

CHANGE SHEET #1 – BOARD MEETING ITEM #5

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

Changes in ~~strike through~~ are previously proposed deletions to the existing sections of Title 23, Division 3, Chapter 2, Article 24 of the California Code of Regulations that were identified in the draft emergency regulation released on July 23, 2021.

Changes in underline are previously proposed additions to proposed sections of Title 23, Division 3, Chapter 2, Article 24 of the California Code of Regulations that were identified in the draft emergency regulation released on July 23, 2021.

Changes in ~~red double strikethrough~~ are new deletions made since the draft emergency regulation was released on July 23, 2021.

Changes in red double underline are new additions made since the draft emergency regulation was released on July 23, 2021.

On page 1, modify the title of section 876.1 as follows:

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

On page 1, modify section 876.1, subdivisions (a) through (c) as follows:

- (a) This section applies to ~~direct water~~ diversions and diversions to storage, of natural and abandoned flows, in the Delta Watershed as defined in section 877.1.
- (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, and 878.2. ~~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.~~

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(c) Initial orders requiring curtailment or reporting ~~as defined in section 877.1~~ 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 (d)(1) and will either require curtailment or will instruct water right holders or claimants 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.

On pages 2 and 3, add section 876.1, subdivision (d)(5), and renumber section 876.1, subdivisions (d)(5) and (d)(6) as follows:

(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.

~~(5)(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.

~~(6)(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 July 23, 2021, 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 July 23, 2021 Water Unavailability Methodology for the Delta Watershed summary report and were established based on Hydrologic Unit Code level 8 watersheds.

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On page 3, modify section 876.1, subdivision (e) as follows:

(e) Upon receipt of an initial order pursuant to this section, 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 or is disconnected and curtailment would not make water available to serve senior downstream water rights or claims. Any such propos~~ed priority date correction~~ and all supporting information and analysis shall be submitted to the Deputy Director within 14 days of receipt of the initial order. Proposals ~~for priority date corrections~~ , supporting information, and analyses submitted more than 14 days after receipt of an initial order may be considered to support corrections in advance of future curtailments. The Deputy Director will review timely-provided proposals and supporting information and analyses as soon as practicable, make a determination regarding the ~~proposal appropriate water right priority date~~ , and inform the affected water right holder or claimant of any appropriate update ~~to the priority date used~~ for purposes of water diversion curtailment orders. Before making any determinations ~~regarding proposed corrections to the priority date of water right holders or claimants who divert~~ within the Legal Delta, the Deputy Director will consult with the Delta Watermaster.

On pages 3 and 4, modify section 876.1, subdivision (g) as follows:

(g) The Deputy Director ~~will may~~ 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, ~~t~~ The Deputy Director will promptly 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.

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On page 4, under section 876.1, add references as follows:

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.

On page 6, modify section 877.1, subdivision (k), add new section 877.1, subdivision (l), renumber previous section 877.1, subdivision (l), and add section 877.1, subdivision (n) as follows:

(k) “Delta Watershed” or “Sacramento-~~San~~ 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 Watershed Boundary Dataset* which is incorporated by reference herein.

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

~~(l)~~(m) “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.

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

On page 6, under section 877.1, add references as follows:

Reference: Cal. Const., Art., X § 2; Sections 100, 100.5, 104, 105, 106.3, 275, 1058.5, 12220, 85230, Water Code; *Environmental Defense Fund v. East Bay Muni. Util. Dist.* (1980) 26 Cal.3d 183.

On page 8, under section 878, add references as follows:

Reference: Cal. Const., Art. X, § 2; Sections 100, 187, 275, 348, *85003, subdivisions (a) and (b)*, Water Code

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On page 9, modify section 878.1, subdivision (b)(1)(D) as follows:

(D) If the diverter is a distributor of a public water supply under Water Code sections 350 et seq., that 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.

On pages 11 and 12, modify section 878.2 as follows:

Water users may propose alternatives to water diversion curtailment that achieve the purposes of the curtailment process described under section 876.1 by submitting a proposal to the Deputy Director. Proposals must 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 ~~approved~~ proposal shall be subject to enforcement as a violation of this article or as an unauthorized diversion or use of water.

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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.

On page 12, under section 878.2, add references as follows:

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.

On pages 14 and 15, modify section 879, subdivision (d) as follows:

(d) 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) Subscribing to the State Water Board’s Delta Drought email distribution list to receive updates directly or frequently checking the State Water Board’s drought webpage; and~~

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- ~~(C)~~(B) Ceasing ~~water~~ 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 or 878.2.
- (2) In addition to the requirements identified under subdivision (d)(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, 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, 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 (d)(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, t~~~~he~~ Deputy Director, or the Delta Watermaster for rights in the Legal Delta, may issue informational orders under this subdivision 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.

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- (4) Any water right holder or claimant receiving an ~~informational~~ order under this subdivision 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 this subdivision 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 of the Delta Watermaster.
- (5) Failure to provide the information required under this subdivision 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 this subdivision, the Deputy Director and Delta Watermaster will consider the need for the information and the burden of producing it, and will take reasonable efforts to avoid requiring duplicative reporting of information that is already in the Board's possession.

On page 15, under section 879, modify references as follows:

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