

STATE OF CALIFORNIA  
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY  
STATE WATER RESOURCES CONTROL BOARD

**DIVISION OF WATER RIGHTS**

**ORDER WR 2023-0065-EXEC**

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**In the Matter of the Petition for Reconsideration of 2022 Curtailment Orders for  
the Sacramento-San Joaquin Delta Watershed**

from

**Central Delta Water Agency and South Delta Water Agency**

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**ORDER DENYING RECONSIDERATION**

BY THE EXECUTIVE DIRECTOR<sup>1</sup>

**1.0 Introduction**

Central Delta Water Agency (CDWA) and South Delta Water Agency (SDWA) (collectively, the Petitioners) have petitioned for reconsideration of curtailment orders issued to landowners within their respective jurisdictions pursuant to the State Water Resources Control Board's (State Water Board or Board) 2022 drought emergency regulation for the Sacramento-San Joaquin Delta (Delta) watershed (the Regulation). The curtailment orders in question required reporting, regular monitoring of a curtailment status list, and—with limited exceptions—the cessation of diversion and use pursuant to a water right shown as curtailed on the curtailment status list. On August 16, 2022, Petitioners received notice that certain of their water rights were curtailed. These curtailments are the subject of the petition for reconsideration (Petition) and this Order.

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<sup>1</sup> State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Water Code section 1122 directs the State Water Board to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. However, as set forth in section 2.10, below, failure to act within the 90-day period does not divest the Board of jurisdiction to act upon the petition.

The Petition raises several arguments challenging the curtailment orders, many of which already were addressed in the State Water Board's 2022 order denying reconsideration of curtailment orders issued pursuant to the 2021 emergency regulation. (State Water Board Order WR 2022-0147-EXEC (May 9, 2022).) This Order incorporates by reference the discussion and analysis of those similar issues from Order WR 2022-0147-EXEC where applicable, as indicated below. New issues raised by the 2022 Petition either are addressed in the following discussion and analysis or do not raise substantial issues that merit reconsideration.

The Petition is denied because each of the arguments it raises fails on the merits. The curtailment orders were a valid exercise of regulatory authority delegated to the Deputy Director for the Division of Water Rights (Deputy Director) under the Regulation. Certain challenged aspects of the Regulation's methodology governing curtailments were compelled by the Regulation itself, which is not subject to reconsideration. To the extent the methodology relied on the Deputy Director's discretion, the Petition fails to refute the substantial evidence supporting those exercises of discretion.

## **2.0 Factual, Legal, and Procedural Background**

### **2.1 Drought Conditions**

California and the Delta watershed experienced extremely dry conditions from 2019 to 2022, with water years 2020, 2021, and 2022 constituting the driest three-year period on record based on precipitation. The combination of unusually low precipitation, warm temperatures, and dry soils resulted in unprecedented low runoff from the Sierra-Cascade snowpack, leading to significant reductions in available water supplies for various purposes. Due to drought conditions, water supply in many parts of California, including the Delta watershed, was insufficient to meet a significant portion of the water demand of water right holders and claimants. These conditions resulted in the need for immediate action to effectively and efficiently administer and enforce the State's water rights system in light of severely limited water availability in the Delta watershed.

### **2.2 Drought Declaration**

On April 21, 2021, Governor Gavin Newsom issued a Proclamation of a State of Emergency (proclamation) 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 for 41 counties, including those in the Delta watershed, in response to emergency drought conditions. The May 10, 2021 proclamation directed the State Water Board to consider adoption of 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. On July 8, 2021, the Governor expanded the emergency declaration to 9 additional counties and called upon

Californians to voluntarily reduce their water use by 15 percent. On October 19, 2021, the Governor issued a proclamation that extended the drought emergency statewide.

On March 28, 2022, the Governor issued an order declaring that the orders and provisions in the April 21, 2021, May 10, 2021, July 8, 2021, and October 19, 2021 proclamations should remain in effect and that the Board should expand inspections to determine whether illegal diversions or wasteful or unreasonable use of water were occurring and bring enforcement actions against illegal diverters and those engaging in the wasteful and unreasonable use of water. (Governor Gavin Newsom, Executive Order N-7-22 (March 28, 2022).)

## **2.3 Description of the Delta Watershed**

This Order incorporates by reference the description of the Delta watershed in Section 2.3 of Order WR 2022-0147-EXEC.

## **2.4 Emergency Regulation**

Water Code section 1058.5 authorizes the State Water Board to adopt emergency regulations in certain drought years or when the Governor proclaims a drought state of emergency to prevent the unreasonable use of water, to require curtailment of diversions when water is not available under the diverter's priority of right, or to require monitoring and reporting of diversion or use. Emergency regulations adopted under Water Code section 1058.5 remain in effect for up to one year and may be renewed. (Wat. Code, § 1058.5, subd. (c).)

### **2.4.1 Development Process**

The Board adopted the initial emergency curtailment regulation for the Sacramento-San Joaquin Delta watershed on August 3, 2021, which explicitly authorized the use of the Water Unavailability Methodology for the Delta Watershed (Water Unavailability Methodology, or Methodology) to inform curtailment determinations under the regulation. During 2022, the Board revised, updated, and readopted the emergency regulation. On April 19, 2022, the Board posted the draft text of the regulation and proposed refinements to Water Unavailability Methodology on its website and distributed those materials via the Board's email distribution list. The Board solicited public input both in writing and orally at a public workshop held on May 12, 2022, and thereafter developed updates to the Methodology based on the comments received. The Board issued a revised draft of the regulation text on June 27, 2022, together with an updated version of the Water Unavailability Methodology for the Delta Watershed Report, which was incorporated by reference in the regulation text. The Board issued a corrected version of the regulation text on July 6, 2022. The Board readopted the proposed regulation in a meeting on July 20, 2022.

## **2.4.2 Office of Administrative Law Approval**

Government Code section 11346.1, subdivision (a)(2), requires that, at least five working days prior to the submission of a proposed emergency action to the Office of Administrative Law (OAL), the adopting agency must provide notice of the proposed emergency action to every person who has filed a request for notice of regulatory action with the agency. The State Water Board provided formal notice of the proposed emergency rulemaking to parties interested in regulations and drought information on July 25, 2022. With the July 25, 2022 notice of proposed emergency rulemaking, the State Water Board released a finding of emergency, informative digest, fiscal impact statement, and draft regulation text that had been revised in response to oral and written comments on the April 19, 2022 initial draft of the Regulation. The Board made additional, non-substantive clarifying changes to the Regulation text prior to and during the State Water Board's adoption meeting. On August 2, 2022, the Board submitted the Regulation and supporting information to OAL for review and a second comment period pursuant to Government Code section 11349.6. OAL approved the Regulation, which became effective upon filing with the Secretary of State on August 12, 2022. The Regulation was codified in sections 876.1 through 879.3 of title 23 of the California Code of Regulations.

