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# STATE WATER BOARD USES TERM 91 AS THE BASIS FOR CURTAILMENT ORDERS TO WATER RIGHT PERMIT AND LICENSE HOLDERS

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By: Craig A. Tristao

On April 30, 2015 the State Water Resources Control Board declared that (1) water being released from state and federal water projects is being released in the Sacramento-San Joaquin Delta Watershed (Delta Watershed) and (2) the Delta is in Balanced Condition. It then issued curtailment notices to 88 holders of post 1914 water rights permits and licenses in the Delta Watershed whose permit or license contains Term 91.

So, what is Term 91: when did it come into effect, what water right permits or licenses does it apply to, what is its purpose, and when can the State Water Resources Board issue curtailments under Term as it did on April 30th?

On March 25, 1980 the State Water Resources Control Board adopted term No. 91. Term 91 applies to permits or licenses obtained after August 16, 1978 that (1) authorize the diversion of water within the Delta Watershed at a rate greater than one cubic foot per second or (2) authorize the collection to storage within the Delta of more than 100 acre-feet of water per year. Its purpose is to allow for the improvement of water quality in the Delta. Term 91 prohibits, via curtailment orders, water right permit holders or licensees that contain the provision from diverting water when the amount of water being released from “the Shasta, Oroville, and Folsom reservoirs, plus the amount of water the Bureau of Reclamation is importing from the Trinity River, exceeds the amount of water the projects are exporting from the Delta plus “carriage water,” which is “the amount of additional Delta outflow required to compensate for currents created by the export pumps.” (El Dorado Irr. Dist. v. State Water Resources Control Bd. (2006) 142 Cal.App.4th 937, 951.) When such circumstances exist the water that the state and federal governments are releasing is considered their “own stored or imported water” and that its use is to meet water quality objectives or other in basin demands. (Ibid.)



The State Water Resources Control Board consults with the U.S Bureau of Reclamation and the California Department of Water Resources to determine when to curtail water rights subject to Term 91. Curtailments under Term 91 can be issued when the following conditions exist:

The Projects are releasing previously stored Supplemental Project Water to meet water quality objectives and in basin entitlements in the Delta.

The condition of the Delta is declared to be “Balanced” by the U.S Bureau of Reclamation and the California Department of Water Resources. The condition of the Delta is generally declared to be “Balanced” when water quality objectives and in basin entitlements are only being met because of the release of previously stored Supplemental Project Water. When there is sufficient flow through the Delta to meet water quality objectives and in basin entitlements without requiring the release of Supplemental Project Water, the condition of the Delta is declared to be “Excess.”

The curtailment notice can be viewed [here](#).

The source data used to determine if Supplemental Project Water is being released into the Delta can be viewed [here](#).

The source used to determine if the condition of the Delta is “Balanced” or “Excess” can be viewed [here](#).

Additional

Sources:

[http://www.waterboards.ca.gov/board\\_info/agendas/2012/dec/120412\\_10.pdf](http://www.waterboards.ca.gov/board_info/agendas/2012/dec/120412_10.pdf),

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/applications/docs/term9193.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/applications/docs/term9193.pdf)

Craig A. Tristao is a Partner in the litigation and transactions departments of the firm’s Fresno office. He provides representation to clients in litigation matters involving agricultural law, environmental law, construction law, land use and natural resource law, water law, probate and estates, and eminent domain matters that involve the California High Speed Rail Authority. Craig also assists clients with regulatory compliance issues concerning the Clean Water Act (CWA), the Porter-Cologne Act, and the Clean Air Act (CAA). In addition to litigation, Craig also represents clients before the Regional Water Quality Control Boards and the State Water Resources Control Board, air districts, and the Contractors State License Board (CSLB). He has also been named a Super Lawyers “Rising Star” for 2015-2018 (2.5% of lawyers practicing under 10 years). You can contact Craig at (559) 248-4820 or [ctristao@ch-law.com](mailto:ctristao@ch-law.com).