

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

DIVISION OF WATER RIGHTS

ORDER WR 2021-0095-EXEC

In the Matter of Petition for Reconsideration of

City of Ukiah

Regarding Curtailment of Statement of Diversion and Use S019769

SOURCES: Russian River

COUNTY: Mendocino

ORDER DENYING RECONSIDERATION

BY THE EXECUTIVE DIRECTOR¹

1.0 INTRODUCTION

The City of Ukiah (Ukiah or Petitioner) has petitioned the State Water Resources Control Board (State Water Board or Board) for reconsideration of an August 2, 2021 Order (curtailment order, or curtailment) issued pursuant to a drought emergency regulation (the Regulation). The curtailment order requires that Ukiah cease all surface water diversions from the Upper Russian River watershed pursuant to a pre-1914 water right claimed by Ukiah through Statement of Diversion and Use S019769, or seek an exception for diversions falling within the Regulation's definition of "minimum human health and safety needs."

¹ State Water Board Resolution No. 2012-0061 delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of a water right curtailment order falls within the scope of the authority delegated under Resolution No. 2012-0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

Petitioner first asks that the Board exercise its discretion to lift Ukiah's curtailment so that it may divert and deliver emergency water supplies to communities on the Mendocino coast that, due to drought conditions, have lost reliable access to water even for minimum human health and safety needs. Petitioner then raises several challenges to the curtailment order in question as well as to aspects of the Regulation. Specifically, Petitioner states that the State Water Board was required to hold a hearing before it made findings of unreasonable use as to Ukiah and issued the curtailment order, that the curtailment unlawfully contravenes the rule of priority, that curtailment interferes with the human right to water, and that curtailment of Ukiah's surface water rights is an unconstitutional taking. Petitioner further argues that State Water Board staff's decision not to accept Ukiah's alternative proposal to its own curtailment discriminates on the basis of geography and therefore deprives it of equal protection under the law.

Ukiah's Petition for Reconsideration is denied because each of its arguments fails on the merits, as explained in detail below. The August 2, 2021 curtailment order is a valid exercise of the authority delegated to the Deputy Director for the Division of Water Rights (Deputy Director) under the Regulation, specifically under California Code of Regulations, Title 23, section 877.3. As this Order explains, the adoption and application of the Regulation comports with the most recent and factually relevant precedential decisions addressing the Board's authority to adopt emergency regulations authorizing water right curtailments—decisions that have considered and rejected many of the very same arguments that are central to Ukiah's Petition for Reconsideration and which the Petition fails to acknowledge.²

Further, the premise underlying Ukiah's proposed alternative to curtailment—namely, that curtailment is preventing it from diverting and delivering water to neighboring communities for minimum human health and safety needs—is an incorrect reading of the Regulation. The Regulation includes a procedure for authorizing human health and safety diversions notwithstanding curtailment. On September 8, 2021, the Deputy Director exercised that authority and amended Ukiah's curtailment order to expressly authorize provision of limited emergency water supplies to the Mendocino Coast for health and safety needs (the Amended Order). The Amended Order was necessary due to the clear need to provide emergency water supplies to neighboring communities in need and because Ukiah rejected State Water Board staff's repeated requests that it follow the procedures provided in the Regulation. Because lifting Ukiah's curtailment in its entirety was not necessary to achieve Petitioner's stated objective, the Board will not accept Petitioner's alternative proposal.

² Petitioner's arguments regarding due process, takings, and the rule of priority all were raised in substantially the same form by *amici curiae* in *Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976. In addition to rejecting Stanford Vina Ranch Irrigation Co.'s claims, the court summarily rejected all of the *amici* arguments in a footnote, such was the settled state of the law. (*Id.* at 986, n. 2.)

2.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a water rights decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law.

(Cal. Code of Regs., tit. 23, § 768.)

A petition must specify the specific Board action for which the petitioner requests reconsideration, “the reason the action was inappropriate or improper,” “the specific action which petitioner requests,” and must contain “a statement that copies of the petition and accompanying materials have been sent to all interested parties.” (Cal. Code of 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).)

A petition for reconsideration must be timely filed within 30 days of the decision or order at issue. (Cal. Code of Regs., tit. 23, § 768.) 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. (*Id.*, § 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.