## **2.4.3 Content of the Emergency Regulation**

### **2.4.3.1 Purpose of the Regulation**

The purpose of the Regulation was to improve the State Water Board's ability to quickly and effectively implement and enforce water right curtailments in response to severe water shortages in the Delta watershed. In the resolution adopting the Regulation, the Board found that there was an urgent need to curtail diversions by water right holders and claimants when water was unavailable under their priority of right to protect senior water rights and prevent the unauthorized diversion of previously stored water needed for salinity control in the Delta, human health and safety needs, and ecosystem protection.<sup>2</sup> The Regulation was intended to implement the water right priority system in furtherance of and in a manner consistent with the overarching, constitutional requirement that all water use within the state must be reasonable and beneficial. (State Water Board Resolution No. 2022-0028, ¶¶ 16, 17, 19, 22, 23.)

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<sup>2</sup> The Board supports and is supported by ongoing progress in understanding the Delta, and at all times seeks to use the best and most up-to-date science available to guide its decision-making. The petition for reconsideration addresses decisions made by the Board in August of 2022, and therefore the Board's decisions are evaluated in light of the best available information at the time.

### **2.4.3.2 Authorizes Curtailment in Order of Priority**

Pursuant to section 876.1, subdivision (b) of the Regulation, the Deputy Director was authorized to issue orders requiring water right holders and claimants in the Delta watershed to curtail their diversions of natural and abandoned flows in order of water right priority when water was unavailable at their priority of right. Before issuing curtailment orders to water right holders and claimants in the Legal Delta, the Deputy Director was required to consult with and obtain the concurrence of the Delta Watermaster.<sup>3</sup> Section 876.1, subdivision (c), established a procedure whereby initial curtailment or reporting orders were mailed to all water right holders and claimants in the watershed. The orders either required curtailment or instructed water right holders and claimants that notification of potential future curtailments (and suspension of curtailments) would be provided by email and posting to the State Water Board's drought webpage. Recipients were required to either sign up for the State Water Board's Delta Drought email distribution list or check the Board's webpage regularly. (Cal. Code Regs., tit. 23, § 876.1, subd. (c).)

### **2.4.3.3 Determining Water Unavailability**

Section 876.1, subdivision (d), of the Regulation directed the Deputy Director to consider certain information in determining whether water was unavailable under a water right holder's or claimant's priority of right and whether to order curtailment of water diversions under specific water rights or claims. This information included: relevant available information regarding date of priority; monthly water right demand projections based on reports of water use for permits and licenses, or Statements of Water Diversion and Use (Statements) from 2018, 2019, 2020, or 2021; monthly water right demand projections based on information submitted in response to reporting requirements; water supply projections from the Department of Water Resources (DWR) California Cooperative Snow Surveys Bulletin 120 and the California Nevada River Forecast Center; and any information concerning stream system disconnection where curtailing diversions would not make water available to senior water right holders downstream. (Cal. Code Regs., tit. 23, § 876.1, subds. (d)(1)-(d)(5).)

The Regulation authorized the Deputy Director to evaluate available water supplies against demands for purposes of determining whether to issue curtailments using the Methodology, as described in the June 27, 2022 report, or comparable tools. The Regulation also authorized evaluation of available supplies against demands at the Sacramento and San Joaquin River watershed scale (U.S. Geological Survey

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<sup>3</sup> The Delta Watermaster is an independent officer of the State, reporting jointly to the State Water Board and the Delta Stewardship Council. Water Code section 85230 authorizes the Delta Watermaster to oversee the day-to-day administration of water rights, and when necessary, to take enforcement action, related to water diversions within the Legal Delta portion of the Delta watershed.

Hydrologic Unit Code level 4) or sub-watershed scale (Hydrologic Unit Code level 8). (Cal. Code Regs., tit. 23, § 876.1, subd. (d)(7).) Significantly for the Petition, the Regulation included a change from the previous year's iteration that mandated an exception to the ordinary application of the Methodology: it instructed the Deputy Director not to reduce demand projections for water rights held by the Sacramento River Settlement Contractors (SRSC) or the Feather River Contractors (FRC) based on any reduction in their contractual supplies resulting from an operations plan for the Central Valley Project (CVP) or State Water Project (SWP) that was necessary to address dry hydrologic conditions and conserve water upstream later in the year in order to protect cold water pools for salmon and steelhead, improve water quality, protect carry over storage, or ensure minimum health and safety water supplies. (Cal. Code Regs., tit. 23, § 876.1, subd. (d)(8).)

The Regulation further directed the Deputy Director to suspend curtailments, in order of water right priority, when water availability increased or was projected to increase due to precipitation and runoff events or reductions in demand. In determining whether to suspend curtailments, and the geographic scope and duration of any suspensions, the Deputy Director was directed to consider the best available information, such as water supply forecasts from DWR and other similarly reliable sources. (Cal. Code Regs., tit. 23, § 876.1, subd. (g); see also Order WR 2022-0147-EXEC, pp. 32-33 [explaining that the imposition, suspension, and reimposition of curtailments was informed by the same information and tools].)

#### **2.4.3.4 Authorized Exceptions to Curtailment**

Under the Regulation, an exception to curtailment could be authorized if: (1) the water right or claim was used only for a non-consumptive use, as described in section 878 of the Regulation; or (2) water diverted under the water right or claim was the diverter's only source of water and was needed to meet minimum human health and safety needs, as defined in section 878.1 of the Regulation. Water right holders and claimants who sought to continue diverting pursuant to one of these exceptions were required to submit a certification to the Deputy Director describing the nature of their use and compliance with the conditions outlined in the Regulation.

In accordance with section 876.1, subdivision (e), an exception to curtailment also could be authorized if a proposal were submitted and approved by the Deputy Director indicating curtailment is not appropriate for a particular diverter in a specific stream system as demonstrated by verifiable circumstances. Water users also could propose alternative water sharing agreements that would achieve the purposes of the curtailment process. The Deputy Director could approve an alternative water sharing agreement, provided that the Deputy Director found that implementing the agreement would not injure legal users of water who are not parties to the agreement or unreasonably affect fish and wildlife. (Cal. Code Regs., tit. 23, § 878.2.) Before making any determinations regarding proposals that curtailment was inappropriate within the

Legal Delta, or alternative water sharing agreements among diverters in the Legal Delta, the Deputy Director was directed to consult with the Delta Watermaster.

