

**STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 2022-0028**

REVISING AND RE-ADOPTING AN EMERGENCY CURTAILMENT AND REPORTING
REGULATION FOR THE SACRAMENTO-SAN JOAQUIN DELTA (DELTA)
WATERSHED

WHEREAS:

1. California and the entire western United States are facing a significant drought in the wake of one of the driest periods on record, driven by climate change and unprecedented hydrologic conditions. Water supply in many parts of California, including the Delta watershed, is insufficient to meet demands and requires urgent action to ensure the protection of health, safety, and the environment;
2. On March 22, 2021, the State Water Resources Control Board (State Water Board or Board) sent [letters regarding ongoing dry conditions in most California watersheds](#) to all water right holders and claimants in the state. These letters encouraged water right holders and claimants to plan and prepare for potential water shortages in 2021 and notified them that accurate and timely reporting of water use data would provide critical information needed to manage the state's water resources;
3. On April 21, 2021, Governor Gavin Newsom issued a [Proclamation of a State of Emergency for Mendocino and Sonoma counties](#), in response to drought conditions in the Russian River watershed. On May 10, 2021, Governor Newsom issued an expanded Proclamation of a State of Emergency for 41 counties, including those within the Sacramento-San Joaquin Delta (Delta) watershed ([May 2021 Proclamation](#)), in response to drought conditions. The May 2021 Proclamation finds it necessary to act expeditiously to mitigate the effects of drought conditions in the Delta watershed to ensure the protection of health, safety, and the environment and to prepare for potential sustained drought conditions. It directs the State Water Board to consider adopting an emergency regulation to curtail water diversions when water is not available at water right holders' priority of right or to protect releases of stored water in the Delta watershed. For purposes of approving an emergency regulation pursuant to this directive, the May 2021 Proclamation also suspends the California Environmental Quality Act in Public Resources Code, Division 13 (commencing with section 21000) and regulations adopted pursuant to that Division;
4. Due to the conditions described in the April and May 2021 proclamations persisting, additional executive orders have been issued that extend and expand the authorities and directives contained in the April and May 2021 proclamations;¹

¹ Governor Newsom's July 8, 2021 proclamation expanded the emergency declaration to nine additional counties and called upon Californians to voluntarily reduce their water use by 15 percent. Governor Newsom issued another proclamation on October 19, 2021, further increasing the number of counties included in the drought state of emergency.

5. Due to persistent drought conditions, the State Water Board developed a Water Unavailability Methodology for the Delta Watershed ([Water Unavailability Methodology](#) or Methodology) to determine when the best available data indicates that water is not available at water right holders and claimants' priorities of right. The State Water Board released a draft of the Methodology on May 12, 2021 for written and oral comments at a workshop on May 21, 2021, and presented the Methodology at a June 1, 2021 Board meeting. Based on public comments the Methodology was updated June 15, 2021;
6. Based on the output of the Methodology, on June 15, 2021, the State Water Board sent informational [Notices of Water Unavailability](#) to all post-1914 appropriative water right holders, pre-1914 appropriative water right claimants, and riparian right claimants in the Delta watershed, informing them that continued drought in summer 2021 could impact their ability to divert and notifying the public of the State Water Board's intent to consider an emergency curtailment regulation in accordance with the Governor's drought proclamation;
7. A draft of the Delta curtailment and reporting emergency regulation (emergency regulation) was released for public comment on July 23, 2021 and a workshop was held on [July 27, 2021](#), to provide information to and receive input from the public;
8. On [August 3, 2021](#), the State Water Board adopted the emergency regulation. The [emergency regulation](#) was approved by the Office of Administrative Law (OAL) and became effective on August 19, 2021. The emergency regulation is effective for up to one year unless readopted;
9. The State Water Board issued initial orders imposing water right curtailment and reporting requirements (initial order) to all water right holders and claimants in the Delta watershed on August 20, 2021. The initial order immediately imposed curtailments on approximately 4,500 water right holders and claimants. Curtailment statuses have been updated frequently to respond to evolving conditions since the initial order was issued;
10. On January 4, 2022, as a result of the October 2021 proclamation, the State Water Board adopted an emergency regulation to supplement voluntary water conservation. The [regulation](#) went into effect on January 18, 2022 and is effective for up to one year unless readopted;
11. On March 18, 2022, the U.S. Bureau of Reclamation (Reclamation) and the Department of Water Resources (DWR) submitted a Temporary Urgency Change Petition (TUCP) to modify terms of their water right permits and license included in State Water Board Water Rights Decision 1641 (D-1641). Reclamation and DWR requested these modifications because of insufficient inflow and storage to meet D-1641 requirements and because additional operational flexibility was needed to support other Central Valley Project (CVP) and State Water Project (SWP) priorities. The State Water Board issued an order approving the TUCP on April 4, 2022. The changes approved by the order are effective through June 30, 2022, and include a reduction to the Delta outflow requirement from 7,100 cubic feet per second (cfs) (3-day running average) to 4,000 cfs (14-day average) and movement of the Western Delta agricultural

salinity compliance point at Emmaton upstream to Threemile Slough on the Sacramento River;