3.0 LEGAL AND FACTUAL BACKGROUND

3.1 Drought Conditions in The Russian River Watershed

On April 21, 2021, Governor Gavin Newsom declared a drought state of emergency in Mendocino and Sonoma counties due to drought conditions in the Russian River Watershed (April 2021 Proclamation). The April 2021 Proclamation provides specifically:

To address the acutely dry conditions in the Russian River Watershed, the Water Board shall consider:

a. Modifying requirements for reservoir releases or diversion limitations in that watershed to ensure adequate, minimal water supplies for critical purposes.

b. Adopting emergency regulations to curtail water diversions when water is not available at water rights holders' priority of right or to protect releases of stored water.

As of April 2021, the U.S. Drought Monitor classified 100% of California as at least abnormally dry, and almost the entire state of California as experiencing severe to exceptional drought conditions (National Drought Mitigation Center; U.S. Department of Agriculture; National Oceanic and Atmospheric Administration, 2021). By May 18, 2021, most of the Russian River watershed was updated from Extreme Drought to Exceptional Drought (National Drought Mitigation Center; U.S. Department of Agriculture; National Oceanic and Atmospheric Administration, 2021).

These exceptionally dry conditions have resulted in unprecedented drawdown of the two main reservoirs that supply water for important economic and basic human beneficial uses within the watershed, Lake Mendocino and Lake Sonoma. Lake Mendocino was at 22.9% of its target water supply curve and Lake Sonoma was at 43.6% of water supply capacity, as of October 7, 2021, and October 14, 2021, respectively. For both reservoirs, these storage levels represent the lowest on record for this date.

Beginning in July 2020, the State Water Board had engaged in regular, extensive stakeholder outreach within the Russian River watershed to gather detailed information about persistent dry conditions and to encourage potential opportunities for collaborative alternatives to mandatory curtailments. By the time Governor Newsom issued the April 2021 Proclamation, however, there was so little water in storage that the parties had all but exhausted the potential for coordinated water sharing to avoid curtailments. The Sonoma County Board of Supervisors declared a local drought emergency on April 27, 2021, stating there is "...a real threat of [Lake Mendocino] going dry this year." Modeling projections prepared by Sonoma County Water Agency (Sonoma Water) at the request of State Water Board staff show that, should current hydrologic conditions and typical losses from the river related to diversions, evaporation, and seepage persist until October 1, Lake Mendocino would empty at some point in the next year in 10 out of the 108 years of historical conditions used to simulate potential future conditions. The human and ecological consequences of Lake Mendocino emptying would be dire given its role in supplying water necessary for both minimum human health and safety and protected fisheries along the Russian River upstream of its confluence with Dry Creek.

On May 25, 2021, the State Water Board issued Notices of Water Unavailability for 2021 (Notice of WUA). The Notice of WUA advised that water is unavailable as of June 1, 2021, for junior water right holders with a post-1914 priority date in the Russian

River Watershed upstream of the Dry Creek confluence. The Notice of WUA also warned more senior water right holders, including pre-1914 appropriative right holders and riparian right holders, to conserve water and that development of an emergency regulation was under consideration. This informational notice did not encourage enough water users to reduce diversions sufficient to increase flows along the Russian River. Following issuance of the Notice of WUA, reach losses-reductions in stream flow due to diversions, evaporation, or losses to groundwater-either stayed the same or *increased*. Lake Mendocino storage levels continued to drop at an alarming rate.

3.2 Russian River Drought Emergency Regulation

On June 15, 2021, the State Water Board adopted an emergency regulation for Curtailment of Diversions to Protect Water Supplies and Threatened and Endangered Fish in the Russian River Watershed. (State Water Board Resolution No. 2021-0023 (adding sections 877, 877.1, 877.2, 877.3, 877.4, 877.5, 877.6, 878, 878.1, 879, 879.1 and 879.2 to California Code of Regulations, Title 23 [the Regulation]).) The Office of Administrative Law approved the Regulation and it went into effect on July 12, 2021.