### **2.4.3.5 Reporting Requirements**

Section 879, subdivision (c)(1), of the Regulation required water right holders and claimants in the Delta watershed to certify that they would take actions needed to comply with initial curtailment or reporting orders issued under the Regulation. Specifically, recipients of orders issued under the Regulation were required to certify that they are aware of the process by which the State Water Board notifies right holders and claimants in the Delta watershed of the updated status of curtailments and that they are aware of what exceptions apply to curtailment, as well as the process for obtaining applicable exceptions.

The Regulation authorized additional reporting requirements for water right holders and claimants whose water right or claim had a total authorized face value or recent annual reported diversion amount of one thousand acre-feet or greater. (Cal. Code Regs., tit. 23, § 879, subd. (c)(2).) Specifically, the Deputy Director was authorized to require reporting on the following information: prior diversions, unless otherwise reported in annual reports of water diversion and use, including direct diversions and diversions to storage; and demand projections for subsequent months through October 1, 2023, including direct diversions and diversions to storage. Before imposing any of these reporting requirements on water right holders and claimants in the Legal Delta, the Deputy Director would consult with and obtain the concurrence of the Delta Watermaster.

## **2.5 Water Unavailability Methodology**

In conjunction with the Regulation, the Division developed the Water Unavailability Methodology for identifying when available data indicate that natural and abandoned water supplies are unavailable to water right holders and claimants in the Delta watershed under their priority of right. The Methodology informed curtailment of water rights and claims of right in the Delta watershed pursuant to the Regulation, including its prior iterations (*see* Section 2.5.1, *infra*). Since its initial release, the Methodology had been updated to address public comments and to make other needed improvements.<sup>4</sup>

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<sup>4</sup> Section 876.1, subdivision (d) of the regulation initially adopted in 2021 authorized the Deputy Director to determine water unavailability using the Methodology, as documented in a Methodology report dated July 23, 2021, or comparable tools. As described in section 3.4.1 of Order WR 2022-0147-EXEC, the updates to the Methodology after adoption of the 2021 regulation were relatively minor compared to the July 23, 2021 version of the Methodology, and therefore those updated versions of the Methodology constituted comparable tools within the meaning of the regulation. (Order WR 2022-0147-EXEC, p. 22, fn. 5, pp. 27-28.) After the Board adopted Order

## **2.5.1 Methodology Development Process**

The Board first released the Water Unavailability Methodology on May 12, 2021, in order to implement the initial version of the emergency regulation. Thereafter, Board staff repeatedly met with affected water right holders and interested parties, making iterative improvements to better conform the Methodology to observed conditions of the Delta watershed. (See Order WR 2022-0147-EXEC, pp. 4-5.) As stated in Section 2.4.1, above, the Board held a workshop on May 12, 2022, concerning proposed refinements to the Methodology. After reviewing comments received during the workshop and written comments received by the May 19, 2022 deadline, the Board released further updates to the Methodology on June 27, 2022—the seventh Methodology revision released since the initial May 12, 2021 version—with the aim of improving accuracy and increasing public transparency. The June 27, 2022 update to the Methodology included refinements to the demand dataset made as a result of quality control review of additional water rights and claims, refinements of enhanced reporting requirements, adjustment of the demand dataset to reflect known changes to demand due to dry conditions, recognition of the Projects’ Coordinated Operations Agreement, and additional description regarding the estimation of return flows and the selection of the appropriate exceedance forecast. Discussions with stakeholders regarding potential refinements to the Methodology continued up until, and even subsequent to, the rescission of the curtailment and reporting orders on April 3, 2023, due to improved water supply conditions.

## **2.5.2 Content of the Water Unavailability Methodology**

The Water Unavailability Methodology compares the best available estimates for supply and demand within the Sacramento and San Joaquin River watersheds, and within delineated sub-watersheds, to determine the extent to which supply may be insufficient to meet certain priorities of right. These comparisons are presented in spreadsheet format and visually using interactive graphs.

The approach and major assumptions for the Water Unavailability Methodology are described in a report and associated technical appendices. Appendix A describes the Water Unavailability Methodology Spreadsheet, including the input data sources, computational steps, and outputs used to develop the water unavailability visualizations and inform curtailments. Appendix B describes the process used in collection and quality control of the demand datasets. Appendix C summarizes the substantive technical, factual, or legal comments regarding the Water Unavailability Methodology

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WR 2022-0147-EXEC, the Methodology was updated once, on June 27, 2022. When the Board revised and renewed the Regulation in August of 2022, it updated section 876.1, subdivision (d), to authorize use of the June 27, 2022 version of the Methodology, or comparable tools. The Methodology was updated again on January 19, 2023, but as of that date all curtailments had been suspended, and they were not reimposed after that date.



that were received prior to the release of the July 23, 2021 version of the report, as well as any relevant sections of the report where those comments have been addressed. Appendix D was developed and included to respond to public comments regarding the hydrologic complexities of the Legal Delta and to provide additional explanation regarding the assumptions used in the Methodology with regard to freshwater residence time in the Legal Delta and the exclusion of tidal inflows as a source of supply. (See Order WR 2022-0147-EXEC, section 2.4.2.)

## **2.6 Issuance of Curtailment and Reporting Orders**

On August 20, 2021, initial curtailment and reporting orders were mailed to approximately 6,000 water right holders and claimants and applied to nearly 17,000 water rights and claims of right. (See Order WR 2022-0147-EXEC, section 2.6.) The orders required water right holders and claimants to certify electronically that they would comply with the order and regularly monitor for changes in curtailments by subscribing to the Board's Delta Drought email distribution list or frequently checking the Delta Drought webpage. The Board continued to issue curtailment updates pursuant to the initial orders and to inform water right holders and claimants of the updates electronically.

On August 16, 2022, the Board issued the first curtailment update subsequent to the August 12, 2022 effective date of the renewed Regulation. Based on the output of the Methodology, all post-1914 appropriative rights and many pre-1914 appropriative rights were curtailed, effective August 17, 2022. Within the Legal Delta, post-1914 appropriative rights with a priority date of 1920 or later were curtailed. As stated above, Petitioners seek reconsideration of the curtailments imposed pursuant to the August 16, 2022, update.<sup>5</sup>

Effective September 1, 2022, some curtailments within the Legal Delta were suspended, but curtailments remained in place for post-1914 appropriative rights with a priority date of 1948 or later. During the month of September, the Board gradually suspended curtailments within the Legal Delta until September 20, 2022, by which date all curtailments within the Legal Delta were suspended. The Board reimposed curtailments within the Legal Delta between October 12 and 18, 2022, for post-1914 appropriative rights with a priority date of 1960 or later, and between October 19 and 20, 2022, for post-1914 appropriative rights with a priority date of 1927 or later. Effective October 20, 2022, all curtailments within the Legal Delta were suspended again.

