

August 24, 2021

Curtailments Ordered in the Delta Watershed

Water Law

By: [Douglas Wance](#) and [Vanessa LeFort](#)

On August 20, 2021, the Deputy Director of the Division of Water Rights (Deputy Director) of the State Water Resources Control Board (State Water Board) issued water curtailment orders for the remainder of August and for all of September to approximately 4,500 water right holders in the Sacramento-San Joaquin Delta watershed (Delta Watershed). These curtailment orders affect post-1914, pre-1914, and riparian rights, though in different ways, as described further below. The orders also include reporting requirements, with more extensive reporting required for those diverting 5,000 AFY or greater. The orders are called initial orders (Orders) and hard copies were sent to water right holders via snail mail. (Orders:

https://www.waterboards.ca.gov/drought/delta/docs/082021_order_sm.pdf [$< 5,000$ AFY];
https://www.waterboards.ca.gov/drought/delta/docs/082021_order_lg.pdf [$\geq 5,000$ AFY])

Affected Watersheds

The overall area affected by the curtailments is shown in the first map below, which shows the Delta Watershed boundary, with the adjudicated portion referred to in Water Code section 12220 (Legal Delta) shown in black cross-hatch. The second map shows subwatersheds within the Delta Watershed, including the Sacramento River and San-Joaquin River watersheds.



Curtailments Ordered

The curtailments ordered on August 20, 2021 affect water right holders in the Delta Watershed differently based on the month, priority, and location within the Delta Watershed:

Curtailments Ordered for the Remainder of August

1. **All post-1914** appropriative water rights in the **Delta watershed** (including the Sacramento River and San Joaquin River watersheds and the Legal Delta);
2. **All pre-1914** appropriative water right claims in the **San Joaquin River watershed**;
3. **All pre-1914** appropriative water right claims in the **Sacramento River watershed and in the Legal Delta** with a priority date of **1883 or later**;
4. **Some pre-1914** appropriative water right claims on **specific tributaries to the Sacramento River** with a priority date **earlier than 1883**; and
5. **All riparian** water right claims in the **Calaveras subwatershed that are outside of the Legal Delta**.*

Curtailments Ordered for September, Unless the State Water Board Advises Otherwise

1. **All post-1914** appropriative water rights in the **San Joaquin River watershed**;
2. **All pre-1914** appropriative water right claims in the **San Joaquin River watershed**;
3. **All riparian** water right claims in the **American River watershed upstream of Folsom Reservoir**;
4. **A subset of Central Valley Project and State Water Project water rights** in the **Sacramento River watershed and in the Legal Delta**;
5. **Some pre-1914** appropriative water right claims **and post-1914** appropriative water rights on **specific tributaries to the Sacramento River**; and
6. **All riparian** water right claims in the **Calaveras subwatershed that are outside of the Legal Delta**.*

* Riparian water right claims in the Calaveras subwatershed that are outside the Legal Delta were not included with the hard copy Orders that were mailed on August 20, 2021. The State Water Board's website, however, states: "These water right claims . . . should be curtailed until further notice by the State Water Board. Because of deferred notice to riparian claimants with diversions in the Calaveras subwatershed that are outside of the Legal Delta, curtailment of these claims is required as soon as notice is provided but no later than August 27, 2021."
(<https://www.waterboards.ca.gov/drought/delta/#tableau>)

The Orders were issued pursuant to emergency regulations for the Delta Watershed that became effective on August 19, 2021 (Delta Regulations). For a discussion of the Delta Regulations, including available exceptions to curtailment, please see our prior alert on the topic (<https://www.buchalter.com/publication/emergency-regulations-allow-curtailments-in-the-delta-watershed/>).

Requirement to Subscribe to Email Distribution List / Monitor Delta Drought Website

Water right holders are required either to subscribe to the Delta Drought email distribution list or to check the Delta Drought webpage frequently (www.waterboards.ca.gov/drought/delta/). It is the responsibility of the water right holder, claimant, or agent of record to remain informed regarding whether their water rights are currently curtailed.

All future communications regarding changes in water availability, including notices of required curtailments and modifications of curtailment orders, will be sent by email to the State Water Board's Delta Drought email distribution list and will be posted on the State Water Board's Delta Drought webpage—hard copy notices will not be mailed.

Key Dates in Responding to the August 20, 2021 Curtailment Orders**(1) Compliance Certification Forms**

September 3, 2021—Water right holders are required to submit, under penalty of perjury, an online Compliance Certification Form for each water right or claim of right by September 3, 2021. The Compliance Certificate Form is accessible using the portal at <https://public.waterboards.ca.gov/>. The certification must confirm compliance with the curtailment order, except to the extent that continuing diversions are authorized pursuant to curtailment exceptions the water right holder is pursuing or to the extent that rediversions of water released from storage are authorized by a water right or contract.

September 10, 2021—Water right holders seeking an exception to curtailment now or possibly in the future in order to continue diversions must submit their exception requests by September 10, 2021, using the forms available at the portal <https://public.waterboards.ca.gov/>. Additional certifications and documentary support are required when a water right holder seeks to continue diverting water, such as when pursuing an exception to curtailment for non-consumptive use (section 878 of the Delta Regulations) or minimum health and safety needs (sections 878.1, 879(d)).

The State Water Board will hold a Compliance Assistance Webinar to explain reporting requirements, including certification requirements, on August 31, 2021.

(2) Proposals

Proposals to Correct Water Right Priority Date or That Curtailment May Not Be Appropriate:

Within 14 days of receiving the initial order (which was mailed by the Deputy Director on August 20, 2021), the water right holder may submit a proposal to correct the water right priority date and/or submit a proposal that curtailment may not be appropriate as demonstrated by verifiable facts, such as that an adjudicated stream system is disconnected and curtailment would not make water available to serve senior downstream water rights (section 876.1(e) of the Delta Regulations). Proposals must include all supporting information and analysis. The Deputy Director will review timely proposals as soon as practicable, make a determination, and inform the water right holder of any appropriate update to the curtailment order. Proposals submitted more than 14 days after receipt of an initial order may be considered to support corrections in advance of future curtailments. Submit proposals to Bay-Delta@waterboards.gov.

Proposals for Alternative Water Sharing Agreements:

There is no deadline for the submission of proposals for alternative water sharing agreements that achieve the purposes of curtailment (section 878.2 of the Delta Regulations). Such proposals can

be submitted at any time, but they may not be implemented instead of complying with a curtailment order, unless all potentially affected water right holders and claimants concur with the proposal, or it has been approved by the Deputy Director. Submit proposals to Bay-Delta@waterboards.gov.

(3) Requests for Reconsideration

September 20, 2021—A water right holder may submit a petition to request that the State Water Board reconsider the order. Such petitions must be filed with the State Water Board no later than September 20, 2021. Absent a timely petition, a court challenge could be limited or possibly barred depending on the circumstances.

Enforcement

The Orders state that the State Water Board may enforce the Orders by levying fines, issuing cease and desist orders, and/or prosecution in court. Fines may be up to \$1,000 per day of violation and up to \$2,500 for each acre-foot diverted or used in excess of a valid water right.

Should you need assistance in responding to a curtailment and/or informational order, or otherwise have questions or concerns about the Delta Regulations, please contact Douglas E. Wance at dwance@buchalter.com or Vanessa LeFort at vlefort@buchalter.com.



Douglas E. Wance

Shareholder
(949) 224-6439
dwance@buchalter.com



Vanessa LeFort

Senior Counsel
(213) 891-5011
vlefort@buchalter.com

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