12. Similar to the March 22, 2021 letter, on March 21, 2022, the State Water Board sent a [letter to water right holders and claimants](#) with the intent of helping them prepare for drought impacts due ongoing dry conditions and notifying water right holders and claimants of expected limited supplies this summer and fall;
13. On March 28, 2022 Governor Newsom issued an [executive order](#) directing the State Water Board to consider adopting emergency regulations, in support of urban water conservation, that would require urban water suppliers to implement certain water shortage response actions and that would ban most irrigation of non-functional turf. Following this, the State Water Board adopted a second emergency water conservation regulation on May 24, 2022. The [regulation](#) went into effect on June 10, 2022, and is effective for up to one year unless readopted;
14. The State Water Board held public workshops on [August 31, 2021](#), [October 20, 2021](#), and [December 15, 2021](#), and provided associated opportunities for written public comments on the Methodology. The State Water Board also held a workshop on [May 12, 2022](#), and provided an opportunity for written public input on draft proposed revisions to the emergency regulation and Methodology. The August 2021 workshop provided guidance to diverters on curtailment and reporting requirements. The October and December 2021 workshops focused on potential changes to the Methodology and alternative approaches to address water supply shortages in the Delta. The May 2022 workshop noticed refinements to the Methodology and informed the public of minor revisions to the emergency regulation proposed as part of an intended upcoming readoption of the emergency regulation in advance of it expiring. These revisions streamline administration of the emergency regulation, provide additional flexibility in implementation of the methodology used to determine water unavailability in the Delta watershed, and clarify existing requirements;
15. The Delta watershed is currently experiencing three consecutive extremely dry years. Additionally, January to March of 2022 was among the driest winter periods on record for California. As of May 1, 2022, water supply index forecasts for both the Sacramento Valley and the San Joaquin Valley suggest that 2022, like 2021, will meet the criteria to be categorized as a critical water year. As implemented in State Water Board Decision 1641, this index is used to determine Sacramento and San Joaquin Valley water year type. As categorized by the National Drought Mitigation Center, as of June 7, 2022, most of the Delta watershed is in severe or extreme drought. Due to lack of storms, and early season snowmelt, California's April 1, 2022 snowpack levels were within the 10 worst on record. As of June 13, 2022, the statewide snow water equivalent was 0 percent of April 1 average. These conditions have resulted in below average storage levels in many reservoirs. As of June 1, 2022, storage levels in the state's two largest reservoirs, Shasta and Oroville, which provide water supplies for much of the state as well as salinity control in the Delta and other instream flows, are at 1.8 million acre-feet (MAF) and 1.9 MAF, respectively. Shasta is at 40 percent of its capacity (48 percent of its historical average for this time) and Oroville is at 54 percent of its capacity (68 percent of its historical average for this time);

16. There is an urgent need to address water shortages in the Delta watershed to protect water supplies necessary to meet human health and safety needs, preserve stored water needed to prevent salinity from the ocean from intruding into the Legal Delta and making water unusable for municipal, industrial, and agricultural purposes, and to minimize impacts to fish and wildlife. The Delta watershed is the state's largest surface water source, supplying two-thirds of Californians with at least some portion of their drinking water. It is also home to numerous fish, wildlife, and plant species listed as threatened, endangered, or special status under the state and federal Endangered Species Acts, as well as species that hold significant cultural importance to California tribes and are vital to the commercial and recreational fishing economy. Water quality within the Legal Delta relies on an intricate balance between freshwater flows and tidal actions. Leaving freshwater storage unprotected could result in severe salinity intrusion in the Legal Delta, rendering this critical water source unusable for humans and ecosystems alike;
17. Further, there is a need to ensure continued minimum human health and safety needs are met, notwithstanding the shortage conditions. The California Water Code declares water supplies for consumption, sanitation, and cooking as a human right (Wat. Code, § 106.3); identifies domestic use as the highest water use (Wat. Code, § 106); and provides water suppliers with authority to declare a water shortage emergency to allow sufficient water for human consumption, sanitation, and fire protection (Wat. Code, § 350). Additional efforts are needed in the Delta watershed this year to ensure that water right holders and claimants without other means to access basic health and safety supplies are able to continue to access water for these uses under critical drought conditions;
18. Water agencies across California have taken actions in response to the dry conditions, including reducing or eliminating contract water deliveries and implementing mandatory and voluntary conservation efforts. The CVP and the SWP, the state's two major water supply projects operating reservoirs throughout the Delta watershed, announced severe reductions in contract deliveries. For 2022, Reclamation, which operates the CVP, has made no allocation to agricultural service contractors and has made the minimum allocation needed for health and safety to municipal and industrial contractors. DWR, which operates the SWP, has made a five percent allocation to both municipal and agricultural contractors. As described further below, the Sacramento River Settlement Contractors (SRSC) who hold senior water right claims on the Sacramento River have been subject to an 82 percent reduction in allocations and the Feather River Contractors (FRC) have been subject to a 50 percent reduction in their allocations. In addition to water supply reductions and conservation efforts, water users have requested and received approvals for temporary changes to regulatory requirements to extend limited supplies. Many water users have also pursued water transfers and purchases from willing sellers to make up for reduced supplies;
19. During the dire drought conditions currently being experienced in the Delta watershed, it is imperative that water right holders and claimants who do not have water available at their priority of right and do not have a need or obligation to provide water for minimum human health and safety uses cease diversions of water that is needed for more senior rights and to prevent unauthorized diversion

of previously stored water needed for salinity control, human health and safety supplies, and minimal ecosystem protections;