The Regulation establishes drought emergency curtailment methodologies for the Russian River watershed and authorizes limited diversions for “minimum human health and safety needs,” as defined, to continue notwithstanding curtailment under certain circumstances. Section 878.1, subdivision (g), provides:

Diversion and use within the Russian River Watershed that deprives water for minimum human health and safety needs in 2021, or which creates unacceptable risk of depriving water for minimum human health and safety needs in 2022, is an unreasonable use of water. The Deputy Director shall prevent such unreasonable use of water by implementing the curtailment methodology described in section 877.2 for diversions in the Lower Russian River Watershed and sections 877.3, 877.4, 877.5, and 877.6 for diversions in the Upper Russian River Watershed.

Under section 877.3, when Sonoma Water is releasing stored water from Lake Mendocino for in-basin needs and Lake Mendocino storage levels have fallen below the thresholds specified in section 877.4, diversions from the Upper Russian River watershed that do not fall within one of the Regulation’s exceptions are declared an unreasonable use and are prohibited. In other words, when the conditions in section 877.3 are met, the only lawful basis for diversion is an authorized exception to curtailment, such as “minimum human health and safety needs” or a non-consumptive use. Pursuant to section 877.3, subdivision (b), the Deputy Director for the Division of Water Rights (Deputy Director) may issue curtailment orders to implement the requirements of section 877.3. Notably, because curtailment authority in the Upper Russian River watershed is not triggered until Lake Mendocino falls below the storage targets in section 877.4, water users could have avoided the issuance of curtailment orders by undertaking voluntary conservation measures that slowed drawdown effectively enough to keep Lake Mendocino above those storage targets.

On July 26, 2021, section 877.3's curtailment criteria were met, triggering issuance of curtailment orders on August 2, 2021, to all water right holders diverting from the Upper Russian River watershed. The curtailment orders required the recipient to certify that it would cease its diversions except for those authorized by one of the Regulation's express exceptions to curtailment. Curtailment orders further directed water right holders to log onto an online portal where they could follow the Regulation's procedures for authorizing continued diversions, as applicable to their situation: a certification for non-consumptive uses or for minimum human health and safety diversions under 55 gallons per person per day (gpcd), or a petition requesting approval of minimum human health and safety diversions in excess of 55 gpcd.

On August 9, 2021, the State Water Board received Ukiah's Petition for Reconsideration of its curtailment order.

4.0 ANALYSIS

4.1 Legal Authority

The State Water Board has "authority to prevent illegal diversions and to prevent waste or unreasonable use of water, regardless of the basis under which the right is held." (*Light v. State Water Resources Control Board* (2014) 226 Cal.App.4th 1463, 1487 [quoting *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 429 (internal quotation marks omitted)].) This legal authority includes adoption of regulations establishing per se rules declaring a use of water unreasonable. (*Id.* at pp. 1484-85.) During a declared drought emergency, Water Code section 1058.5 authorizes the State Water Board to adopt emergency regulations to prevent unreasonable use and require curtailment of diversions when water is not available under a diverter's priority of right.

Section 877.3 of the Regulation sets forth a bright-line rule for identifying the circumstances under which a use of water in the Upper Russian River watershed is unreasonable. Specifically, if Lake Mendocino storage levels drop below thresholds in section 877.4 and Sonoma Water is releasing stored water for in-basin uses,³ diversions from the Upper Russian River watershed are per se unreasonable, unless they fall within one of the Regulation's authorized exceptions. This bright-line rule does

³ "Inbasin Uses" is a term defined in the Regulation as "diversions from the Mainstem of the Upper Russian River to meet minimum human health and safety needs, Reach Losses, and minimum flows required for protection of fish and wildlife as required by a water right permit or license term, including any enforceable modifications of the foregoing. Export diversions, deliveries scheduled by the Flood Control District pursuant to License 13898, and Reach Losses associated with those exports and deliveries are specifically excluded from the definition of Inbasin Uses." (Cal. Code of Regs., tit. 23, § 877.3, subd. (c)(1).)

not hinge on the actual availability of natural or abandoned flows at a particular water user's level of priority. Rather, it represents a risk threshold beyond which it is unreasonable to draw down Lake Mendocino any further except for what the State Water Board has deemed the most essential uses of water during this drought emergency. This same risk threshold informed the Board's finding that any natural or abandoned inflows to Lake Mendocino must be devoted toward minimum human health and safety needs to prevent the unreasonable use of water that would result if these needs went unmet. (See Resolution 2021-0023, para. 15.)

