



*To advance the economic, social and environmental sustainability of Northern California
by enhancing and preserving the water rights, supplies and water quality.*

July 29, 2021

State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100
commentletters@waterboards.ca.gov
Bay-Delta@waterboards.ca.gov

RE: August 3, 2021 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)

We offer the following written comments on the proposed Emergency Curtailment Resolution and Reporting Regulation under consideration by the State Water Resources Control Board (SWRCB) at its August 3, 2021 meeting. We appreciate the forward progress by SWRCB staff and look forward to working with you to continue improvement in this process. Water right holders in California invest in the SWRCB's Water Rights Fund to ensure the SWRCB has capacity and prioritizes the effective administration of the water rights priority system, particularly in dry years when surface supplies are limited. We will continue to help organize and work with various water suppliers with all types of water rights and contracts in the Sacramento River Basin as part of our effort to coordinate with the SWRCB and to help facilitate an orderly process to serve multiple benefits during dry years in the region.

We appreciate the thorough and thoughtful presentation and responses provided to past comments at the July 27, 2021 Staff Workshop. We have diligently reviewed the draft regulations and draft resolution in the limited time available to submit written comments and we are still reviewing the July 23, 2021 Water Unavailability Methodology Report and analysis spreadsheet.

1. **Follow the Priority System.** We appreciate the SWRCB's commitment to the water right priority system and making decisions based on water (un)availability. From our perspective, this approach is orderly, will avoid chaos associated with other approaches, and will work well for the Sacramento River Basin, particularly if the SWRCB is able to develop a sound water availability analysis that truly reflects the Sacramento River Basin, as discussed below. On the other hand, the desire to order curtailments based on waste and unreasonable use emergency regulations, although expedient on its face, is neither an effective or particularly thoughtful way to proceed with water allocations in the Sacramento River Basin and betrays the trust and confidence that is essential to make the water rights system work. These decisions have significant consequences for people, the economy and the ecosystem. For this process to be effective, water right holders and the associated communities should be provided adequate time, due process and an ability to fully understand how the proposed regulations and the underlying methodology will apply to their particular diversion of water.

2. **Refine the Water Unavailability Methodology and Analysis.** As we stated at the workshop, we are encouraged by the direction the SWRCB staff is going and the significant work that has been done since 2014-15. We join Marc Van Camp in his comments at the workshop. MBK Engineers and Steve Grinnell continue to work with SWRCB staff to align the water availability curves with actual and projected water supplies and demands in the Sacramento River Basin. This alignment is central to an effective curtailment process and is necessary to improve the SWRCB's and the water users' confidence in the technical tools and analysis that will be used for making determinations on water availability relative to water rights priority. As the SWRCB pursues the potential curtailment of pre-1914 water rights it is of great importance to an individual pre-1914 claimant that the priority dates, associated demand, and purpose of use be as accurate as possible. We assume you have used the recent input from water users, including information provided in response to the 2015 Informational Order, and have performed a thorough QA/QC of this data. MBK Engineers has started to review the List of Noticed Water Right Claims and believe there are some errors. For example, although the Methodology Report states that claims identified as both riparian and pre-14 will be evaluated as only riparian, the list includes many riparian/pre-1914 claims which we do not think should be affected/curtailed at this time. Importantly, this lack of accuracy and reliability of the current Water Unavailability Methodology for curtailing senior water rights calls into question whether the SWRCB has adequately supported its findings of unreasonable use as a basis for the emergency regulation.

We look forward to further discussions to improve the accuracy of the SWRCB's methodology and analysis, particularly improvements in the estimates of the demands in the system so that the SWRCB's demand estimates recognize monthly variations in demands, avoid double counting the same demands, and do not include demands for non-consumptive uses. With these improvements, the SWRCB's demand estimates will hopefully have enough precision so the SWRCB can chronologically curtail specific tranches of water rights (i.e., 1976 to 2014) in future years without blanket curtailment notices.