20. As the result of historic dry conditions, extremely low storage conditions in Shasta Reservoir, and the need to maintain water in storage for temperature control and minimal protection of endangered species and critical water supplies this year and going into next year, Reclamation has implemented extraordinary water supply reductions in contractual supplies for the SRSC. DWR has also implemented substantial reductions in contractual supplies for the FRC in recognition of the extremely dry conditions. Reclamation and DWR may also implement similar measures next year if drought conditions persist. These reductions in contractual supplies affect diversions under the contractors' underlying water rights as well as supplemental stored water supplies provided to these contractors under Reclamation's and DWR's water rights. Although natural and abandoned flows may be adequate to satisfy the contractors' underlying water rights early in the irrigation season, natural and abandoned flows will decrease as the season progresses, and the contractors must schedule their diversions based on the amount of supplemental stored water that will be available during the entire irrigation season. The reductions in diversions under the contractors' underlying rights are intended to preserve limited reservoir storage in upstream reservoirs to satisfy the contractors' reduced allocations, and meet water quality and other critical needs as part of an operations plan for the CVP and SWP, and are not intended to make water available to more junior water right holders. Given these circumstances and the need to maintain storage for critical purposes, it would be unreasonable for reduced diversions by the SRSC and FRC to make water available to more junior water right holders and claimants. Any water unused by the SRSC and the FRC due to a reduction in their contractual supplies is needed to remain instream to allow Reclamation and DWR to conserve limited cold water pools, improve water quality, protect carry over storage, or ensure minimum health and safety water supplies in accordance with their operations plan. The emergency regulation includes provisions to prevent junior water right holders and claimants from diverting water that would be available under the SRSC and FRC underlying water rights, but is not being diverted in order to preserve reservoir storage for critical purposes in accordance with an operations plan developed to meet specified objectives;
21. Water Code section 1058.5 provides the State Water Board the authority to adopt emergency regulations in certain drought years or when the Governor proclaims a drought state of emergency in order to "prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to 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";

22. Article X, section 2 of the California Constitution declares that the water resources of the state must be put to beneficial use to the fullest extent possible and the unreasonable use of water be prevented. Relevant to the current drought conditions, the California Supreme Court has clarified that “[w]hat may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” (*Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567.) The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (*Peabody v. City of Vallejo* (1935) 2 Cal.2d 351, 367.) This regulation is in furtherance of article X, section 2 during this drought emergency;
23. Re-adoption of the emergency regulation is necessary to address the immediate and dire water shortages in the Delta watershed. The emergency regulation will enable the State Water Board to continue acting in a timely manner to enforce the water right priority system with respect to all water right holders and claimants and to protect critical water storage needed for minimum health and safety, salinity control in the Legal Delta, and some ecosystem protection;
24. The State Water Board is readopting the emergency regulation due to severe emergency drought conditions and the need for continued action;
25. The regulation will rely upon the current Methodology, including any updates to that Methodology, for curtailment decisions, as well as more real-time publicly available and reliable information to support sub-monthly and sub-watershed suspension and re-imposition of curtailments due to precipitation and runoff events as appropriate. State Water Board staff will identify the specific sources used to support sub-monthly and sub-watershed curtailment decisions as part of its email and website updates on curtailments;
26. As appropriate, State Water Board staff may further update the Methodology to reflect best available information. Notice of any such updates will be provided through the Board’s Delta Drought email distribution list and posting on the Board’s drought website;
27. The regulation supports cooperative agreements among water right holders and claimants in the Delta watershed to share or forebear the use of available water and avoid curtailment. Such agreements must not result in injury to other water right holders and claimants or cause unreasonable harm to fish and wildlife, and are expected to achieve the overall objectives that would otherwise be served by curtailment;
28. Emergency regulations adopted under Water Code section 1058.5 may remain in effect for up to one year; and
29. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to staff.

THEREFORE BE IT RESOLVED THAT:

1. The State Water Board readopts California Code of Regulations, Title 23, Division 3, Chapter 2, Article 24, Sections 877.1, 878, 878.1, 879.1, 879.2, and 879.3 and amends and adopts Sections 876.1, 878.2, and 879, as appended to this resolution as an emergency regulation;
2. State Water Board staff will submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director, the Deputy Director for the Division of Water Rights, or their designee, may make such changes;
4. This regulation shall remain in effect for one year after filing with the Secretary of State unless: (i) the State Water Board determines that it is no longer necessary due to changed conditions, (ii) the conditions specified in Water Code section 1058.5 subdivision (a)(2) are no longer in effect, in which case this regulation is deemed repealed, or (iii) the State Water Board renews the regulation due to continued drought conditions as described in Water Code section 1058.5;
5. The State Water Board directs staff to process as expeditiously as possible any proposals for cooperative agreements which may be offered as alternatives to curtailments;
6. The State Water Board directs staff to publicly notice through the Board's email distribution list and posting on the drought website any changes to the Water Unavailability Methodology at least 24 hours prior to implementation. If those changes are substantial, State Water Board staff shall hold a workshop as soon as practical, which may be subsequent to implementation. Staff shall provide updates on the changes to the Water Unavailability Methodology during public meetings;
7. The State Water Board directs staff to closely monitor evolving hydrology and weather conditions and suspend curtailments, as circumstances warrant, as quickly as possible. In suspending curtailments staff shall consider opportunities and needs to replenish stored water supplies;
8. The Division of Water Rights will consider whether subwatershed curtailments are appropriate during the wet season and may suspend subwatershed curtailments as appropriate; and

9. Except for purposes of enforcement of a curtailment order issued pursuant to this regulation, this regulation and any order issued pursuant to the regulation shall not be cited as authority for, or evidence of, the validity or priority of any water right or claim affected or protected by this regulation. Given this, it would be inappropriate to consider compliance with the regulation to be an admission or waiver of any rights or claims of affected parties.

CERTIFICATION

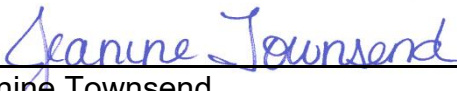
The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on July 20, 2022.

