

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

DIVISION OF WATER RIGHTS

ORDER WR 2021-0096 EXEC

In the Matter of Petition for Reconsideration of

City of Cloverdale

Regarding Curtailment of Statement of Diversion and Use S014237

SOURCES: Russian River

COUNTY: Mendocino

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The City of Cloverdale (Cloverdale or Petitioner) has petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of an August 2, 2021 Order (curtailment order, or curtailment) issued pursuant to a drought emergency regulation (the Regulation). The curtailment order requires that Cloverdale cease all surface water diversions from the Upper Russian River watershed pursuant to a pre-1914 water right claimed by Cloverdale through Statement of Diversion and Use S014237, or seek an exception for diversions falling within the Regulation's definition of "minimum human health and safety needs."

¹ State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of a water right curtailment order falls within the scope of the authority delegated under Resolution No. 2012-0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

Petitioner raises several challenges to the curtailment order in question. Specifically, Petitioner states that the State Water Board lacks any legal authority to regulate pre--1914 appropriative water rights, that the curtailment unlawfully contravenes the rule of priority, that curtailment is not supported by substantial evidence, and that curtailment of Cloverdale's surface water rights violates its right to due process.

Cloverdale's Petition for Reconsideration is denied because each of its arguments fails on the merits, as explained in detail below. The August 2, 2021 curtailment order is a valid exercise of the authority delegated to the Deputy Director for the Division of Water Rights (Deputy Director) under the Regulation, specifically under California Code of Regulations, Title 23, section 877.3. As this Order explains, the adoption and application of the Regulation comports with the most recent and factually relevant precedential decisions addressing the Board's authority to adopt emergency regulations authorizing water right curtailments—decisions that have considered and rejected many of the very same arguments that are central to Cloverdale's Petition for Reconsideration and which the Petition fails to acknowledge.²

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a water rights decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(Cal. Code of Regs., tit. 23, § 768.)

A petition must specify the specific Board action for which the petitioner requests reconsideration, "the reason the action was inappropriate or improper," "the specific action which petitioner requests," and must contain "a statement that copies of the petition and accompanying materials have been sent to all interested parties." (Cal. Code of Regs., tit. 23, § 769, subds. (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).)

² Petitioner's arguments regarding due process and the rule of priority all were raised in substantially the same form by *amici curiae* in *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976. In addition to rejecting Stanford Vina Ranch Irrigation Co.'s claims, the court summarily rejected all of the *amici* arguments in a footnote, such was the settled state of the law. (*Id.* at 986, n. 2.)

A Petition for Reconsideration must be timely filed within 30 days of the decision or order at issue. (Cal. Code of Regs., tit. 23, § 768.) 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. (*Id.*, § 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.*, subds. (a)(2)(A)-(C).) The State Water Board may elect to hold a hearing on the Petition for Reconsideration.

3.0 CLOVERDALE'S PROCEDURAL REQUESTS

3.1 Cloverdale's Request to Hold Petition in Abeyance

Petitioner has requested that the State Water Board hold its petition in abeyance to allow Cloverdale to continue working on local cooperative efforts. In response to questions from State Water Board legal counsel, Cloverdale submitted a declaration detailing the reasons for its abeyance request. Petitioner asserts that local cooperative efforts are making progress, have the potential to resolve the issues raised by the Petition, and that pursuing its legal remedies in support of the Petition would draw scarce city resources away from those efforts.

Petitioner's abeyance request is denied. The State Water Board has remained actively engaged in the same local cooperative efforts as Petitioner, and therefore is aware that they are aimed at developing ways to avoid curtailments in the succeeding water year, not this year. The success of those efforts therefore has no potential to affect the factual or legal bases for Cloverdale's curtailment this year. Additionally, scarce resources, alone—which every petitioner has—are an insufficient basis for holding a petition in abeyance. The public interest weighs in favor of prompt resolution of the issues raised by the Petition and would not be served by needless delay of this Order.

3.2 Cloverdale's Request for a Hearing

The Petition includes a request for a hearing. Under California Code of Regulations, Title 23, section 770, subdivision (a)(2)(C), the Board may elect to hold a hearing prior to taking action on a Petition for Reconsideration. In this instance, however, a hearing would not meaningfully inform the issues raised by the Petition. The Petition raises legal arguments only; none of the facts discussed therein have any bearing on the Regulation's criteria for curtailment. In that context, the Petition itself and the body of law governing the scope and application of the State Water Board's authority to curtail water use together provide a sufficient basis to take action on the Petition. The request for a hearing is denied.