3. **Appropriate Timing.** The SWRCB sent an early warning notice to water right holders on March 22, 2021 that curtailments could be expected if dry conditions continue. These notices are critical to provide advance warning to help people plan for the year. As the year developed, however, the SWRCB was slow in sending the actual notices for curtailment by waiting until June 15. For context, in 2015 the notices were sent to post-1914 water right holders by May 1, 2015. Appropriate timing of curtailments is essential for planning in the Sacramento River Basin and we encourage the SWRCB to be poised to issue curtailments when appropriate based on a sound water unavailability methodology and analysis.
4. **Continued Use Provisions.** We encourage confirmation, consistent with past practice of the Division, that the use of previously stored water, contract supplies and groundwater as alternatives remains justification for continued use, and will continue to be identified on the certification form. (See our requested edits in Attachment A to clarify that curtailments orders would not prevent the re-diversion of previously stored water.) In addition, it may be important to provide a section on the certification form for a water user far removed, lacking hydraulic connectivity from the Delta to provide supporting information that ceasing their diversions will not result in any increased flow to a downstream senior water right holder or to the Delta. The draft Scott/Shasta Emergency Regulation Text includes Section 875.3 which addresses

minimum diversion for livestock watering. We encourage the SWRCB to consider similar language for the Delta Watershed.

5. **Flexible Process to Suspend Curtailments.** As we look to the fall and winter, we encourage the SWRCB's flexibility in establishing a process to promptly suspend curtailments based on precipitation and storm events, including a real time on-line system. Suspending curtailments is important for:
 - a. **Storage.** We encourage the SWRCB to express a clear policy to encourage putting any available water into storage to prepare for next year. The fact that water right holders of storage projects, including the CVP and SWP, must comply with all terms and conditions of their water rights, including minimum instream flow, together with the rapid change in water availability and the complaint process, should help the suspension of curtailments during this time period. (See requested edits in Attachment A to facilitate storage and recharge as soon as conditions permit.)
 - b. **Recharge.** We also encourage the SWRCB to express a clear policy to encourage suspending curtailments to facilitate groundwater recharge and to help expedite groundwater recharge projects in any way feasible.
 - c. **Birds and Fish.** We have appreciated past efforts by the SWRCB to lift Term 91 and other curtailments to allow water to be spread out in the Sacramento Valley for birds along the Pacific Flyway and fish food programs. We continue to encourage the SWRCB to provide flexibility to serve water for the Pacific Flyway and fish food programs.
 - d. **Energy.** Grid stability for hydropower is essential as part of the public health provisions in §877.1(g)(2).

Additionally, the proposed emergency regulations are authorized in the specific and narrow circumstances prescribed by Water Code §1058.5 and the term should be limited to the current drought conditions.

6. **Protection of Water Releases from Storage.** Term 91 was imposed on April 29, 2021 this year and appears to work well in the Sacramento River Basin. We encourage the SWRCB to continue to use a real time system with respect to Term 91. This flexibility in operating Term 91 in real time is increasingly important to serving water in the fall and winter for both birds and fish food programs. We support the protection of storage releases, such as Term 91, and we will continue to work with SWRCB staff to identify additional feasible approaches to protect storage releases.
7. **Delta Water.** The recent discussions around water use in the Delta has raised many important issues before the SWRCB. With respect to the Sacramento River Basin, it is important to note that the Department of Water Resources (DWR), under its contract with the North Delta Water Agency (NDWA), has an obligation to provide water supplies for various water users in the North Delta. For other Delta water users south of the NDWA, the SWRCB has consistently found that water rights on the Sacramento River system should not be curtailed for those southern Delta water users' benefit, given the SWRCB's determination of the source of those users' water rights. (See e.g., Order WR-89-8; D-1641 at 21; *The State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, at 736-37; *Phelps v. State Water Resources Control Board* (2007) 157 Cal.App.4th 89, 111.) Put differently, the application of the emergency regulations must not curtail senior water rights before junior water rights in the

Delta. This defies the priority system and previous SWRCB decisions and requires a robust hearing, with notice and a full opportunity to comment. (See *El Dorado Irrigation Dist. v. State Water Resources Control Board* (2006) 142 Cal.App.4th 937, 969-970.)

