of rights as riparian. (Water Unavailability Methodology for the Delta Watershed Report (July 23, 2021) p. 54.) Moreover, this assumption is not arbitrary, capricious, or lacking in evidentiary support because it is theoretically possible to hold both a riparian and an appropriative right under limited circumstances, and there is no basis to assume that a riparian claim is invalid because the diverter also claims to hold a pre-1914 appropriative right. (See *Millview County Water Dist. v. State Water Resources Control Board*, *supra*, 229 Cal.App.4th at p. 905.)¹⁷ OID and SSJID also argue that the Methodology inappropriately assumes that no appropriative right can be associated with a riparian right. This argument lacks merit because the Methodology does not necessarily make this assumption. Rather, the Methodology treats diversions under both riparian and pre-1914 appropriative claims of right as riparian for purposes of curtailments in order to respect the higher priority of the riparian claim, and to avoid double-counting diversions, which would result in an inflated estimate of water demands.

3.8.3 Unauthorized Diversions and TUCPs Did Not Violate the Priority System

In addition to their contention that the exceptions to curtailment violate the priority system, OID and SSJID contend that the curtailment orders violate the rules of priority because (1) diverters were curtailed before unauthorized diversions were stopped, and (2) the Deputy Director curtailed senior water right holders during the same period when the State Water Board relieved junior water right holders of their responsibility to meet flow-dependent water quality objectives. Presumably, OID and SSJID's second contention refers to the approval of the TUCP filed by DWR and Reclamation in 2021. The approval temporarily changed the conditions of the water right permits for the State Water Project and Central Valley Project that were imposed pursuant to State Water Board Decision 1641 to allow the Projects to meet a minimum Delta outflow in June and

¹⁷ Although it is possible to hold both a riparian and appropriative right, it is unlikely in most circumstances that a valid riparian right holder would also hold a valid appropriative right because an appropriative right cannot be developed by diverting natural flows and applying them to beneficial use on riparian land in accordance with a riparian right. (See Memorandum to Michael Patrick George, Delta Watermaster, from Micah Green, Water Rights Analyst, *Re: Issues Pertaining to Overlap Between Pre-1914 and Riparian Water Right Claims in the Delta* (Dec. 15, 2017), and authority cited therein.)

July of 3,000 cfs, rather than 4,000 cfs, relocated the Western Delta agricultural salinity compliance location from Emmaton to Threemile Slough until August 15, and restricted Southern Delta Project exports through August 15.

OID and SSJID's contentions lack merit because neither unauthorized diversions nor the TUCP approval had any effect on curtailments. Preliminarily, OID and SSJID fail to identify any unauthorized diversions in particular. Nonetheless, the Board recognizes that unauthorized diversions do occur, and will continue to be addressed by the Board's complaint and enforcement processes. However, any unauthorized diversions within the Delta watershed did not affect curtailments because the Water Unavailability Methodology does not reduce the estimated amount of supply considered to be available to right holders or claimants as a result of any unauthorized diversions. If unauthorized diversions are known or suspected, the allegation should be reported to the Board through the complaint process to initiate an investigation.

Likewise, the approval of the TUCP did not affect the August 20 curtailments (or any subsequent curtailments) because the Methodology does not estimate supplies based on the Delta outflow and other flow-dependent water quality requirements that DWR and Reclamation are required to meet. Accordingly, temporary changes to those requirements did not affect the estimate of the natural and abandoned flows used to determine water unavailability for purposes of curtailment. In addition, the approval of the TUCP did not change DWR's or Reclamation's obligation to comply with orders to curtail their own water rights based on a lack of water unavailability. Finally, it merits note that, contrary to OID and SSJID's allegation, none of the changes approved by the 2021 TUCP were in effect when the August 20, 2021 curtailment orders were issued.

3.8.4 Curtailments Were Consistent with OID's and SSJID's Priorities of Right

OID and SSJID contend that the August 20, 2021 curtailment of their Stanislaus River rights violated the priority system because those curtailments benefited Reclamation, a junior right holder, by allowing it to reduce storage releases from New Melones Reservoir on the Stanislaus River by 100–150 cfs. For context, in September 2021 New Melones inflow and outflow averages were 269 and 1,215 cfs, respectively. In other words, Reclamation was bypassing all natural and abandoned inflow to New Melones Reservoir and augmenting natural and abandoned flows below New Melones Reservoir with water released from storage.