4.0 LEGAL AND FACTUAL BACKGROUND

4.1 Drought Conditions in The Russian River Watershed

On April 21, 2021, Governor Gavin Newsom declared a drought state of emergency in Mendocino and Sonoma counties due to drought conditions in the Russian River Watershed (April 2021 Proclamation). The April 2021 Proclamation provides specifically:

To address the acutely dry conditions in the Russian River Watershed, the Water Board shall consider:

- a. Modifying requirements for reservoir releases or diversion limitations in that watershed to ensure adequate, minimal water supplies for critical purposes.
- b. Adopting emergency regulations to curtail water diversions when water is not available at water rights holders' priority of right or to protect releases of stored water.

As of April 2021, the U.S. Drought Monitor classified 100% of California as at least abnormally dry, and almost the entire state of California as experiencing severe to exceptional drought conditions (National Drought Mitigation Center; U.S. Department of Agriculture; National Oceanic and Atmospheric Administration, 2021). By May 18, 2021, most of the Russian River watershed was updated from Extreme Drought to Exceptional Drought (National Drought Mitigation Center; U.S. Department of Agriculture; National Oceanic and Atmospheric Administration, 2021).

These exceptionally dry conditions have resulted in unprecedented drawdown of the two main reservoirs that supply water for important economic and basic human beneficial uses within the watershed, Lake Mendocino and Lake Sonoma. As of September 16, 2021, Lake Mendocino was at 25% of its target water supply curve and Lake Sonoma was at 45.8% of water supply capacity. For both reservoirs, these storage levels represent the lowest on record for this date.

Beginning in July 2020, the State Water Board had engaged in regular, extensive stakeholder outreach within the Russian River watershed to gather detailed information about persistent dry conditions and to encourage potential opportunities for collaborative alternatives to mandatory curtailments. By the time Governor Newsom issued the April 2021 Proclamation, however, there was so little water in storage that the parties had all but exhausted the potential for coordinated water sharing to avoid curtailments in 2021. The Sonoma County Board of Supervisors declared a local drought emergency on April 27, 2021, stating there is "...a real threat of [Lake Mendocino] going dry this year." Modeling projections prepared by Sonoma County Water Agency (Sonoma Water) at the request of State Water Board staff showed that, should then-current hydrologic conditions and typical losses from the river related to

diversions, evaporation, and seepage persist until October 1, Lake Mendocino would empty at some point in the next year in 10 out of the 108 years of historical conditions used to simulate potential future conditions. The human and ecological consequences of Lake Mendocino emptying would be dire, given its role in supplying water necessary for both minimum human health and safety and protected fisheries along the Russian River upstream of its confluence with Dry Creek.

On May 25, 2021, the State Water Board issued Notices of Water Unavailability for 2021 (Notice of WUA). The Notice of WUA advised that water is unavailable as of June 1, 2021, for junior water right holders with a post-1914 priority date in the Russian River Watershed upstream of the Dry Creek confluence. The Notice of WUA also warned more senior water right holders, including pre-1914 appropriative right holders and riparian right holders, to conserve water and that development of an emergency regulation was under consideration. This informational notice did not encourage enough water users to reduce diversions sufficient to increase flows along the Russian River. Following issuance of the Notice of WUA, reach losses—reductions in stream flow due to diversions, evaporation, or losses to groundwater—either stayed the same or *increased*. Lake Mendocino storage levels continued to drop at an alarming rate.

4.2 Russian River Drought Emergency Regulation

On June 15, 2021, the State Water Board adopted an emergency regulation for Curtailment of Diversions to Protect Water Supplies and Threatened and Endangered Fish in the Russian River Watershed. (State Water Board Resolution No. 2021-0023 (adding sections 877, 877.1, 877.2, 877.3, 877.4, 877.5, 877.6, 878, 878.1, 879, 879.1 and 879.2 to California Code of Regulations, Title 23 [the Regulation]).) The Office of Administrative Law approved the Regulation and it went into effect on July 12, 2021.

The Regulation establishes drought emergency curtailment methodologies for the Russian River watershed and authorizes limited diversions for “minimum human health and safety needs,” as defined, to continue notwithstanding curtailment under certain circumstances. Section 878.1, subdivision (g), provides:

Diversion and use within the Russian River Watershed that deprives water for minimum human health and safety needs in 2021, or which creates unacceptable risk of depriving water for minimum human health and safety needs in 2022, is an unreasonable use of water. The Deputy Director shall prevent such unreasonable use of water by implementing the curtailment methodology described in section 877.2 for diversions in the Lower Russian River Watershed and sections 877.3, 877.4, 877.5, and 877.6 for diversions in the Upper Russian River Watershed.