AYE: Chair E. Joaquin Esquivel
Vice Chair Dorene D'Adamo
Board Member Sean Maguire
Board Member Nichole Morgan

NAY: None

ABSENT: Board Member Laurel Firestone

ABSTAIN: None



Jeanine Townsend
Clerk to the Board

Emergency Curtailment Regulation to Protect Water Supplies in the Sacramento-San Joaquin Delta Watershed

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Readopt California Code of Regulations, Title 23, Division 3, Chapter 2, Article 24, Sections 877.1, 878, 878.1, 879.1, 879.2, and 879.3 and revise Sections 876.1, 878.2, and 879 to read:

Article 24 Curtailment of Diversions Due to Drought Emergency

876.1 Emergency Curtailments Due to Lack of Water Availability in the Sacramento-San Joaquin Delta Watershed

(a) This section applies to direct diversions and diversions to storage, of natural and abandoned flows, in the Delta Watershed as defined in section 877.1. This section also applies to the redirection of water released from storage in the Delta Watershed, except to the extent authorized by a water right or contract.

(b) After the effective date of this regulation, when flows are determined to be insufficient to support all diversions, the Deputy Director as defined in section 877.1 may issue curtailment orders as defined in section 877.1 to water right holders and claimants in the Delta Watershed in order of water right priority, requiring the curtailment of water diversion under designated water rights and claims, except as provided in sections 878, 878.1, 878.2, and 879.1 subdivision (b). Before issuing curtailment orders to water right holders and claimants in the Legal Delta, the Deputy Director will consult with and obtain the concurrence of the Delta Watermaster.

(c) Initial orders requiring curtailment or reporting will be mailed to each water right holder, claimant, or the agent of record on file with the State Water Board, Division of Water Rights within the Delta Watershed. The initial orders will require reporting in accordance with section 879, subdivision (c)(1) and will either require curtailment or will instruct the water right holder, claimant, or agent of record regarding procedures for potential future curtailments. The water right holder, claimant, or agent of record is responsible for immediately providing notice of the orders to all diverters exercising the water right or claim covered by the orders. Communications regarding changes in water availability, including notification of when curtailments of water diversions are required and when curtailments are temporarily suspended or reimposed, will be provided by email to the State Water Board's Delta Drought email distribution list and by posting on the State Water Board's drought webpage. Notice provided by email and by posting on the State Water Board's drought webpage shall be sufficient for all purposes related to required curtailments and reporting pursuant to this section and section 879.

(d) In determining whether water is unavailable under a water right holder or claimant's priority of right and whether to order curtailment of water diversions under specific water rights, the Deputy Director will consider:

(1) Relevant available information regarding date of priority, including but not limited to claims of first use in statements of water diversion and use, judicial and State Water Board decisions and orders, and other information contained in the Division of Water Rights' files. Absent evidence to the contrary, riparian water rights are presumed senior to appropriative water rights for the purposes of curtailments pursuant to this section.

(2) Monthly water right demand projections based on reports of water use for permits and licenses, or statements of water diversion and use, from calendar years 2018, 2019, 2020, or 2021, and water right demand projections based on annual watermaster reports.

(3) Monthly water right demand projections based on information submitted in response to an informational order issued under section 879, subdivision (c).

(4) Water supply projections based on the following sources of forecasted supply data:

(A) Monthly full natural flow forecasts contained in the Department of Water Resources' California Cooperative Snow Surveys Bulletin 120 Water Supply Forecast, where available;

(B) Daily full natural flow forecasts from the California Nevada River Forecast Center; and

(C) Other available and reliable data on projected or actual precipitation and runoff events that may inform water availability at a monthly or sub-monthly scale.

(5) Relevant available information regarding stream system disconnection where curtailing diversions would not make water available to serve senior downstream water rights or claims, including seasonal or temporary disconnections.

(6) The Deputy Director may also consider any other pertinent, reliable, and publicly available information when determining water right priorities, water availability, water supply projections, and demand projections.

(7) Evaluation of available water supplies against demands may be performed using the Water Unavailability Methodology for the Delta Watershed, or comparable tools. The Water Unavailability Methodology for the Delta Watershed is described in the Water Unavailability

Methodology for the Delta Watershed report dated June 27, 2022, which is hereby incorporated by reference. Evaluation of available supplies against demands may be performed at the Hydrologic Unit Code level 4 Sacramento and Hydrologic Unit Code level 4 San Joaquin River watershed scale, or at the subwatershed scale. Subwatersheds within the Delta Watershed are defined in the Water Unavailability Methodology for the Delta Watershed report dated June 27, 2022, and were established based on Hydrologic Unit Code level 8 watersheds.

(8) Monthly demand projections for water rights or claims held by the Sacramento River Settlement Contractors (SRSC) or the Feather River Contractors (FRC) will not be reduced based on any reduction in contractual supplies to the SRSCs or the FRCs resulting from an operations plan for the Central Valley Project (CVP) or State Water Project (SWP) that is necessary to address dry hydrologic conditions and is designed to conserve water upstream later in the year in order to protect cold water pools for salmon and steelhead, improve water quality, protect carry over storage, or ensure minimum health and safety water supplies. It would be unreasonable for junior water right holders or claimants to divert any water projected to be unused under water rights or claims held by the SRSCs or FRCs under those circumstances because the water would not be available for diversion and use by junior water right holders or claimants but for the reduced contractual supplies, and the water would need to remain instream to conserve cold water pools, improve water quality, protect carry over storage, or ensure minimum health and safety water supplies in accordance with the operations plan.