It is unclear whether Reclamation reduced New Melones storage releases because of the curtailment orders' impact on river diversions, and, if so, by how much. Regardless, curtailment of OID and SSJID's rights was based on the demands of water right holders senior to OID and SSJID, not Reclamation's New Melones rights, which were also curtailed. The fact that the curtailments may have reduced the amount of previously stored water that Reclamation was required to release from New Melones Reservoir does not violate the priority system, which only applies to natural and abandoned flows.

Reclamation has a paramount right to water previously stored consistent with the priorities of its water rights, as explained above in section 2.7.5. Moreover, preservation of stored water needed to prevent salinity intrusion into the Delta, which would make water in the Delta unusable for municipal, industrial, and agricultural purposes, is a legitimate purpose of the emergency regulation and subsequent curtailment orders. Leaving dwindling freshwater storage supplies unprotected could result in severe salinity intrusion in the Delta, rendering this critical water source unusable. (State Water Board Resolution No. 2021-0028, ¶¶ 5, 15).

3.8.5 Curtailments Were Consistent with SFPUC's Priorities of Right

CCSF also contends that the curtailment orders violate the priority system because the State Water Board relied on the date of first use reported in SFPUC's Statements to determine the priority of SFPUC's claims of right. This contention lacks merit because the priority date assigned to SFPUC's claims of right was consistent with the Methodology. The emergency regulation authorized the Deputy Director to rely on the Methodology to determine water unavailability for purposes of curtailments, and therefore this is not a valid basis for challenging the curtailment orders. Moreover, the Methodology's approach to assigning priority dates to pre-1914 appropriative claims of right is not arbitrary, capricious, or lacking evidentiary support, for the reasons given below.

The Methodology relies on the information reported in Statements to estimate the demands and priority dates associated with riparian and pre-1914 appropriative water right claims. (Water Unavailability Methodology for the Delta Watershed Report (July 23, 2021) pp. 32–33; Technical Appendix B (April 19, 2021) pp. B-12–B-13.) Statements are required to be submitted on forms provided by the Board. Those forms do not include a “priority date” field because that information is not required to be reported. (See Wat. Code, § 5103.) Accordingly, the Methodology relies on the year of first use, which is required to be reported, as a proxy for the priority date. (See Wat. Code, § 5103, subd. (h).) If the year of first use associated with a pre-1914 claim is after 1914, a priority date of January 1, 1914, is assigned because, by definition, pre-1914 appropriative rights must be initiated before the December 19, 1914 effective date of the Water Commission Act, and therefore must have a priority date before that date. (Water Unavailability Methodology for the Delta Watershed Report, Technical Appendix B (April 19, 2021) p. B-13; *Millview County Water Dist. v. State Water Resources Control Board*, *supra*, 229 Cal.App.4th at p. 889, fn. 7.)

In most cases, the priority date of an appropriative right and the year of first use will be the same, but it is possible for a pre-1914 appropriative right to be initiated before water is actually applied to beneficial use, through the posting of a notice of appropriation or through the manifestation of an intent to appropriate water by beginning construction of diversion facilities, in which case the priority date relates back to the date when the right was initiated. (*Haight v. Costanich*, *supra*, 184 Cal. at pp. 431–433.) In recognition of

this possibility, the regulation allows a water right holder or claimant to submit information to the Deputy Director to support a proposed correction to the priority date of their water right or claim. (Cal. Code Regs., tit. 23, § 876.1, subd. (e).) Accordingly, the cover letter transmitting the initial curtailment orders advised recipients that they could submit additional information in support of a request to correct the priority date of their water right or claim.

SFPUC claims substantial pre-1914 appropriative water rights for the Tuolumne River, Canyon Ranch Creek, Cherry Creek, Eleanore Creek, and an Unnamed Creek that occasionally supports Camp Mather. SFPUC's pre-1914 appropriative water rights in the Delta watershed¹⁸ were all assigned priority dates of January 1914 because SFPUC reported years of first use after 1914. The January 1914 priority dates were based on the best information available since the dates when the claims of right were initiated are unknown.

SFPUC requested priority date corrections under cover of a letter dated December 1, 2021. In support of its request, SFPUC submitted 21 notices of appropriation with dates ranging from 1901 to 1911. In a response dated January 24, 2022, Division staff informed SFPUC that more information was needed in order to process SFPUC's request. Specifically, staff explained that it was unclear (1) which notice or notices support diversions under each Statement, (2) whether any notices supported diversions under multiple Statements, (3) whether diversions under any of the Statements occur under multiple claims of right with different priority dates, and, if so, (4) the volume of water diverted under each claim of right. This information is needed in order to make corrections to the priority dates of SFPUC's claims of right in the Methodology. Although SFPUC claims to have provided the information necessary to support its request, to-date SFPUC has not provided the information requested by Division staff. Furthermore, as stated in the Division's January 24, 2022 response to SFPUC, assigning an earlier priority date to SFPUC's claims of right would not have affected the curtailment status of SFPUC's claims of right in the fall of 2021.