Under section 877.3, when Sonoma Water is releasing stored water from Lake Mendocino for inbasin needs and Lake Mendocino storage levels have fallen below the thresholds specified in section 877.4, diversions from the Upper Russian River watershed that do not fall within one of the Regulation’s exceptions are declared an unreasonable use and are prohibited. In other words, when the conditions in section

877.3 are met, the only lawful basis for diversion is an authorized exception to curtailment, such as “minimum human health and safety needs” or a non-consumptive use. Pursuant to section 877.3, subdivision (b), the Board delegated authority to the Deputy Director for the Division of Water Rights (Deputy Director) to issue curtailment orders to implement the requirements of section 877.3. Notably, because curtailment authority in the Upper Russian River watershed is not triggered until Lake Mendocino falls below the storage targets in section 877.4, water users could have avoided the issuance of curtailment orders by undertaking voluntary conservation measures that slowed drawdown effectively enough to keep Lake Mendocino above those storage targets.

On July 26, 2021, section 877.3’s curtailment criteria were met, triggering issuance of curtailment orders on August 2, 2021, to all water right holders diverting from the Upper Russian River watershed. The curtailment orders required the recipient to certify that it would cease its diversions except for those authorized by one of the Regulation’s express exceptions to curtailment. Curtailment orders further directed water right holders to log onto an online portal where they could follow the Regulation’s procedures for authorizing continued diversions, as applicable to their situation: a certification for non-consumptive uses or for minimum human health and safety diversions under 55 gallons per person per day (gpcd), or a petition requesting approval of minimum human health and safety diversions in excess of 55 gpcd.

On September 1, 2021, the State Water Board received Cloverdale’s Petition for Reconsideration of its curtailment order.

5.0 ANALYSIS

5.1 Legal Authority

Petitioner advances several arguments that the State Water Board lacks any jurisdiction to regulate, much less curtail, pre-1914 appropriative water rights. The Petition further argues that Cloverdale’s curtailment order was not supported by substantial evidence because it failed to make individualized findings specific to Cloverdale’s diversion and use. The Petition fails to acknowledge, much less meaningfully distinguish, the recent, factually relevant, precedential legal authority to the contrary, some of which expressly rejects Petitioner’s arguments. The Finding of Emergency makes clear that this legal authority is the basis for the Regulation that authorized curtailment of Cloverdale’s water rights. Additionally, Petitioner misunderstands the legal prerequisites for a curtailment order issued pursuant to a regulation establishing a per se rule governing unreasonable use. Therefore, for the reasons provided below, Petitioner’s arguments must fail on the merits.

The State Water Board has “authority to prevent illegal diversions and to prevent waste or unreasonable use of water, *regardless of the basis under which the right is held.*” (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1487

[quoting *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 429 (internal quotation marks omitted)] [emphasis added]; see also *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, 999-1004.) This legal authority thus extends to actions affecting pre-1914 appropriative water rights and includes adoption of regulations establishing per se rules declaring a use of water unreasonable. (*Light, supra*, 226 Cal.App.4th at pp. 1484-85.) During a declared drought emergency, Water Code section 1058.5 authorizes the State Water Board to adopt emergency regulations to prevent unreasonable use and require curtailment of diversions when water is not available under a diverter's priority of right.

Section 877.3 of the Regulation sets forth a bright-line rule for identifying the circumstances under which a use of water in the Upper Russian River watershed is unreasonable. Specifically, if Lake Mendocino storage levels drop below thresholds in section 877.4 and Sonoma Water is releasing supplemental storage water to satisfy inbasin uses,³ diversions from the Upper Russian River watershed are per se unreasonable, unless they fall within one of the Regulation's authorized exceptions. This bright-line rule does not hinge on the actual availability of natural or abandoned flows at a particular water user's level of priority. Rather, it represents a risk threshold beyond which it is unreasonable to draw down Lake Mendocino any further except for what the State Water Board has deemed the most essential uses of water during this drought emergency. This same risk threshold informed the Board's finding that any natural or abandoned inflows to Lake Mendocino must be devoted toward minimum human health and safety needs to prevent the unreasonable use of water that would result if these needs went unmet.⁴ (See Resolution No. 2021-0023, para. 15.)

³ "Inbasin Uses" is a term defined in the Regulation as "diversions from the Mainstem of the Upper Russian River to meet minimum human health and safety needs, Reach Losses, and minimum flows required for protection of fish and wildlife as required by a water right permit or license term, including any enforceable modifications of the foregoing. Export diversions, deliveries scheduled by the Flood Control District pursuant to License 13898, and Reach Losses associated with those exports and deliveries are specifically excluded from the definition of Inbasin Uses." (Cal. Code of Regs., tit. 23, § 877.3, subd. (c)(1).)