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<sup>5</sup> After the August 16, 2022 update, the Board issued curtailment updates on a weekly basis, if not more frequently, for the remainder of the year. The Board also issued several updates on a less frequent basis in 2023. Petitioners did not file petitions for reconsideration of any subsequent updates. Petitioners therefore have not exhausted their administrative remedies with respect to any new legal or factual issues presented by those updates, and any such issues are not the subject of this order.

Due to increased precipitation and decreased demand in December, all curtailments watershed-wide were suspended effective December 13, 2022. All curtailments remained suspended until April 3, 2023, when the initial curtailment and reporting orders were rescinded due to significant and continued precipitation throughout the Delta watershed.

## **2.7 Previous Reconsideration Order**

Numerous parties, including Petitioners, filed petitions for reconsideration of the State Water Board's August 3, 2021 adoption of the initial emergency curtailment regulation for the Delta watershed. In addition, numerous parties, including Petitioners, filed petitions for reconsideration of the August 20, 2021 initial curtailment and reporting orders. The Executive Director denied all of the petitions for reconsideration in a single order—Order WR-2022-0147-EXEC—relevant portions of which are incorporated herein by reference.

## **2.8 Water Right Priority System**

This Order incorporates by reference the description of California's water right priority system in Section 2.7 of Order WR-2022-0147-EXEC.

## **2.9 State Water Board Authority**

This Order incorporates by reference the description of the State Water Board's authority in Section 2.8 of Order WR-2022-0147-EXEC. In addition to a summary of the Board's authority, that section explained that a different standard of judicial review applies to an agency's adoption of quasi-legislative regulations than applies to an agency's adoption of adjudicative decisions or orders, such as the initial curtailment orders. A more deferential standard applies to regulations, which are valid unless they are arbitrary, capricious, or entirely lacking in evidentiary support, whereas the requisite findings in orders and decisions must be supported by substantial evidence. Section 2.8 also explained that, when the Board adopts a regulation authorizing the issuance of curtailment orders under specified conditions, any orders issued pursuant to the regulation are reviewed to determine whether substantial evidence supports the finding that those conditions existed. (See Order WR-2022-0147-EXEC, pp. 17-18 [discussing *Stanford Vina Ranch Irrigation Company v. State* (2020) 50 Cal.App.5th 976].)

## **2.10 Petitions for Reconsideration**

Water Code sections 1120 through 1126 provide for administrative reconsideration and judicial review of water right decisions and orders. Water Code section 1122 authorizes the State Water Board to reconsider all or part of a decision or order on the Board's own motion or in response to a petition for reconsideration. Any petition must be filed no later than 30 days from the date on which the Board adopted the decision or order. Similarly, the Board's authority to order reconsideration on its own motion expires 30 days after it

has adopted the decision or order. Section 1122 directs the Board to act on a petition for reconsideration no later than 90 days from the date on which the board adopted the decision or order. If the State Water Board fails to act within 90 days, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (State Water Board Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1147–1151.)

Any interested person may file a petition for reconsideration of a water rights decision or order on any of the following grounds:

- A. Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- B. The decision or order is not supported by substantial evidence;
- C. There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- D. Error in law.

(Cal. Code Regs., tit. 23, § 768.)

A petition must specify the specific State Water Board action for which the petitioner requests reconsideration, “the reason the action was inappropriate or improper,” and “the specific action which petitioner requests” as well as contain “a statement that copies of the petition and accompanying materials have been sent to all interested parties.” (Cal. Code Regs., tit. 23, § 769, subds. (a)(2), (4)–(6).) Additionally, “a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.” (*Id.*, subd. (c).)

The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (Cal. Code Regs., tit. 23, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subds. (a)(2)(A)–(C).) The State Water Board may elect to hold a hearing on the petition for reconsideration. (Wat. Code, § 1123.)

Water Code sections 1120 through 1126 provide for administrative reconsideration and judicial review of quasi-judicial water right decisions and orders, not quasi-legislative approvals, such as the adoption of a regulation. (State Water Board Order WR 2014-0028, p. 1, fn. 2 [“Water Code section 1122 does not provide for reconsideration of quasi-legislative actions.”]; see *also* Wat. Code, § 1126, subds. (b) & (c) [providing for judicial review of water right decisions or orders pursuant to section 1094.5 of the Code of Civil Procedure]; *Stanford Vina Ranch Irrigation Company v. State* (2020) 50 Cal.App.5th 976, 996–997 [interpreting section 1126 to require judicial review pursuant to section 1094.5 of all quasi-adjudicative decisions relating to state water law].)

### **3.0 Discussion**

Petitioners contend that they were deprived of a fair hearing, that the August 16, 2022 curtailments were not supported by substantial evidence, and that the curtailments were contrary to law. Many of the arguments that Petitioners advance in support of these contentions were contained in Petitioners' previous petitions for reconsideration. Those arguments were addressed in Order WR-2022-0147, and the Board's responses to those arguments are incorporated by reference, as indicated below. In addition, the Petition includes several new arguments that the Methodology informing curtailment decisions erred in several respects—namely, (1) by failing to account for water savings due to the Delta Drought Response Pilot Program; (2) by failing to adjust Sacramento River Settlement Contractor and Feather River Contractor demands based on conservation efforts they undertook in coordination with the CVP and SWP; and (3) by failing to treat saline tidal flows as an additional source of water for determining water unavailability.

In this case, the Regulation authorized the Deputy Director to determine water unavailability using the June 27, 2022 version of the Methodology or a comparable tool, after considering certain categories of information concerning water supply and demand. Thus, the only factual issues potentially relevant to the validity of the curtailment orders at issue here are whether the Deputy Director did in fact determine water unavailability using the Methodology or a comparable tool, and whether the Deputy Director duly considered the information required. Petitioners do not contend that the Deputy Director failed to determine water unavailability using the Methodology or a comparable tool or failed to consider the information required. Instead, Petitioners challenge the validity of the Methodology for purposes of determining water unavailability. This amounts to a challenge to the Regulation, not the curtailment orders. As stated above, the Regulation is not subject to reconsideration, and the subject Petition does not seek reconsideration of the Regulation. Moreover, for the reasons discussed below, each of these arguments fails on the merits because the Methodology is not arbitrary, capricious, or lacking in evidentiary support.