The Regulation gives effect to the Board's findings regarding unreasonable use by authorizing the issuance of curtailment orders and allowing certain limited diversions to minimum human health and safety needs to continue notwithstanding curtailment. This exception ensures that curtailment will not result in deprivation of the human right to water or create conditions that jeopardize the safety of local communities. Invoking this exception to curtailment requires the water right holder to abide by certain requirements to ensure accountability and prevent abuse, such as regular reporting, conservation, and due diligence with respect to obtaining alternative sources of water.

4.2 Ukiah's Alternative Proposal

Ukiah's Petition includes a proposal that the State Water Board lift the curtailment order so that Ukiah may divert and deliver emergency water supplies for Mendocino County communities that have lost access to reliable water even for minimum human health and safety needs.⁴ In addition to asserting that natural or abandoned flows are legally available at its point of diversion, Petitioner points to language added to State Water Board Resolution No. 2021-0023 prior to adoption:

5. The State Water Board (1) continues to support cooperative efforts to meet needs within the Russian River watershed and to develop more precise methodologies for determining water availability; and (2) directs staff to continue

⁴ In this context, lifting the curtailment order means exercising the State Water Board's discretion to terminate the legal effect and requirements of Ukiah's curtailment under the Regulation even though the curtailment criteria under section 877.3 are still met.

As noted in the Introduction to this Order, on September 8, 2021, the Deputy Director issued an Amended Order continuing the requirements of the August 2, 2021 curtailment order but carving out an express authorization for deliveries of emergency water supplies to coastal communities in Mendocino County that have lost access to water for minimum human health and safety needs. Although issuance of the Amended Order resolves the stated concerns motivating Ukiah's alternative proposal, the possibility that similar circumstances may recur—as to Ukiah or other curtailed water users—warrants a full explanation as to why Ukiah's alternative proposal would not have been an appropriate exercise of the State Water Board's discretion.

work with stakeholders on improvements in water availability and use within the Russian River watershed based on its unique hydrology to support curtailments in future years or that could support voluntary efforts to meet storage targets this year or avoid curtailments.

Based on this text, Petitioner argues that its proposal that the Board lift its curtailment “achieves the vision and direction of the Board members.”

Petitioner appears to misread the Board’s direction to Division of Water Rights staff. By its terms, Resolved Number 5 does not express generalized support for any and all voluntary measures as a substitute for curtailment under the Regulation. Rather, the cooperative efforts described in that paragraph aim to achieve two specific outcomes: improving water availability methodologies, and avoiding the need for curtailments by meeting storage targets. Ukiah’s alternative proposal would achieve neither of these aims.

The “improved information” supporting Petitioner’s alternative proposal is just a subset of what Board staff already knew: that there is some natural or abandoned flow measured just above Lake Mendocino. Viewed in isolation, this information is insufficient to justify lifting Petitioner’s curtailment. Merely demonstrating the presence of inflows to Lake Mendocino does not address publicly available data showing that reach losses between Lake Mendocino and Ukiah’s point of diversion far exceed those inflows, which strongly suggests that water flowing past Ukiah’s point of diversion comprises releases of water previously stored in Lake Mendocino, not natural or abandoned flow. Petitioner’s “improved information” likewise is not responsive to the State Water Board’s stated imperative of stretching scarce water supplies to ensure that minimum human health and safety needs can continue to be met until the watershed receives enough precipitation to begin serving other uses, as well.⁵ Moreover, Petitioner’s alternative proposal includes nothing about its anticipated effect on meeting Lake Mendocino storage targets, which both the Resolution and the Regulation make clear are a key measure of whether voluntary conservation is doing enough to mitigate the drought emergency. These considerations, alone, demonstrate that Petitioner’s

⁵ Paragraph 15 of Resolution No. 2021-0023 reads, in pertinent part: “To the extent quantifiable water is conserved in storage as a result of curtailment of diversions of extremely limited inflows of abandoned water from the Potter Valley Project and tributaries of the Upper Russian River, the storage of water is necessary to protect human health and safety needs. [...] While the entire watershed is experiencing unprecedented drought conditions, the severity of present and anticipated storage levels in Lake Mendocino warrant requiring the extremely limited amount of natural and abandoned flows in the Upper Russian River watershed to support minimum health and safety needs for this water year as well as during an on-going drought emergency in 2022.”

alternative proposal is not consistent with the intended aims of the State Water Board's Regulation or holistic water management more generally.