⁴ The Petition asserts that the Board's findings regarding Lake Mendocino levels and stream flows are not supported by substantial evidence because the Board has not proved that the monitoring stations and stream flow gages it relied upon to determine that conditions in section 877.3 were met are the best available sources of information. The Petition did not include, within its supporting evidence, any contrary data tending to discredit the Board's reliance on these monitoring stations and stream flow gages. Since the date of the curtailment order, Lake Mendocino storage levels have, by any measure, continued to fall, indicating that the conditions described in section 877.3 have been present since issuance of the curtailment order through at least October 21, 2021.

The Regulation gives effect to the Board's findings regarding unreasonable use by expressly authorizing the Deputy Director to issue curtailment orders and allows certain limited diversions to minimum human health and safety needs to continue notwithstanding curtailment. This exception ensures that curtailment will not result in deprivation of the human right to water or create conditions that jeopardize the safety of local communities. Invoking this exception to curtailment requires the water right holder to abide by certain requirements to ensure accountability and prevent abuse, such as regular reporting, conservation, and due diligence with respect to obtaining alternative sources of water.

5.2 Cloverdale's Curtailment Does Not Violate the Rule of Priority

Petitioner argues that curtailing Cloverdale, a senior water right holder, while allowing other, more junior water users to divert for minimum human health and safety needs violates California's rule of priority. Here, as with its arguments regarding the Board's authority, Petitioner has not acknowledged or addressed the most recent and relevant judicial precedent on point. As explained below, these precedents thoroughly refute Petitioner's arguments concerning the rule of priority.

All water rights in California, both riparian and appropriative, are constrained by two limiting principles: (1) the rule of reasonableness, and (2) the public trust doctrine. (*Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, 994 [*Stanford Vina*].) “[T]he rule of priority is not absolute, nor is the Board without power to act contrary to that rule in appropriate circumstances. Sometimes, a competing principle or interest may justify the Board's taking action inconsistent with a strict application of the rule of priority. [...] [W]hen the rule of priority clashes with the rule against unreasonable use of water, the latter must prevail.” (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 965-66 [*EID*]; see also *Light, supra*, 226 Cal.App.4th at p. 1489 “[T]he Board has the ultimate authority to allocate water in a manner inconsistent with the rule of priority, when doing so is necessary to prevent the unreasonable use of water.”.)

The Regulation and its implementation in the Upper Russian River watershed did not impose any limitation on senior water right holders that it did not also impose on junior water right holders. The State Water Board issued curtailment orders to every single water right holder diverting surface water from the Upper Russian River watershed; no water user junior to Petitioner was exempted. Additionally, all curtailed water users—including Petitioner—may avail themselves of the Regulation's authorized exceptions to curtailment for minimum human health and safety diversions or non-consumptive uses.

To the extent Petitioner complains that allowing curtailed water right holders to divert water for minimum human health and safety violates the rule of priority, the Regulation falls squarely within the legal authority quoted from *EID*, above. Specifically, the Regulation finds that “[d]iversion and use within the Russian River Watershed that deprives water for minimum human health and safety needs in 2021, or which creates

unacceptable risk of depriving water for minimum human health and safety needs in 2022, is an unreasonable use of water.” (Cal. Code of Regs., tit. 23, § 878.1, subd. (g); see also State Water Board Resolution No. 2021-0023, para. 15 [“To the extent quantifiable water is conserved in storage as a result of curtailment of diversions of extremely limited inflows of abandoned water from the Potter Valley Project and tributaries of the Upper Russian River, the storage of water is necessary to protect human health and safety needs.”].) Under the Regulation, to the extent any natural or abandoned flows—however small—may be present while section 877.3’s curtailment triggers are met, it would be unreasonable to deprive or risk depriving water for minimum human health and safety needs by allocating that water to a senior right holder based on its priority. This finding represents the Board’s judgment that, within the specific context of this drought emergency, strict application of the rule of priority would clash with constitutional prohibition against the unreasonable use of water. As the *EID* Court concluded, under such circumstances, the latter must prevail.

5.3 Cloverdale’s Curtailment Provided All the Process That Could Be Due

Petitioner asserts that the Regulation’s finding of unreasonable use required an opportunity for an individualized pre-deprivation hearing to consider that finding’s application to Cloverdale’s water right, specifically. This contention fails to acknowledge or address contrary precedent and is without merit.