#### **3.1 The Methodology Did Not Err by Failing to Account for the Delta Drought Response Pilot Program**

Petitioners allege that August 16, 2022 curtailments were not supported by substantial evidence because land participating in the Delta Drought Response Pilot Program (DDRPP)<sup>6</sup> was not properly accounted for in the Methodology, leading to overestimation of demand, underestimation of supply, and thus unnecessary curtailments. Petitioners do not specify how not incorporating the acreage of the DDRPP led to misestimation of

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<sup>6</sup> Sacramento-San Joaquin Delta Conservancy, Delta Drought Response Pilot Program Solicitation Summary, available at <http://deltaconservancy.ca.gov/wp-content/uploads/2022/01/DDRPP-Solicitation-1.18.22.pdf>.

supply and demand. As this section demonstrates, however, the Methodology was justified in not accounting for water savings under the DDRPP.

As a preliminary matter, the Petition omits any explanation of how failure to account for the DDRPP in the Methodology harmed the Petitioners, specifically. The Petition contains no evidence or argument regarding the impact of this alleged error on Petitioners' members, much less of the magnitude of any alleged harm. This argument should be rejected on that ground alone.

Moreover, the Methodology reasonably excluded putative water savings from the DDRPP that were both highly speculative and, at best, nominal. The DDRPP was a pilot program, implemented between March and September of 2022, with the aim of determining the amount of water that could be saved through certain management actions. Due to several variables that remained highly uncertain at the outset, estimating water savings from the program with a meaningful level of confidence was not possible until after the program had concluded. Those estimates required a retrospective study using multiple methods, the results of which were not released until March of 2023. Therefore, the actual amount of water saved could not have been factored into the Methodology when it was originally developed in the spring of 2021, nor as part of any of the updates to the Methodology, all of which occurred before March 2023.

It also merits note that, given the DDRPP's limited scope, even the most optimistic prospective estimates of possible water savings would not have been enough to alter curtailments significantly. In total, just 8,800 acres of farmland, out of the approximately 500,000 acres in the Delta region, were enrolled in the DDRPP between March and September of 2022. However, the results of the retrospective study confirm that including assumptions about meaningful water savings from the DDRPP would have made the demand estimate included in the Methodology less accurate, not more. As it turned out, water savings due to the DDRPP were meager in most areas and varied significantly depending on the characteristics of the land enrolled in the DDRPP. The total calculated water savings for the duration of the program—3,300 to 5,500 acre-feet—were far less than what the Office of the Delta Watermaster and program participants had hoped for, which was an estimated 22,000 acre-feet of savings. This quantity is equal to at most approximately 0.5 percent of May-September water demand in the Legal Delta alone. (See SWRCB Water Unavailability Methodology for the Delta Watershed - Technical Appendix D, p. D-7 (June 27, 2022).) If the Methodology had incorporated the preliminary estimates of possible water savings, it would have underestimated demand. Thus, both the information available to the Board when developing the Methodology and subsequent data support the Board's decision not to include assumptions related to the DDRPP in the Methodology.

### **3.2 The Methodology's Treatment of Settlement Contractor Demands Implements a Lawful Mandate from the Regulation**

Petitioners assert that the Methodology artificially modifies the demands of the Sacramento River Settlement Contractors (SRSC) and the Feather River Contractors (FRC). However, the changes to the Methodology at issue here represent a lawful exercise of the State Water Board's authority under Article X, section 2 of the California Constitution to prevent the unreasonable use of water. Because the challenged aspect of the Methodology was established in the Regulation itself rather than an exercise of the Deputy Director's discretion, it is not subject to reconsideration. (See Section 2.10, *infra*.) Further, as explained below, the Finding of Emergency supporting adoption of the Regulation provided a compelling justification for treating foregone diversions by the SRSC and FRC as unavailable for diversion by other water users. The Petition fails to refute that justification, much less to demonstrate how the Board's decision is arbitrary, capricious, or entirely lacking in evidentiary support.

The Finding of Emergency supporting the Regulation explained the State Water Board's factual and policy justification for protecting certain flows from diversion based on a finding of unreasonable use. Pages 19 and 20 of the Finding of Emergency detailed how the CVP and SWP implemented coordinated drought operations in 2022 that contemplated significant reductions in water supplies allocated to the SRSC and FRC, respectively. These reduced allocations were intended to preserve limited water supplies in upstream reservoirs to protect cold water pools for salmon and steelhead, improve water quality, protect carryover storage, and to ensure that minimum human health and safety water supplies would be available later in the irrigation season. Reductions in the SRSC's and FRC's diversion and use were intended to allow the U.S. Bureau of Reclamation (Reclamation) and DWR to conserve stored water supplies by minimizing the amount of water needed to be released from storage to satisfy the demands of the SRSC and FRC, meet flow-dependent water quality requirements below Project reservoirs, maintain salinity control, and meet water quality objectives in the Delta. The success of this coordinated drought strategy hinged on ensuring that other water users would not cancel out those conservation efforts by diverting the water saved by SRSC's and FRC's foregone diversions.

Section 876.1, subdivision (d)(8), of the Regulation promoted reasonable use by protecting those foregone diversions. As noted in Section 2.5.2, the Methodology determined water unavailability based on observed supply conditions and projected water demands. Section 876.1, subdivision (d)(8), mandated an exception to the ordinary method for estimating demand as applied to any water unused by the SRSC or FRC in accordance with an operations plan for the CVP or SWP that met certain criteria. To protect the water conserved by those foregone diversions, which were integral to the coordinated drought operations, subdivision (d)(8) ensured that the Methodology would not treat the water conserved as available to other water right holders. Specifically, that subdivision included the State Water Board's finding that it

would be unreasonable for junior water right holders and claimants to divert any water not used by the contractors under those circumstances because (1) the water would not be available but for the reduced contractual supplies; and (2) the water must remain instream to conserve cold water pools, improve water quality, protect carryover storage, or ensure minimum health and safety water supplies in accordance with the coordinated operations plan. To implement the Board's finding in subdivision (d)(8), the Methodology relied on the SRSC's and FRC's 2018 demand data rather than reducing those quantities to reflect their foregone diversions. Thus, this aspect of the Methodology was compelled by the Regulation itself, not an exercise of the Deputy Director's discretion.

