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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2022-

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;

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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
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;

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.

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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

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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

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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

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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;

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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;

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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.

Jeanine Townsend
Clerk to the Board