Ukiah's alternative proposal sets up a false choice between lifting its curtailment or halting proposed deliveries of emergency water supplies to Mendocino County communities in need. The Regulation provides a legal pathway for making those deliveries without the need to lift a duly issued curtailment order in its entirety. Section 878.1, subdivision (b)(1), allows a curtailed water user to continue diverting for minimum human health and safety needs up to 55 gallons per person per day (gpcd) by submitting a certification using the online portal identified in the curtailment order. If those deliveries would average more than 55 (gpcd), Ukiah's proposed deliveries could be authorized under the petition procedure described in section 878.1, subdivision (b)(2).⁶ Curtailment is not standing in the way of Ukiah coming to its neighbors' aid.

The key difference between Petitioner's alternative proposal and achieving the same outcome under the Regulation's procedures is that accepting the alternative proposal would remove important accountability and enforcement mechanisms that are especially crucial during this drought emergency. The Regulation's exception to curtailment includes certification and reporting requirements to ensure that water is being used only for authorized purposes. Far from mere paper exercises, this information is what enables the Board to fulfill its responsibility to manage drought conditions in the watershed effectively. The Regulation's requirements also are backed by well-established enforcement authorities under the Water Code. In contrast, trying to verify or enforce similar limitations on Petitioner's diversion and use through an individual voluntary agreement⁷ would be subject to uncertain and untested procedures. Unnecessarily introducing uncertainty outside of the framework provided by the Regulation is not acceptable to the State Water Board given the risks involved.

This Order's consideration of enforcement contingencies should not be taken as an indictment of Petitioner's trustworthiness as an honest and responsible operator within the water community, but rather as a statement of just how dire the conditions are in the Upper Russian River watershed. The rate at which Lake Mendocino is falling and the stakes of the reservoir running dry mean there is no margin for error when managing

⁶ Note that section 878.1's gpcd limitations apply to the population being served by minimum human health and safety diversions, not across the water right holder's entire service area. If, as Petitioner has said, it proposes to meet its own residents' needs with alternative water sources and devote all diversions under its pre-1914 water right toward its good neighbor emergency deliveries, Ukiah's own residents' water use would not be subjected to the limitations associated with invoking that exception to curtailment.

⁷ Whether the Board could even secure these commitments from a voluntary agreement with Ukiah remains hypothetical, as Petitioner has not yet indicated whether it would be willing to abide by requirements similar to those that would apply under the Regulation's minimum human health and safety exception.

available water supplies in the Upper Russian River. In the context of the current drought emergency, an alternative agreement without adequate accountability would be too great a risk—particularly when the same result could be achieved under the Regulation.

4.3 Ukiah’s Curtailment Provided All the Process That Could Be Due

Petitioner asserts that the Regulation’s finding of unreasonable use required an individualized hearing to consider its application to Ukiah’s water right. Petitioner further argues that the curtailment order violated its right to due process because it was issued without the opportunity for a hearing. Both of these contentions are without merit.

It is now well-established that the State Water Board possesses legal authority to adopt regulations declaring that a particular use of water under given circumstances is unreasonable without the requirement to conduct a hearing as to any individual water right. (*Stanford Vina Ranch Irrigation Co. v. State* (2020) 50 Cal.App.5th 976, 1004 [citing *Light v. SWRC State Water Resources Control Bd.* (2014) 226 Cal.App.4th 1463, 1484-85] [*“Stanford Vina”*].) *Stanford Vina* arose from a challenge to an emergency regulation that the State Water Board adopted during the previous drought and which established minimum flow requirements to protect two threatened species of anadromous fish, spring-run Chinook salmon and steelhead trout, during their respective migratory cycles. The regulation declared that diversion and use that caused flows to fall below thresholds specified in the regulation were a “waste and unreasonable use of water,” with certain exceptions, and authorized the issuance of curtailment orders to enforce this prohibition. Like Ukiah, plaintiff Stanford Vina Ranch Irrigation Company argued that making such a finding by regulation without holding a hearing deprived it of its constitutional right to due process.