The State Water Board's legal authority to prevent the unreasonable use of water by regulation is well-established. (See *Stanford Vina Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, 998-1007 [discussing precedents governing State Water Board actions to prevent unreasonable use of water, including emergency regulations].) Here, the State Water Board identified limited circumstances under which allocating water in order of priority would lead to unreasonable use and acted in a quasi-legislative capacity to prevent it. The SRSC and FRC's reduced allocations made water available for particular purposes—namely, to prevent drought conditions from producing calamitous results, such as communities running out of water for minimum human health and safety needs, fish kills due to lack of cold water, and in-Delta water users losing access to future freshwater supplies due to seawater intrusion. Under these circumstances, the State Water Board rightly concluded that it would be unreasonable to allow other water users to undermine those coordinated drought operations by taking water conserved specifically for those purposes. As already noted, the Board documented and supported this policy judgment in the Finding of Emergency for the Regulation. The Methodology's treatment of foregone diversions by SRSC and FRC therefore is consistent with and pursuant to a lawful exercise of the State Water Board's regulatory authority.

### **3.3 The Methodology Reasonably Excluded Tidal Flows**

The Petition raises several different arguments that all rest upon a common premise: that tidal flows in the Delta are a distinct and viable source of water that the Methodology was wrong to exclude from its calculation of available water supplies.<sup>7</sup> Petitioners assert that there is essentially no limit on the quantity of water their landowners may divert, nor on the times when they may divert, because there will always be water at their points of diversion in Delta channels. These arguments are agnostic as to the actual share of water in the Delta at any given time that represents natural or abandoned freshwater flows. Many of the Petition's arguments were addressed in Section 3.7.5 of Order WR 2022-0147-EXEC, which discussion is incorporated by reference.

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<sup>7</sup> Petition at pp. 6, 9-14.

### **3.3.1 Tidal Flows Are Not a Distinct Water Source That Independently Supports Legal Diversions**

The Petition's various arguments mischaracterize tidal flows as a separate source of available supply that is wholly distinct from the natural and abandoned freshwater flows apportioned by the Methodology. The Petitioners effectively construe tidal flows as a limitless spring from which they claim a legal right to take unlimited water and make the Projects dilute it to a usable quality for their use. As explained below, this interpretation does not conform to either established legal precedent or physical reality and must be rejected accordingly.

As explained in Appendix D, tidal flows entering the Delta from the west are composed of a combination of intruding seawater and previous freshwater inflows from the east that have not yet permanently left the Delta. One of the functions of the Methodology was to allocate the freshwater component of Delta water representing natural or abandoned flows, which it did using mass balance accounting. In essence, calculated in-Delta water unavailability hinged on the total quantity of natural or abandoned freshwater inflows during a one-month period. The Methodology assumed the freshwater flows could remain in the Delta for a month, referred to as residence time. The Methodology's one-month residence time was a reasonable assumption for mass balance purposes, if not a liberal assumption given the extreme dry conditions and the average amount of time that those inflows typically remain and circulate within the Delta before becoming unavailable—whether due to consumptive use, evaporation, transpiration, or Delta outflow. (The extent of tidal mixing—which Appendix D demonstrates can be very significant—oftentimes means freshwater inflows in fact permanently leave the Delta well before the Methodology's one month residence time. See SWRCB Water Unavailability Methodology for the Delta Watershed - Technical Appendix D, pp. D3 to D-8 (June 27, 2022).) The Petition does not meaningfully refute the substantial evidence supporting Appendix D's conclusions as to the freshwater component of water in the Delta.

To the extent the freshwater component of tidal flows consisted of either (1) stored water releases or (2) natural or abandoned flows allocated to water right holders senior to Petitioners, that water was not available to Petitioners as a matter of law—not merely because the Methodology said so. The Petition provides no legal support for its underlying premise that mixing ocean water with natural or abandoned freshwater flows expands the quantity of water legally available to them without limit, no matter how small the quantity of natural and abandoned freshwater flows.

Taken to its logical conclusion, treating tidal flows as the Petition advocates would subvert well-established principles of California water rights and administration of the Delta, thereby injuring other legal users and degrading water quality. Absent curtailment, the freshwater that Petitioners otherwise would be diverting would be composed primarily of stored water releases and water to which senior right holders are entitled—not some distinct source of water with a merely incidental water quality benefit



from storage releases. Petitioners' diversion of these flows under the guise of a claimed right to divert saline tidal flows thus would violate the rule of priority. Additionally, with each diversion Petitioners made from these freshwater flows dedicated to other legal users or purposes, the Projects would be required to release more stored water from reservoirs to ensure attainment of in-Delta water quality objectives. The Petitioners' claimed right to both divert saline seawater and make the Projects dilute it to a usable quality would drain reservoirs built and managed for the benefit of all Californians.

Water rights are tied to the river or other source of those rights, based on the flow and quality of water available from that source. Having water rights to divert water from that source does not somehow confer a right to greater flows or better water quality than is available from that source. (See *Wright v. Best* (1942) 19 Cal.2d 368, 378 [water right holder is entitled to the quality of water at its point of diversion in its "natural state".]) And water rights are limited to reasonable and beneficial use. (Cal. Const., art. X, § 2.) Even assuming ocean derived saline waters are a source to which water rights may attach, Petitioners have not established that they would make reasonable and beneficial use of a significant quantity of those waters.<sup>8</sup>

Additionally, there is ample evidence that Petitioners and others in the Delta would not have been able to use the mixture of saline and fresh water that would have filled the Legal Delta in the absence of substantial releases of stored water from Project reservoirs in order to prevent salinity intrusion. When drought conditions are most severe, the demand for water in the Legal Delta far exceeds the quantity of natural and abandoned inflows. In the absence of curtailments and Project storage releases, the magnitude of the deficit would cause significant saltwater inflow from the west. (See SWRCB Water Unavailability Methodology for the Delta Watershed - Technical Appendix D, pp. D-8 to D-15 (June 27, 2022).) The substantial volume of supplemental Project water releases<sup>9</sup> during the time period that Petitioners challenge curtailments demonstrates that this saltwater inflow would have been significant. Specifically, from August to October of 2022, even though curtailments were in effect, about 475 thousand acre-feet (TAF) of supplemental Project water was released in order to help maintain Delta water quality. (USBR, Term 91 Water Accounting Reports (August, September, October 2022).)<sup>10</sup> In August alone, 204 TAF of supplemental Project water

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<sup>8</sup> Although Petitioners claim that waters could be used for some non-agricultural uses, they do not establish that they would have used substantial quantities of water for those uses. Even if a suggested use would be reasonable and beneficial, a water right holder is not entitled to protection of water for that use unless the water right holder would in fact use the water for that purpose. See Section 3.4.4 below.