(e) A water right holder or claimant may submit information to the Deputy Director to: support a proposed correction to the water right priority date of the right for which the order was issued; or propose that curtailment may not be appropriate for a particular diverter or in a specific stream system as demonstrated by verifiable circumstances, such as a system that has been adjudicated and is disconnected and curtailment would not make water available to serve senior downstream water rights or claims. The Deputy Director will review timely-provided proposals and supporting information and analyses as soon as practicable, make a determination regarding the proposal, and inform the affected water right holder or claimant of any appropriate update for purposes of water diversion curtailment orders. Before making any determinations within the Legal Delta, the Deputy Director will consult with the Delta Watermaster.

(f) Water right holders and claimants in the Delta Watershed must either subscribe to the Delta Drought email distribution list referenced in subdivision (c) or frequently check the State Water Board's drought webpage to receive updated information regarding water diversion curtailment and reporting orders and water unavailability.

(g) The Deputy Director will temporarily suspend curtailments for some diverters, in order of water right priority, when water availability increases or is projected to increase due to precipitation and runoff events or due to reductions in demand, and the Deputy Director determines that such increased water availability warrants a suspension. The Deputy Director will consider the best available information, such as water supply forecasts from the California Department of Water Resources and other similarly reliable sources, to determine the geographic scope and duration of suspension. By no later than October 1, 2021, and by no more than every 30 days thereafter, the Deputy Director will consider reliable and publicly available information that supports suspension, extension of suspension, or reimposition of curtailments of water diversions, and will publicly issue an update explaining any decisions resulting from the consideration of that information.

(h) All curtailment orders issued under this section shall be subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463; *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

877 [Reserved]

877.1 Definitions

(a) “Curtailment Order” refers to an order from the Deputy Director of the Division of Water Rights ordering a water right holder to reduce or cease diversions. A curtailment order may require the recipient to monitor and comply with a curtailment status list if curtailments are not required immediately upon issuance of the order.

(b) “Curtailment Status List” refers to a list published by the Deputy Director with the current status of curtailments noticed under a curtailment order.

(c) “Delta Watermaster” has the same meaning as in Water Code section 85230.

(d) “Delta Watershed” or “Sacramento-San Joaquin Delta Watershed” refers to the Hydrologic Unit Code level 4 Sacramento and the Hydrologic Unit Code level 4 San Joaquin subregions, as defined using the U.S. Geological Survey Hydrologic Units Dataset.

(e) “Deputy Director” refers to the Deputy Director of the Division of Water Rights, or duly authorized designee, at the State Water Resources Control Board.

(f) “Informational Order” refers to an order issued by the Deputy Director which orders reporting of water diversion and use information in the Delta Watershed to inform water unavailability determinations and to support the curtailment process described in section 876.1.

(g) “Legal Delta” has the same meaning as the Sacramento-San Joaquin Delta, as defined in Water Code section 12220.

(h) “Minimum human health and safety needs” refers to the amount of water necessary to prevent adverse impacts to human health and safety, for which there is no feasible alternate supply. “Minimum human health and safety needs” include:

(1) Domestic water uses including water for human consumption, cooking, or sanitation purposes. Further, domestic water uses include incidental uses necessary for household animals or domestic sustenance such as small vegetable gardens. As necessary to provide for domestic water use, water diverted for minimum human health and safety needs may include water hauling and bulk water deliveries, so long as the diverter maintains records of such deliveries and complies with the reporting requirements of section 879 of this article, and so long as such diversion and use is consistent with a valid water right.

(2) For Urban Water Suppliers, water uses consistent with demand reduction actions required by the strictest stage of that supplier’s adopted Water Shortage Contingency Plan, which actions must achieve at least a 50% reduction in water use, as part of its Urban Water Management Plan, as described by Water Code Section 10632.

(3) Water supplies necessary for energy sources that are critical to basic grid reliability, as identified by the California Independent System Operator, California Public Utilities Commission, California Energy Commission, or a similar energy grid reliability authority.

(4) Water supplies necessary to prevent tree die-off that would contribute to fire risk to residences, and for maintenance of ponds or other water sources for fire fighting, in addition to water supplies identified by the California Department of Forestry and Fire Protection or another appropriate authority as regionally necessary for fire preparedness.

(5) Water supplies identified by the California Air Resources Board, a local air quality management district, or other appropriate public agency with air quality expertise, as necessary to address critical air quality impacts to protect public health.

(6) Water supplies necessary to address immediate public health or safety threats, as determined by a public agency with health or safety expertise.

(7) Other water uses necessary for human health and safety which a state, local, tribal or federal health, environmental, or safety agency has determined are critical to public health and safety or to the basic infrastructure of the state. Diverters wishing to continue diversions for these uses must identify the health and safety need, include approval or similar relevant documentation from the appropriate public agency, describe why the amount requested is critical for the need and cannot be met through alternate supplies, state how long the diversion is expected to continue, certify that the supply will be used only for the stated need, and describe steps taken and planned to obtain alternative supplies.

(i) “Russian River Watershed” refers to the area located in Mendocino and Sonoma Counties that drains towards the outlet of the Russian River at the Pacific Ocean.

(j) “State Water Board” refers to the State Water Resources Control Board.

(k) “Urban Water Supplier” has the same meaning as defined in Water Code section 10617.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art., X § 2; Sections 100, 100.5, 104, 105, 106.3, 275, 1058.5, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183.