The *Stanford Vina* court rejected this claim, pointing to the broad regulatory authority granted to the State Water Board under article X, section 2 of the California Constitution to prevent waste and unreasonable use, as well as express authority in Water Code section 1058.5 to adopt emergency regulations for that purpose. The court distinguished the precedents finding that an adjudicative hearing is required by noting that those cases all involved an individualized, ad hoc finding of unreasonableness, not a legislative or quasi-legislative per se rule of unreasonableness. On this point, the court concluded:

While we acknowledge that in the absence of a per se rule of unreasonableness, the determination of whether Stanford Vina’s water use was reasonable or not would necessarily have been determined ad hoc, adjudicatively, this does not mean due process requires the Board to hold an evidentiary hearing before engaging in the legislative function of promulgating a regulation defining diversions of water under certain emergency circumstances to be per se unreasonable. Such a requirement would turn the regulatory process on its head. Nor did the Board violate article X, section 2 by failing to hold such a hearing. As we held in

[*California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585], the Legislature may, consistent with this constitutional provision, legislate per se rules of unreasonable use. [...] So too may the Board. (*Id.* at p. 1003-04.)

Here, as in *Stanford Vina*, the State Water Board adopted a drought emergency regulation that included a quasi-legislative, per se rule of unreasonableness pursuant to Article X, section 2 of the California Constitution. An evidentiary hearing to evaluate that finding specifically as applied to Ukiah's water rights was not required. Nor did due process require a hearing to evaluate application of the Regulation's curtailment criteria prior to issuance of the curtailment order. "[D]ue process' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (*Matthews v. Eldridge* (1976) 424 U.S. 319, 334.) Rather, in determining if notice and opportunity to be heard was adequate, a reviewing court considers: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of the private interest; and (3) the Government interest, including the function involved and the fiscal and administrative burdens. (*Id.* at 335.)

As already discussed, Petitioner does not have a vested right to the unreasonable use of water. The per se rule of reasonableness embodied in sections 878.1, subdivision (g), and 877.3 of the Regulation establishes conclusively that continued diversions under Ukiah's pre-1914 water right without an authorized exception would constitute unreasonable use. The risk of an erroneous deprivation is miniscule given that Ukiah's curtailment occurred pursuant to application of a bright-line rule based on public, readily verifiable information that the Petition does not contest. A hearing therefore has no potential to change application of the legally relevant criteria. Finally, providing the right to a hearing prior to each curtailment would far outstrip the State Water Board's limited resources at a time when the Board is committed to managing drought conditions throughout the state. With over a thousand curtailments underway in the Russian River watershed alone, and tens of thousands across the state, providing each curtailed diverter with the opportunity for a hearing before issuance of a curtailment order would present an impractical administrative burden that would render the directives contained in the Water Code and the Governor's Drought Proclamation impossible. Most importantly, it would delay the cessation of diversions that is urgently necessary to ensure that Californians do not run out of drinking water.

For all of the foregoing reasons, due process did not require a hearing prior to curtailing Ukiah's water right. Should the State Water Board's Office of Enforcement initiate enforcement action against Ukiah for violation of the Regulation, and assuming there is a material issue of disputed fact relevant to the alleged violation or the appropriate remedy, Ukiah will have an opportunity for an evidentiary hearing.

4.4 Ukiah's Curtailment Does Not Violate the Rule of Priority

Petitioner next argues that curtailing Ukiah, which claims one of the most senior water rights in the watershed, while allowing other water users to divert for minimum human health and safety needs violates California's rule of priority. Petitioner incorrectly asserts that the Regulation has assigned any natural or abandoned flows that would otherwise be available to Petitioner to a water right holder with a priority 75 years its junior.⁸ Here, as with its due process claims, Petitioner has not acknowledged or addressed the most recent and relevant judicial precedents on point. As explained below, these precedents thoroughly refute Petitioner's arguments concerning the rule of priority.