<sup>9</sup> Supplemental Project water is defined as water imported to the Delta watershed or released from storage in Project reservoirs that exceeds Project exports, carriage water, and in-basin deliveries. (State Water Board Decision 1594 (1983) p. 57.)

<sup>10</sup> Official notice of these reports is taken in accordance with California Code of Regulations, title 23, section 648.2, and Evidence Code section 452, subdivision (h).

was released. Were that volume of water to have instead flowed into the Delta from the west, water quality would have been severely impaired.

Though Petitioners may derive incidental water quality benefits from the Projects' releases of stored water, they have no right to divert the Projects' previously stored water itself. Rather, like any water right holder, Petitioners' lawful diversions are limited to natural and abandoned flows available at their priority of right. This bedrock principle of California water rights finds ample support in precedent (e.g., *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 738, 743) in contrast to the overruled trial court opinion that Petitioners now have relied on two years in a row (see Petition at pp. 14-16; see also Order WR 2022-0147-EXEC at p. 48, n. 15). The Third District Court of Appeal directly contradicted Petitioners' argument that the Delta Protection Act entitles them to "water quantity protections" that include the right to take limitless quantities of tidal flows diluted by storage releases:

As for the argument of the Central Delta parties that the Delta Protection Act gives Delta riparians and appropriators a right to water stored upstream by others, we disagree. Nothing in the Delta Protection Act purports to grant any kind of water right to any particular party. The Delta Protection Act does preclude the diversion [by the Projects] of water from the Delta that is necessary for salinity control or to provide an adequate water supply for users within the Delta; however, it is for the Board to decide, in the exercise of its judgment, what level of salinity control should be provided and what is an adequate supply of water for users in the Delta.

(*State Water Resources Control Board Cases*, *supra*, 136 Cal.App.4th at pp. 771-772; see also *Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 109 ["[N]othing in the language of the [Delta Protection Act] gives plaintiffs a new right to divert water in the Delta or entitlement to Project water without paying for it."] )

Thus, by relying on a mass balance approach to calculating available freshwater in the Delta rather than treating tidal flows as a separate source of water, the Methodology prevented the unlawful diversion of flows needed to meet the rights of senior right holders and of storage releases needed for salinity control.

### **3.3.2 The Methodology Implements the Regulation's Reasonable Use Mandate**

In addition to preventing unlawful diversions out of order of priority, the Methodology's exclusion of tidal flows from water available for diversion also implemented the Board's reasonable use directive in section 878.1, subdivision (h), of the Regulation. That provision read, in pertinent part:

Diversion and use within the [...] Delta Watershed [...] that deprives water for minimum human health and safety needs in 2022, or which creates unacceptable risk of depriving water for minimum human health and safety needs in 2023, is an unreasonable use of water. The Deputy Director shall prevent such unreasonable use of water by

implementing the curtailment methodology described in [...] section 876.1 for diversions in the Delta Watershed [...].

Pursuant to this provision of the Regulation, one of the functions of the Methodology was to prevent diversions that threatened to deprive water for minimum human health and safety. The Regulation expressly authorized the Deputy Director to rely on the Methodology to determine when such conditions would occur.<sup>11</sup>

As already noted, treating tidal flows as an additional source of water that remains available, even when natural or abandoned freshwater flows are not, would have resulted in Petitioners taking the Projects' storage releases. Because of CDWA and SDWA's location in the eastern portion of the Delta, diverting under those circumstances would have prevented those storage releases from serving their intended purpose, which included protecting beneficial uses for other in-Delta water users such as municipal water right holders located to the west of the Petitioners. (Indeed, there are several major water rights with a municipal beneficial use located to the west of CDWA and SDWA, including Byron-Bethany Irrigation District, the City of Antioch, and Contra Costa Water District.) By curtailing Petitioners when the freshwater component of the Delta did not include sufficient natural or abandoned flows to serve their water right priority, the Methodology prevented the Petitioners from diverting storage releases and thus interfering with the Projects' maintenance of water quality sufficient to meet minimum human health and safety needs of other in-Delta water users. The Methodology's exclusion of tidal flows from available water supplies thus implemented the State Water Board's lawful directive in section 878.1, subdivision (h), to protect water supplies for minimum human health and safety.

### **3.3.3 The Petition Incorrectly Invokes "Commingling Doctrine"**

The Petition cites Water Code section 7075 and *Butte Canal & Ditch Co. v. Vaughn* (1858) 11 Cal. 143, in support of its assertion that Petitioners are entitled to divert the Projects' storage releases, on the theory that those releases are simply commingled with another source that Petitioners have a right to divert (namely, tidal flows). Water Code section 7075 reads:

Water which has been appropriated may be turned into the channel of another stream, mingled with its water, and then reclaimed; but in reclaiming it the water appropriated by another shall not be diminished.

By their terms, both of the legal authorities cited in the Petition establish an anti-abandonment principle that pertains to appropriators who import foreign water into a

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<sup>11</sup> It is worth noting that the prior iteration of the Methodology in effect at the time the Regulation was renewed in 2022 also excluded tidal flows from its calculation of water unavailability. Thus, given the opportunity to provide express direction to the Deputy Director to correct the exclusion of tidal flows from the Methodology, the Board declined, effectively ratifying this exercise of discretion.

stream and subsequently redivert it. The stored water released by the Projects may be viewed as foreign-in-time, but as with water imported into the watershed, the right to that foreign water is held by the appropriator who imported or stored the water. Others who hold rights to divert from streams in the watershed hold rights only to the water that otherwise would be available without the importation or release from storage. Of course, the rights of others in the watershed are to the flow and quantity that would be available without importation, not to the same molecules of water. But the commingling of water from natural and foreign sources does not alter the amount or quality of water to which water right holders in the watershed are entitled.

In this case, the presence within the Legal Delta of Project water released from upstream storage did not serve to increase or decrease the amount of water in the Delta considered available for diversion and use. Instead, water unavailability within the Delta was determined in accordance with the Methodology, by comparing estimated natural and abandoned flows to estimated demand. Accordingly, the presence of commingled Project water did not preclude any water right holders or claimants within the Delta from diverting the natural and abandoned flows to which they were otherwise entitled, and the curtailment orders were not inconsistent with the legal authority concerning commingling of foreign water cited by Petitioners.