CCSF also argues that the curtailment orders violated the priority system because in September several of Reclamation's water rights (junior to SFPUC's) had curtailments suspended while SFPUC's were not. This argument lacks merit because the Methodology does not necessarily curtail water rights to the same priority level in each watershed and the Reclamation water rights for which curtailments were suspended are in different watersheds than SFPUC's water rights. From August 20, 2021, to August 31, 2021, all of Reclamation's water rights tributary to the Delta were curtailed. But because of a substantial increase in the Sacramento River return flow estimate, on September 1, those curtailments were suspended for 15 of Reclamation's water rights with priority dates between 1921 and 1963. The rights are all either within the

¹⁸ These rights include Statement Nos. S002635, S002636, S002637, S002638, S014379, S018734, and S018735.

Sacramento River watershed or the Legal Delta, and they include Permit Nos. 11317, 11318, 12365, 12720 through 12726, 13776, and 21542 as well as License Nos. 2625, 9956, and 9957.

The change in the Methodology's Sacramento River return flow estimate for September was largely due to the draining of a substantial amount of acres of flooded rice fields on the Sacramento Valley Floor prior to rice harvest. In contrast, SFPUC's pre-1914 appropriative water rights are all located on the Tuolumne River, or tributaries thereto. The Methodology assumes that the Tuolumne River does not benefit from return flows the same way, so the suspension of curtailments in September for water rights on the Sacramento Valley Floor or in the Legal Delta, while Tuolumne River water rights, including senior ones, remained curtailed, is a valid and expected result of the Methodology and wholly consistent with the priority system. (Water Unavailability Methodology for the Delta Watershed Report (August 20, 2021) pp. 47–49.)

3.9 Diversions in Violation of the Regulation Would Be Unreasonable

BCID and BBID contend that section 879.2, subdivision (b) of the emergency regulation and curtailment orders improperly rely on waste and unreasonable use for enforcement of violations. As stated above, section 879.2, subdivision (b) provides that the diversion or use of water within the Delta watershed in violation of the regulation constitutes an unreasonable use of water, subject to enforcement.

BCID argues that section 879.2, subdivision (b) misconstrues the reasonable use doctrine because violations of the priority system and violations of the reasonable use doctrine are distinct. Although the two legal doctrines are distinct, it does not necessarily mean that diversions in violation of the priority system cannot be considered unreasonable. That is particularly true under the present circumstances, where diversions in the Delta watershed when water is unavailable under the diverters' priority of right threaten not only senior water right holders and claimants, but also threaten to deplete limited stored Project water supplies needed for multiple critical purposes, including salinity control in the Delta.

BBID argues that the Board was required to conduct a reasonableness analysis, in which the reasonableness of a particular use is evaluated in light of its impact on another specific use, before determining that a violation of a curtailment order constitutes an unreasonable use of water as prescribed by section 879.2, subdivision (b). Contrary to this argument, the cases cited by BBID do not establish a rule that a reasonableness determination necessarily entails an evaluation of the impacts of one specific use on another specific use. Moreover, the facts demonstrating the need for Delta curtailments during the drought emergency, summarized in section 3.8.1, above, provide ample evidentiary support for the Board's determination that it would be unreasonable for water right holders and claimants in the Delta watershed to divert water when it is unavailable under their priority of right.

4.0 CONCLUSION

For the foregoing reasons, the petitions for reconsideration of the regulation are improper and should be dismissed. In addition, the issues raised in all of the petitions for reconsideration either lack merit or have been addressed through corrections to the Methodology for determining water unavailability in the Delta watershed. The curtailment orders were consistent with the regulation, did not violate any of the procedural or substantive rights asserted by the petitioners, and were otherwise appropriate and proper. Therefore, the petitions for reconsideration should be denied.

ORDER

The petitions for reconsideration of the drought emergency curtailment and reporting regulation for the Delta watershed are dismissed. The petitions for reconsideration of the curtailment orders issued pursuant to the regulation are denied.

May 9, 2022



Dated

Eileen Sobeck
Executive Director