All water rights in California, both riparian and appropriative, are constrained by two limiting principles: (1) the rule of reasonableness; and (2) the public trust doctrine. (*Stanford Vina, supra*, 50 Cal.App.5th at p. 994.) "[T]he rule of priority is not absolute, nor is the Board without power to act contrary to that rule in appropriate circumstances. Sometimes, a competing principle or interest may justify the Board's taking action inconsistent with a strict application of the rule of priority. [...] [W]hen the rule of priority clashes with the rule against unreasonable use of water, the latter must prevail." (*El Dorado Irrigation Dist. v. State Water Resources Control Bd.* (2006) 142 Cal.App.4th 937, 965-66 [*EID*]; see also *Light, supra*, 226 Cal.App.4th at p. 1489 ["[T]he Board has the ultimate authority to allocate water in a manner inconsistent with the rule of priority, when doing so is necessary to prevent the unreasonable use of water."].)

The Regulation and its implementation in the Upper Russian River watershed did not impose any limitation on senior water right holders that it did not also impose on junior water right holders. The State Water Board issued curtailment orders to every single water right holder diverting surface water from the Upper Russian River watershed, including Sonoma Water; no water user junior to Petitioner was exempted. Additionally, all curtailed water users—including Petitioner—may avail themselves of the Regulation's authorized exceptions to curtailment for minimum human health and safety diversions or non-consumptive uses. (This latter point, alone, is sufficient basis to reject Petitioner's argument that the curtailment order interferes with the human right to water.)

To the extent Petitioner complains that allowing curtailed water right holders to divert water for minimum human health and safety violates the rule of priority,⁹ the Regulation

⁸ The Petition presumably refers to Sonoma Water, though it does not identify Sonoma Water by name.

⁹ The Petition does not address the inconsistency in arguing that Ukiah's curtailment deprives residents of the human right to water while also contending that authorizing other water right holders' limited diversions for minimum human health and safety needs

falls squarely within the legal authority quoted from *EID*, above. Specifically, the Regulation finds that “[d]iversion and use within the Russian River Watershed that deprives water for minimum human health and safety needs in 2021, or which creates unacceptable risk of depriving water for minimum human health and safety needs in 2022, is an unreasonable use of water.” (Cal. Code of Regs., tit. 23, § 878.1, subd. (g); see also State Water Board Resolution No. 2021-0023, para. 15 [“To the extent quantifiable water is conserved in storage as a result of curtailment of diversions of extremely limited inflows of abandoned water from the Potter Valley Project and tributaries of the Upper Russian River, the storage of water is necessary to protect human health and safety needs.”].) Under the Regulation, to the extent any natural or abandoned flows—however small—may be present while section 877.3’s curtailment triggers are met, it would be unreasonable to deprive or risk depriving water for minimum human health and safety needs by allocating that water to a senior right holder based on its priority. This finding represents the Board’s judgment that, within the specific context of this drought emergency, strict application of the rule of priority would clash with constitutional prohibition against the unreasonable use of water. As the *EID* Court concluded, under such circumstances, the latter must prevail.

4.5 Ukiah’s Curtailment Did Not Effect an Unconstitutional Taking

Petitioner next argues that its curtailment order effected a physical taking of water available to Ukiah. The Petition fails on this claim because the curtailment order did not take anything that Ukiah previously owned. Ukiah’s pre-1914 water right, like all water rights, is usufructury, and has always been subject to the prohibition against unreasonable use. As the *Stanford Vina* Court made clear, there is no vested right to use water unreasonably. (*Stanford Vina*, *supra*, 50 Cal.App.5th at 1006-07 [citing *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 145].) A regulation that defines unreasonable use activates a limitation that has always been a component of the water right. A curtailment order implementing that regulation therefore is not a compensable taking.¹⁰

is unlawful. The human right to water extends to all human beings and is not dependent on possessing a senior water right.

