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Emergency Regulations Allow Curtailments in the Delta Watershed

Water Law

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Effective August 19, 2021, emergency regulations were approved for water curtailment orders and related reporting requirements in the Sacramento-San Joaquin Delta watershed, defined as Hydrologic Unit Code level 4 Sacramento and level 4 San Joaquin subregions (Delta Watershed), as shown in the map below.



The following emergency regulations that the State Water Resources Control Board (State Water Board) adopted on August 3, 2021, were approved by the Office of Administrative Law: addition of sections 876.1 and 878.2; and amendments to sections 877.1, 878, 878.1, 879, 879.1, and 879.2, at Title 23, Division 3, Chapter 2, Article 24 of the California Code of Regulations (Delta Regulations) (https://www.waterboards.ca.gov/drought/delta/docs/std400_signed.pdf).

Curtailment Orders

Under the Delta Regulations, the Deputy Director of the Division of Water Rights (Deputy Director) is charged with issuing curtailment orders to holders of water rights, including riparian and pre-1914 rights, in order of priority, based on water unavailability. Riparian rights are not exempted, but are presumed senior to appropriative water rights absent evidence to the contrary. For water rights in the portion of the Delta Watershed referred to in Water Code section 12220 (Legal Delta), the Deputy Director must obtain the concurrence of the Delta Watermaster before issuing any curtailment order.

The diversions subject to curtailment are direct diversions and diversions to storage, of natural and abandoned flows, in the Delta Watershed, as well as rediversions of water released from storage if not authorized by a water right or contract. Contract water rediversions are not subject to curtailment under the Delta Regulations.

Exceptions to curtailment orders for certain non-consumptive uses and health and safety needs may be available subject to a number of conditions.

Proposals for correcting priority dates or regarding the appropriateness of curtailment, such as when adjudicated waters are disconnected, may be submitted to the Deputy Director. In addition, water users may submit proposed alternative water sharing agreements that achieve the goals of curtailment. Prior to adopting the Delta Regulations, the State Water Board issued notices of water unavailability for post-1914 water right holders on June 15, 2021, and for senior water right claims on July 23, 2021 (https://www.waterboards.ca.gov/drought/delta/docs/061521_notice.pdf; https://www.waterboards.ca.gov/drought/delta/docs/notice_deltawatershed.pdf).

Informational Orders (Reporting Requirements)

The Deputy Director is also authorized to issue informational orders that require the reporting of information relating to diversions and use in the Delta Watershed, such as diversion volumes and demand projections. For curtailment orders, water right holders must submit a curtailment certification under penalty of perjury (discussed further below). If the water right holder pursues an exception to curtailment, additional certifications and reporting are required. The Deputy Director may also require any person to provide additional information reasonably necessary to assess compliance with the Delta Regulations. These are just some examples of the informational reporting the Deputy Director may order.

Overview of Receiving the Initial Curtailment/Informational Order

The Deputy Director will send initial orders by mail to each water right holder, claimant, or agent of record on file with the State Water Board's Division of Water Rights for the Delta Watershed. The initial orders will require reporting and will either require curtailment or provide instructions on procedures for potential future curtailments. A water right holder is responsible for immediately providing notice of the order to all diverters exercising the water right or claim covered by the order.

Subsequent 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. 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/).

Key Dates in Responding to a Curtailment Order

(1) Certifications

No sooner than 7 calendar days after the *issue date* of the initial order, the water right holder is required to submit, under penalty of perjury, a curtailment certification. 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. Additional certifications and documentary support are required when the water right holder seeks to continue diverting water, such as when pursuing an exception to curtailment for non-consumptive use (section 878) or minimum health and safety needs (section 878.1).

(2) Proposals

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

Within 14 days of *receiving* the initial order, 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)). 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. For determinations within the Legal Delta, the Deputy Director must consult with the Delta Watermaster. Proposals submitted more than 14 days after receipt of an initial order may be considered to support corrections in advance of future curtailments.

Proposals for Alternative Water Sharing Agreements.

No specific deadlines are provided regarding the submission of proposals for alternative water sharing agreements that achieve the purposes of curtailment (section 878.2).

(3) Requests for Reconsideration

Within 30 days of the *issue date* of the initial order, the water right holder may submit a petition to request that the State Water Board reconsider the order. Absent a timely petition for reconsideration, a court challenge could be limited or possibly barred depending on the circumstances.

Enforcement

There are penalties for violations of the Delta Regulations. The Delta Regulations state that diversions or use of water in the Delta Watershed in violation of the regulations "constitutes an unreasonable use of water" and "is a trespass under Water Code section 1052." Trespass violations are subject to fines of up to \$500 per day under Water Code section 1058.5, violations of regulations are subject to fines of up to \$500 per day under Water Code section 1846, and other penalties may be imposed. In addition, compliance with the Delta Regulations constitutes a condition of all water right permits, licenses, certificates, and registrations for diversions from the Delta Watershed.

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 vlefort@buchalter.com.



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