878 Non-Consumptive Uses

Non-consumptive uses under any valid basis of right may continue after issuance of a curtailment order without further approval from the Deputy Director, subject to the conditions set forth in this section. For the purposes of this section, a non-consumptive use is one for which direct diversion and use of water does not decrease downstream flows or the availability of water for downstream water users. Any diverter wishing to continue diversion under this section must submit to the Deputy Director a certification, under penalty of perjury, which describes the non-consumptive use of water and explains, with supporting evidence, how the diversion and use do not decrease downstream flows in the applicable watershed. The Deputy Director may request additional information and may invalidate any non-consumptive use certification if the information provided is insufficient to support eligibility or if more convincing evidence contradicts the claims in the certification. If a certification submitted pursuant to this section is invalidated, the diversions are subject to any curtailment order issued for that basis of right.

This section applies to:

- (a) Direct diversions solely for hydropower if discharges are returned to the source stream or its tributaries and water is not held in storage.
- (b) Direct diversions dedicated to instream uses for the benefit of fish and wildlife pursuant to Water Code section 1707, including those that divert water to a different location for subsequent release, provided the location of release is hydraulically connected to the source stream.
- (c) Direct diversions subject to curtailment orders issued under sections 877.2 and 877.3 where the Deputy Director, the California Department of Fish and Wildlife, and the Executive Officer of the North Coast Regional Board have approved a substitution of releases of either stored water or groundwater into the Russian River or a tributary thereof such that there is no net decrease in stream flow as a result of the diversion. The rate of releases made pursuant to this subdivision must be measured daily using a device or measurement method approved by the Deputy Director and provided to the Deputy Director on a monthly basis. Proposals involving the release of groundwater shall provide sufficient data and information to reasonably quantify any depletions of surface water caused by the groundwater pumping, the potential time lags of those depletions, and if additional groundwater releases beyond the diversion amounts are able to offset those depletions. The release of water does not have to be conducted by the owner of the water right proposed for the continued diversions, provided an agreement between the water right holder and the entity releasing the water is included in the proposal.
- (d) Other direct diversions solely for non-consumptive uses if those diverters file with the Deputy Director a certification under penalty of perjury demonstrating that the diversion and use are non-consumptive and do not decrease downstream flows in the watershed or the availability of water for downstream water users.
- (e) Direct diversions located within the Legal Delta used exclusively to irrigate lands entirely below sea level when comparison of diversion and drainage records provide substantial evidence that continued irrigation of those lands does not increase net channel depletions.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 187, 275, 348, Water Code

878.1 Minimum Human Health and Safety Needs

- (a) Diversions described in this section under any valid basis of right may be authorized to continue notwithstanding curtailment of that right, subject to the

conditions set forth in this section. A diversion that would otherwise be subject to curtailment may be authorized if:

(1) The diversion is necessary for minimum human health and safety needs; and therefore,

(2) The diversion is necessary to further the constitutional policy that the water resources of the state be put to beneficial use to the full extent they are capable, and that waste and unreasonable use be prevented, notwithstanding the effect of the diversions on more senior water rights or instream beneficial uses.

(b)

(1) Diversions for minimum human health and safety needs under any valid basis of right of not greater than 55 gallons per person per day may continue notwithstanding curtailment of that right without further approval from the Deputy Director, subject to the conditions set forth in this section. Any diverter wishing to continue diversion under this subdivision must submit to the Deputy Director certification, under penalty of perjury, of compliance with the requirements of subdivisions (b)(1)(A)-(E), below. The Deputy Director may request additional information or set additional requirements on continued diversion.

(A) Not more than 55 gallons per person per day will be diverted under all bases of right.

(B) The diversion is necessary to serve minimum human health and safety needs as defined in section 877.1, subdivision (h), after all other alternate sources of water have been used. To the extent other water sources are available, those sources will be used first and the total used will not exceed 55 gallons per person per day.

(C) The diverter and all end users of the diverted water have implemented all available conservation measures and are operating under the strictest existing conservation plan for that place of use, if such a plan exists for the area or service provider. If additional approvals are required before implementation of the conservation regime, the diverter must certify that all possible steps will be taken immediately to ensure prompt approval.

(D) If the diverter or anyone using water under the diverter's basis of right is an Urban Water Supplier, it has declared a water shortage emergency condition and either already has adopted regulations and restrictions on the delivery of water or will adopt conservation and water delivery restrictions and regulations within a timeframe specified by the Deputy Director as a condition of certification.

(E) The diverter has either pursued steps to acquire other sources of water, but has not yet been completely successful, as described in an attached report, or the diverter will pursue the steps in an attached plan to identify and secure additional water.

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

(A) Describe the specific circumstances that make the requested diversion amount necessary to meet minimum human health and safety needs.

(B) Estimate the amount of water needed.

(C) Certify that the supply will be used only for the stated need.

(D) Describe any other additional steps the diverter will take to reduce diversions and consumption.

(E) Provide the timeframe in which the diverter expects to reduce usage to no more than 55 gallons per person per day, or why minimum human health and safety needs will continue to require more water.

(F) As necessary, provide documentation that the use meets the definition of minimum human health and safety needs provided in section 877.1, subdivision (h). For water supplies necessary for fire prevention or firefighting purposes, substantiating documentation, such as guidance from the local fire department, local city or county ordinances, or equivalent local requirements, may be requested by the Deputy Director.

(c) For public water systems with 15 or greater connections and small water systems of 5 to 15 connections, gallons per person per day shall be calculated on a monthly basis and the calculation methodology shall be consistent with the State Water Board's Percentage Residential Use and Residential Gallons Per Capita Daily Calculation (PRV and R-GPCD Calculation), dated September 22, 2020, which is hereby incorporated by reference.

(d) For water supplies necessary for electrical power generation critical to grid reliability, substantiating documentation, such as a letter of support from California Independent System Operator, California Public Utilities Commission, California Energy Commission, or a similar energy grid reliability authority, must be provided.