### **3.3.4 Poor Water Quality Justified Excluding Saline Tidal Flows from Available Water**

Finally, Petitioners renew their argument from their 2021 petition that Appendix D's consideration of the impacts of reduced water quality on agricultural production is not relevant to certain other uses, such as fish and wildlife habitat uses, tidal wetland uses, fire suppression, and incidental farming uses such as dust control. The discussion in Order WR 2022-0147-EXEC, Section 3.7.5.2, is incorporated by reference.

Petitioners' further claim<sup>12</sup> that even saline tidal flows are a viable source of water that they would put to beneficial use if allowed by the Methodology is, at best, theoretical and moot. Petitioners have provided no evidence to support this claim, nor has the Board been able to find any historical basis for the Petitioners' diversion and beneficial use of tidal flows during times when their water quality was, in fact, saline.<sup>13</sup> Petitioners make this claim knowing full well that they will never have to put it to the test so long as the Projects are required to maintain Delta water quality with storage releases. In the meantime, Petitioners insist on a right to divert those storage releases based on the dubious theory that they are merely exercising their right to divert limitless saline tidal

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<sup>12</sup> *E.g.*, Petition at pp. 6, 11, 12.

<sup>13</sup> Even some of the beneficial uses that Petitioners identify as capable of being served by saline water, such as fire suppression, are irrelevant to their argument; they could be authorized pursuant to an exception to curtailment. (Cal. Code of Regs., tit. 23, § 878.1, subd. (h).)

water which, thanks to the Projects, just happens to be of better quality than they say they need. But as explained above, Petitioners' water rights attach to natural and abandoned flows—to the extent they would be of suitable water quality under natural conditions—not to any and all water flowing past their points of diversion. The mere physical presence of water at their points of diversion is insufficient to demonstrate the legal availability of such water at their priority. Extensive evidence supports the Methodology's exclusion of tidal flows.

### **3.3.5 Other Previously Raised Contentions Regarding the Methodology**

In addition to the issues discussed above, the Petition renews several other critiques of the Methodology and Appendix D from its 2021 petition for reconsideration. This Order incorporates by reference the discussion of those issues in Section 3.7.5 of Order 2022-0147-EXEC.

### **3.4 Curtailments Did Not Violate the Rule of Priority**

The Petition argues that, by requiring upstream senior water right holders to cease diversions for the benefit of in-Delta water quality, the Methodology violated the rule of priority. The Petition's argument here rests on the false premise that the Methodology allocated water from senior water right holders toward achievement of water quality objectives. The Methodology did not allocate any natural or abandoned flow toward attaining water quality objectives.<sup>14</sup> Rather, all available natural or abandoned flow was allocated to water right holders; water quality objectives were achieved solely through releases of the Projects' stored water. Petitioners' argument therefore lacks merit.

### **3.5 Petitioners' Due Process Arguments are Inconsistent with Binding Precedent**

CDWA and SDWA renew several due process challenges raised in their 2021 petition for reconsideration. As the sections of the order denying that petition referenced below demonstrate, these procedural arguments are without merit.<sup>15</sup>

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<sup>14</sup> Under the constitutional principle of reasonable use and the public trust doctrine, the State Water Board has authority to allocate flow to meet water quality objectives. (*United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 129-130, 148-52 See also *Stanford Vina Ranch Irrigation Company v. State* (2020) 50 Cal.App.5th 976, 1005.) The Board did not do so here, however.

<sup>15</sup> The Petition does not acknowledge, much less discuss, the adverse precedent that is controlling on these issues of law. Due diligence, the Finding of Emergency, or the State Water Board's order denying their 2021 petition for reconsideration would have alerted Petitioners to these legal authorities.

### **3.5.1 Petitioners Were Not Prevented from Having a Fair Hearing**

The Petition renews the argument that an individualized hearing was required prior to issuing curtailments. The State Water Board's discussion in Section 3.2 of Order WR 2022-0147-EXEC is incorporated by reference.

In addition, Petitioners' assertion that the Methodology was developed without any meaningful public process or public review lacks merit. Though the public process may not have been as extensive as Petitioners wished, Petitioners had numerous opportunities to review and comment on the Methodology. State Water Board staff demonstrated a commitment to continually reviewing and, when necessary, refining the Methodology to ensure that it was as accurate and useful as possible. As part of this commitment, Board staff held several public workshops to explain the Methodology, as well as refinements under consideration, and to solicit input from affected water right holders and other concerned parties. Prior to the development of the June 27, 2022, version of the Methodology that was explicitly authorized to be used by the 2022 Regulation, the Board held Workshops on the Water Unavailability Methodology on May 21, 2021 (during which CDWA presented), October 20, 2021 (during which both CDWA and SDWA presented), and May 12, 2022 (during which CDWA presented). (State Water Resources Control Board, Notices of Staff Workshops dated May 12, 2021, October 5, 2021, and April 19, 2022.) Board staff also met with Petitioners' consultants, Dr. Susan Paulsen and her colleague Chi-Yu Lin, on August 11, 2022.

During all of these meetings, Petitioners had the opportunity to raise detailed concerns about the Methodology, pose questions to staff, and provide suggestions as to how the Methodology could be changed to better reflect the amounts of water available for diversion. These efforts toward meaningful public engagement and transparency were not legally required, nor was the formal evidentiary hearing that Petitioners evidently found lacking. Given these myriad opportunities to provide constructive feedback on the Methodology, the Petition fails to explain how the additional procedures it deems necessary would have been feasible, given the exigencies of the drought emergency, or would have added anything of significant value.

### **3.5.2 Evaluating Water Unavailability at Each Point of Diversion and Individualized Determinations of Injury Are Not Required**

The Petitioners renew their 2021 arguments that, prior to issuing curtailments, the State Water Board was required to evaluate water unavailability at each point of diversion and make individualized determinations of injury. The State Water Board's discussion in Sections 3.5.3 and 3.5.4 of Order WR 2022-0147-EXEC is incorporated by reference.

## **4.0 Conclusion**

CDWA and SDWA's Petition for Reconsideration is denied because each of its arguments fails on the merits, as explained above. The curtailment and reporting orders

and the Methodology upon which they were based were lawful exercises of the State Water Board's regulatory authority that did not violate any of Petitioners' substantive or procedural rights.

**ORDER**

The petition for reconsideration of the curtailment and reporting orders issued pursuant to the drought emergency regulation for the Delta watershed is denied.

December 14, 2023

A handwritten signature in blue ink, appearing to read "Eileen Sobeck", is written over a light blue rectangular background.

Dated

Eileen Sobeck  
Executive Director