¹⁰ A claim that a curtailment of diversion or extraction of water constitutes an unconstitutional taking is analyzed under a regulatory taking analysis, not as a physical invasion. (*People v. Murrison* (2002) 101 Cal.App.4th 349, 362–363; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1271–1275.) Under either analysis no taking occurs where the curtailment is merely applying a limitation, such as the prohibition against unreasonable use, that is inherent in the right to divert or extract water.

4.6 Rejecting Ukiah's Alternative Proposal Was Not an Equal Protection Violation

Finally, Petitioner argues that the State Water Board unlawfully discriminated against Ukiah by subjecting it to a Regulation that (1) declared its diversion unreasonable solely because of its geographic location in the watershed, and (2) did not provide it the opportunity to avoid curtailment through voluntary measures in the same manner allowed under emergency regulations adopted for other watersheds. Petitioner asserts on this basis that the State Water Board deprived Ukiah of equal protection under the law based solely on its "geography." Because geography is not a suspect class under the United States or California Constitutions and the Regulation does not implicate a concern recognized by courts as a fundamental right, the State Water Board need only provide a rational basis for providing regulated entities different treatment. (*See Heller v. Doe* (1993) 509 U.S. 312, 319–320 ["[A] classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity. [Citations.] Such a classification cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose."].)

Here, the Finding of Emergency and Board Resolution accompanying the Regulation provided extensive information detailing the unique hydrology and drought risks facing the Upper Russian River watershed—in particular, the likelihood that the principal source of water for minimum human health and safety needs might empty entirely and the catastrophic consequences should that occur. This specific risk, which is distinct from those facing the Lower Russian River and other watersheds where the State Water Board has adopted drought emergency regulations, motivated the curtailment methodology for the Upper Russian River watershed that is focused on whether Lake Mendocino storage targets are being met. Far from lacking a rational basis, the Regulation's treatment of the Upper Russian River watershed is based on precisely the kind of factual considerations that the law requires for findings of unreasonable use—and which Ukiah insists on elsewhere in its Petition.

When lake levels are above the targets in section 877.4, the Regulation affords Upper Russian River water users the freedom and ample opportunity to avoid curtailment through cooperative measures that are effective and collective enough to avoid unsafe drawdown of Lake Mendocino. But when lake levels fall below those targets, the margin for error is too small to risk loss of the Upper Russian River watershed's principal water supply for minimum human health and safety needs. Under those circumstances, the State Water Board determined that it would be unreasonable to authorize non-exempt water uses that would further draw down Lake Mendocino, thereby threatening the security of water for minimum human health and safety needs. These considerations, which the Finding of Emergency and Board Resolution explain, provide more than the minimum rational basis required to justify treating water users in different portions of the Russian River watershed differently. And as already noted, Petitioner was subject to the same curtailment and same minimum human health and

safety exception as every other water user in the Upper Russian River watershed. Far from seeking equal protection, the Petitioner's request to opt out of a watershed-wide curtailment appears to be insisting on preferential treatment under the law.

In practice, the distinction between the Board's consideration of Petitioner's alternative proposal and the process for considering alternatives under other drought emergency regulations is one without a difference. Far from being deprived of an opportunity, Ukiah availed itself of several opportunities to provide State Water Board with data and argument that it believes refute findings in the Regulation or its basis for curtailing Ukiah. That Board staff ultimately disagreed with Ukiah's interpretation of a partial data set that did not incorporate reach losses and the needs of others reliant on minimum human health and safety diversions is not evidence that the Board did not receive, review, and duly consider Ukiah's proposed alternative to curtailment. The Petition does not demonstrate how regulation text expressly requiring staff to consider Ukiah's alternative proposal would have achieved a different result. For the above reasons, the Petitioner's equal protection argument must fail.

5.0 CONCLUSION

Ukiah's Petition for Reconsideration is denied because it fails on the merits, for the reasons explained above. The curtailment order did not violate any of the substantive or procedural rights asserted by Petitioner, nor would approval of Petitioner's alternative proposal be an appropriate exercise of the State Water Board's discretion.

ORDER

The State Water Board finds that the challenged actions were appropriate and proper. Accordingly, Petitioner's Petition for Reconsideration is denied.

October 22, 2021

Dated



Eileen Sobeck
Executive Director