(e) To the extent necessary to resolve immediate public health or safety threats, a diversion subject to curtailment may continue while a petition under subdivision (b)(2) is being prepared and is pending. The Deputy Director may require additional information to support the initial petition, information on how long the diversion is expected to continue, and a description of other steps taken or planned to obtain alternative supplies.

(f) Notice of certifications, petitions, and decisions under this section and section 878 will be posted as soon as practicable on the State Water Board's drought webpage. The Deputy Director may issue a decision under this article prior to providing notice.

(g) Notwithstanding California Code of Regulations, Title 23, section 1064, a petition pursuant to Water Code section 1435 or 1725 solely for the provision of water for minimum human health and safety, as defined by section 877.1, subdivision (h), shall be accompanied by a filing fee of \$250.

(h) Diversion and use within the Russian River Watershed or Delta Watershed, including Mill Creek and Deer Creek, that deprives water for minimum human health and safety needs in 2022, or which creates unacceptable risk of depriving water for minimum human health and safety needs in 2023, is an unreasonable use of water. The Deputy Director shall prevent such unreasonable use of water by implementing the curtailment methodology described in sections 877.2, 877.3, 877.4, and 877.5 for diversions in the Russian River Watershed, section 876.1 for diversions in the Delta Watershed, and section 876.5 for diversions in the Mill Creek and Deer Creek Watersheds.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 106.3, 275, 1058.5, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183; *Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463; *Stanford Vina Ranch Irrigation Co. v. State of California* (2020) 50 Cal.App.5th 976.

878.2 Alternative Water Sharing Agreements

Water users may propose alternatives to water diversion curtailment that achieve the intent of the curtailment process described under section 876.1 by submitting a proposal to the Deputy Director. Joint proposals must be explicitly agreed to by all participants and describe the setting, the parties, the actions, the provisions for monitoring, record keeping and reporting, and the purported benefits of the proposal in sufficient detail to

demonstrate to the satisfaction of the Deputy Director that implementing the proposal will not injure non-party legal users of water or result in an unreasonable impact on fish and wildlife. In considering a proposal under this section, the Deputy Director may request additional information or consult with other entities that may have technical or legal information that should be considered in evaluating such proposals, including but not limited to the California Department of Water Resources (DWR) and United States Bureau of Reclamation (Reclamation). The Deputy Director will consult with the Delta Watermaster on any proposals among diverters within the Legal Delta. A proposal may be implemented pending review by the Deputy Director provided that potentially affected water right holders and claimants, including but not limited to DWR and Reclamation, concur with the proposal and no objections to the proposal are submitted to the Deputy Director. The Deputy Director may approve a proposal subject to conditions, including record keeping and reporting requirements, and provided that the Deputy Director finds implementing the proposal will not injure non-party legal users of water or result in an unreasonable impact on fish and wildlife. Diversions consistent with a proposal implemented or approved pursuant to this section are subject to this article, and violations of the terms of the proposal shall be subject to enforcement as a violation of this article or as an unauthorized diversion or use of water.

Notice of proposals and decisions under this section will be posted as soon as practicable on the State Water Board's Delta drought webpage. The Deputy Director may issue a decision under this section prior to providing such notice. Any interested person may file a comment or objection to the proposal or decision with the Deputy Director with simultaneous service to the parties who submitted the proposal. The Deputy Director will consider any comment or objection. The State Water Board may hold a hearing on any proposal to which parties have objected, after notice to all interested persons.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 109, 275, 1011, 1011.5, 1051.5, Water Code; *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224.

879 Reporting

(a) All water users or water right holders whose continued diversion may be authorized under section 878.1 are required to submit, under penalty of perjury, information identified on a schedule established by the Deputy Director as a condition of certification or petition approval pursuant to section 878.1. The required information may include, but is not limited to, the following:

- (1) The water right identification numbers under which diversions continue;
- (2) The public water system identification number for any public water system served by the diversions.

(3) How the diverter complies with any conditions of continued diversion, including the conditions of certification under section 878.1, subdivision (b)(1);

(4) Any failures to comply with conditions, including the conditions of certification under section 878.1, subdivision (b)(1), and steps taken to prevent further violations;

(5) Conservation and efficiency efforts planned, in the process of implementation, and implemented, as well as any information on the effectiveness of implementation;

(6) Efforts to obtain alternate water sources;

(7) If the diversion is authorized under an approved petition filed pursuant to section 878.1, subdivision (b)(2), progress toward implementing the measures imposed as conditions of petition approval;

(8) If the diversion is authorized under section 878.1, subdivision (b)(2):

(A) The rate of diversion if it is still ongoing;

(B) Whether the water has been used for any other purpose; and

(C) The date diversion ceased, if applicable.

(9) The total water diversion for the reporting period and the total population served for minimum human health and safety needs. The total population must include actual or best available estimates of external populations not otherwise reported as being served by the water right holder, such as individuals receiving bulk or hauled water deliveries for indoor water use.

(10) Diversion amounts for each day in acre-feet per day, maximum diversion rate in cubic feet per second, and anticipated future daily diversion amounts and diversion rates.

(b) The Deputy Director, or delegee, may issue an order under this article requiring any person to provide additional information reasonably necessary to assess their compliance with this article. Any person receiving an order under this subdivision shall provide the requested information within the time specified by the Deputy Director, but not less than ten (10) days after issuance.

(c) This subdivision applies to Delta Watershed curtailment orders and enhanced reporting to inform water unavailability determinations and the curtailment process described under section 876.1.