In this light, we encourage you to re-align Delta demands between the Sacramento and San Joaquin Rivers consistent with Order WR 89-8. We also encourage the Delta Watermaster, working with the SWRCB staff, to develop a focused enforcement strategy for water rights that addresses these issues in a narrow and defensible manner consistent with SWRCB decisions. The SWRCB January 1978 report also provides several recommendations that are still salient today and should be considered by the SWRCB.

8. **Fully Utilize Complaint Process.** We appreciate the SWRCB developing its complaint process that is available on the website. This process is very important for several reasons. First, it provides a public process to raise legitimate complaints for actions that affect higher priority water rights. Second, it allows the SWRCB more flexibility in administering the curtailment process, by relying on more senior water right holders to raise issues rather than anticipating every water right that could possibly be affected by water use in the system. We encourage the SWRCB to rely upon this program and more visibly communicate the tools and the opportunities for filing a complaint.
9. **Modernize the Water Rights Information System.** The recent report from UC Berkeley School of Law, Piloting a Water Rights Information System for California, shows that the water rights system is resilient and can work, and that there are opportunities looking forward to update and modernize the information system to help the SWRCB administer the water rights priority system.
10. **Voluntary Measures.** The Governor's recent Proclamation encouraged water users and other parties to **advance voluntary measures** to ensure appropriate flows for salmon and other species rather than heavy-handed regulatory approaches that create mistrust and acrimony. There are flow arrangements on nearly every watercourse in the Sacramento River Basin, which are all focused upon instream flows while maintaining other uses of water. We encourage the SWRCB, in cases where it believes there are specific needs, to engage the leaders in the watershed to develop solutions to meet those needs. When necessary, the SWRCB could pursue targeted enforcement proceedings against water users who have allegedly violated these legal requirements. The SWRCB could also encourage parties to work with the fishery agencies to develop physical improvements, such as deepened channels, as a first option before reallocating water. We believe this is a thoughtful approach to serving beneficial purposes and will be effective in the long-term to meet beneficial purposes in the region.

If you have any questions or would like to discuss this further, please contact David Guy at dguy@norcalwater.org or Marc Van Camp at vancamp@mbkengineers.com.

ATTACHMENT A TO
JULY 29, 2021 NCWA COMMENT LETTER

REDIVERSION OF PREVIOUSLY STORED WATER

The following proposed edits to the draft emergency curtailment regulations would clarify that any such curtailments would not prevent the redirection of previously stored water:

Section 876.1, subdivision (a)

This section applies to water diversions in the Delta Watershed as defined in section 877.1. This section does not apply to rights or contracts for the redirection or use of previously stored water.

Section 879, subdivision (d)(1)(C)

Ceasing water diversions when curtailments are ordered, except to the extent that continuing diversions are authorized in accordance with section 878, 878.1 or 878.2, or under rights or contracts for the use of previously stored water.

TEMPORARY SUSPENSION OF CURTAILMENTS FOR WATER STORAGE

The following proposed edits to the draft emergency curtailment regulations, and the associated draft resolution, would facilitate storage of precipitation in coming months:

Resolution – Recital paragraph 17 edits

17. 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;

Resolution – New recital paragraph 18

18. To enable storage of precipitation to support multiple beneficial uses while the regulation is in effect, the State Water Board directs the Deputy Director for Water Rights to reassess, by October 1, 2021, any curtailment orders issued under the regulation to account for the normal cessation of agricultural diversions at the end of the irrigation season and the resulting reductions in demands. The State Water Board further directs the Deputy Director for Water Rights to frequently reassess after October 1, 2021 the ability to suspend curtailments to enable water storage.

Resolution – Recital paragraph 19 edits

19. Emergency regulations adopted under Water Code section 1058.5 may remain in effect for up to one year;

Resolution – Order paragraph 4 edits

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, subd. (a), paragraph (2) are no longer in effect, in which case this regulation is deemed repealed, or ~~unless~~ (iii) the State Water Board renews the regulation due to continued drought conditions as described in Water Code section 1058.5;

Regulation section 876.1, subdivision (g) edits

(g) The Deputy Director ~~may~~ shall 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 such increased water availability warrants the suspension. In temporarily suspending curtailments, the Deputy Director will follow water right priority within the watershed, or watersheds, in which those suspensions occur. 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 findings regarding any decisions resulting from the consideration of that information.