It is now well-established that the State Water Board possesses legal authority to adopt regulations declaring that a particular use of water under given circumstances is unreasonable without the requirement to conduct a hearing as to any individual water right. (*Stanford Vina*, *supra*, 50 Cal.App.5th at p. 1004 [citing *Light*, *supra*, 226 Cal.App.4th at pp. 1484-85].) *Stanford Vina* arose from a challenge to an emergency regulation that the State Water Board adopted during the previous drought and which established minimum flow requirements to protect two threatened species of anadromous fish, spring-run Chinook salmon and steelhead trout, during their respective migratory cycles. The regulation declared that diversion and use that caused flows to fall below thresholds specified in the regulation were a “waste and unreasonable use of water,” with certain exceptions, and authorized the issuance of curtailment orders to enforce this prohibition. Like Cloverdale, plaintiff *Stanford Vina* Ranch Irrigation Company argued that making such a finding by regulation without holding a hearing deprived it of its constitutional right to due process.

The *Stanford Vina* court rejected this claim, pointing to the broad regulatory authority granted to the State Water Board under article X, section 2 of the California Constitution to prevent waste and unreasonable use, as well as express authority in Water Code section 1058.5 to adopt emergency regulations for that purpose. The court distinguished the precedents finding that an adjudicative hearing is required by noting that those cases all involved an individualized, ad hoc finding of unreasonableness, not a legislative or quasi-legislative per se rule of unreasonableness. On this point, the court concluded:

While we acknowledge that in the absence of a per se rule of unreasonableness, the determination of whether Stanford Vina's water use was reasonable or not would necessarily have been determined ad hoc, adjudicatively, this does not mean due process requires the Board to hold an evidentiary hearing before engaging in the legislative function of promulgating a regulation defining diversions of water under certain emergency circumstances to be per se unreasonable. Such a requirement would turn the regulatory process on its head. Nor did the Board violate article X, section 2 by failing to hold such a hearing. As we held in [*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585], the Legislature may, consistent with this constitutional provision, legislate per se rules of unreasonable use. [...] So too may the Board.

(*Id.* At p. 1003-04.)

Here, as in *Stanford Vina*, the State Water Board adopted a drought emergency regulation that included a quasi-legislative, per se rule of unreasonableness pursuant to article X, section 2 of the California Constitution. An evidentiary hearing to evaluate that finding specifically as applied to Cloverdale's water rights was not required.

Nor did due process require a hearing to evaluate application of the Regulation's curtailment criteria prior to issuance of the curtailment order. "[D]ue process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Matthews v. Eldridge* (1976) 424 U.S. 319, 334.) Rather, in determining if notice and opportunity to be heard was adequate, a reviewing court considers: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the private interest; and (3) the Government interest, including the function involved and the fiscal and administrative burdens. (*Id.* at 335.)

As already discussed, Petitioner does not have a vested right to the unreasonable use of water. The per se rule of reasonableness embodied in sections 878.1, subdivision (g), and 877.3 of the Regulation establishes conclusively that continued diversions under Cloverdale's pre-1914 water right without an authorized exception would constitute unreasonable use. The risk of an erroneous deprivation is miniscule given that Cloverdale's curtailment occurred pursuant to application of a bright-line rule based on public, readily verifiable information. A hearing therefore has no potential to change application of the legally relevant criteria. Finally, providing the right to a hearing prior to each curtailment would far outstrip the State Water Board's limited resources at a time when the Board is committed to managing drought conditions throughout the state. With over a thousand curtailments underway in the Russian River watershed alone, and tens of thousands across the state, providing each curtailed diverter with the opportunity for a hearing before issuance of a curtailment order would present an impractical administrative burden that would render the directives contained in the Water Code and the Governor's Drought Proclamation impossible. Most importantly, it would delay the cessation of diversions that is urgently necessary to ensure that Californians do not run out of drinking water.

For all of the foregoing reasons, due process did not require a hearing prior to curtailing Cloverdale's water rights. Should the State Water Board's Office of Enforcement initiate enforcement action against Cloverdale for violation of the Regulation, and assuming there is a material issue of disputed fact relevant to the alleged violation or the appropriate remedy, Cloverdale will have an opportunity for an evidentiary hearing.

6.0 CONCLUSION

Cloverdale's Petition for Reconsideration is denied because it fails on the merits, for the reasons explained above. The curtailment order was duly issued in accordance with applicable legal authority and did not violate any of the substantive or procedural rights asserted by Petitioner.

ORDER

The State Water Board finds that the challenged actions were appropriate and proper. Accordingly, Petitioner's Petition for Reconsideration is denied.

October 29, 2021

Dated



Eileen Sobeck
Executive Director