(1) All water right holders and claimants issued an initial order pursuant to section 876.1 are required, within the deadlines specified in the initial order but no sooner than seven calendar days following issuance of the order, to submit under penalty of perjury a certification that they have and will continue to take actions needed to comply with section 876.1, including the following actions:

(A) Regularly reviewing information posted on the State Water Board's drought webpage to determine when curtailments are required and when curtailments are suspended or reimposed, or subscribing to the State Water Board's Delta Drought email distribution list to receive updates directly; and

(B) Ceasing diversions of natural and abandoned flow when curtailments are ordered, except to the extent that continuing diversions are authorized in accordance with section 878, 878.1, 878.2, or 879.1 subdivision (b), and ceasing rediversions of water released from storage, except to the extent authorized by a water right or contract.

(2) In addition to the requirements identified under subdivision (c)(1), the Deputy Director may require water right holders and claimants who have been issued an initial order under section 876.1 and whose water right or claim has a total authorized face value or recent annual reported diversion amount of one thousand acre-feet or greater to report the following information by the date specified by the Deputy Director, but no earlier than seven days after receipt of the reporting order and as specified thereafter:

(A) Prior diversions, unless otherwise reported in annual reports of water diversion and use, including direct diversions and diversions to storage. Diversion volumes shall be provided in a daily, weekly, or monthly format, as identified in the order.

(B) Demand projections for subsequent months through October 1, 2023, including direct diversions and diversions to storage. Diversion volumes shall be provided in a daily, weekly, or monthly format, as identified in the order.

(C) Before issuing orders issued pursuant to subdivision (c)(2) to water right holders and claimants in the Legal Delta, the Deputy Director will consult with and obtain the concurrence of the Delta Watermaster.

(3) In order to inform curtailment decisions, the Deputy Director, or the Delta Watermaster for rights in the Legal Delta, may issue informational orders under subdivision (c) of this section requiring a water right holder,

diverter, or user to provide additional information related to a diversion or use of water in the Delta Watershed, including but not limited to: additional reporting of water diversions and use; the basis of right with supporting documents or other evidence; property patent date for the place of use; the date of initial appropriation; anticipated or actual water transfer amounts; or any other information relevant to forecasting demands and supplies and determining compliance with curtailment orders in the current drought year or in contingency planning for continuation of the current drought emergency. Informational orders may require reporting of diversions made in prior months and diversions anticipated during subsequent months on a recurring, monthly basis.

(4) Any water right holder or claimant receiving an order under subdivision (c) of this section shall provide the requested information within the deadlines specified therein, including any recurring deadlines associated with ongoing reporting requirements as applicable. The Deputy Director, or the Delta Watermaster for rights in the Legal Delta, may grant additional time for submission of information upon substantial compliance with the specified deadline and a showing of good cause. Information provided pursuant to subdivision (c) of this section shall be submitted in an online form maintained by the State Water Board and accessible through its website, or in an electronic format as specified by the Deputy Director or Delta Watermaster.

(5) Failure to provide the information required under subdivision (c) of this section within the deadlines specified in the order or any time extension granted by the Deputy Director, or the Delta Watermaster for rights in the Legal Delta, is a violation subject to civil liability of up to \$500 per day for each day the violation continues pursuant to Water Code section 1846.

(6) In determining whether to impose reporting requirements under subdivision (c) of this section, the Deputy Director and Delta Watermaster will consider the need for the information for purposes of informing curtailment decisions and the burden of producing it, and will make reasonable efforts to avoid requiring duplicative reporting of information that is already in the State Water Board's possession.

(7) All orders issued under subdivisions (c)(2) and (c)(3) shall be subject to reconsideration under article 2 (commencing with section 1122) of chapter 4 of part 1 of division 2 of the California Water Code.

Authority: Sections 1058, 1058.5, Water Code

Reference: Sections 100, 187, 275, 348, 1051, 1058.5, 1841 Water Code.

879.1 Conditions of Permits, Licenses and Registrations

(a) Compliance with this article, including any conditions of certification or approval of a petition under this article, shall constitute a condition of all water right permits, licenses, certificates and registrations for diversions from any watershed identified in this article.

(b) Diversions may continue after the issuance of a curtailment order to the extent the maintenance of a mechanism allowing for the bypass of natural or abandoned flow is not conditioned in a water right permit, license, stockpond certificate, or registration not exceeding a total authorized face value of ten acre-feet per year.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1253, 1058.5, Water Code; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

879.2 Compliance and Enforcement

(a) A water user must comply with a curtailment order issued under this article, any updates to the curtailment status list, all conditions of certification or approval of a petition under this article, and all water right conditions under this article, notwithstanding receipt of more than one curtailment order. To the extent of any conflict between applicable requirements, the diverter must comply with the requirements that are the most stringent.

(b) When conducting an inspection to assess a diverter's compliance with this article, the State Water Board may obtain an inspection warrant pursuant to the procedures set forth in Title 13 (commencing with Section 1822.50) of Part 3 of the Code of Civil Procedure where access is not granted by the property owner.

(c) Failure to meet the requirements of this article or of any order issued thereunder constitutes a violation subject to civil liability pursuant to Water Code section 1846, and an infraction pursuant to Water Code section 1058.5, subdivision (d), each of which can carry a fine of up to five hundred dollars (\$500) for each day in which the violation occurs.

(d) Nothing in this section shall be construed as limiting the enforceability of or penalties available under any other provision of law.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 275, 1052, 1055, 1058.5, 1825, 1831, 1846, Water Code; Sections 1822.50 et al., California Code of Civil Procedure; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

879.3 Redelegation of Authorities

Authorities delegated to the Deputy Director under this article may be redelegated.

Authority: Sections 1058, 1058.5, Water Code

Reference: State Water Resources Control Board Resolution No. 2012-0029