CONSIDERATION OF A PROPOSED RESOLUTION TO AMEND AND READOPT AN EMERGENCY REGULATION THAT PROVIDES CURTAILMENT AUTHORITY IN THE KLAMATH RIVER WATERSHED AND ESTABLISHES MINIMUM INSTREAM FLOW REQUIREMENTS AND INFORMATION ORDER AUTHORITY IN THE SCOTT RIVER AND SHASTA RIVER WATERSHEDS

Proposed changes to the Draft Resolution and Proposed Regulation are outlined below. Proposed changes in red double-strikethrough are new deletions and changes in red double-underline are new additions.

**PROPOSED CHANGES TO DRAFT RESOLUTION:**

**Add new Whereas No. 27 to Resolution and update subsequent numbering:**

27. Division of Water Rights staff are currently working with University of California at Davis to update the Scott Valley Integrated Hydrologic Model (SVIHM) which was initiated by the North Coast Regional Water Quality Control Board and built on by Siskiyou County’s groundwater sustainability agency as part of Sustainable Groundwater Management Act with input and data from local landowners and other contributors. Division of Water Rights staff plan to run additional drought and curtailment scenarios, and develop tools to inform water management and drought planning in the Scott River watershed.  As part of this modeling effort, staff will be evaluating the effectiveness of local cooperative solutions
(e.g., 30 percent reduction in groundwater use) and other non-curtailment strategies (e.g., groundwater recharge projects) to improve instream flow.

28. During the dire drought conditions currently being experienced in the Klamath River watershed, it is imperative that water right holders and claimants who do not have water available at their priority of right and do not have a need or obligation to provide water for minimum human health and safety or minimal livestock watering uses cease diversions of water that is needed for the minimal protection of fisheries resources and more senior water rights.

29. Water Code section 1058.5 provides the State Water Board the authority to adopt emergency regulations in certain drought years or when the Governor proclaims a drought state of emergency in order to prevent unreasonable use, require curtailment of diversions when water is not available under the diverter’s priority of right, and require reporting of diversion or use or the preparation of monitoring reports.

30. Article X, section 2 of the California Constitution declares that the water resources of the state must be put to beneficial use to the fullest extent possible and the unreasonable use of water be prevented. Relevant to the current drought conditions, the California Supreme Court has clarified that “[w]hat may be a reasonable beneficial use, where water is present in excess of all needs, would not be a reasonable beneficial use in an area of great scarcity and great need. What is a beneficial use at one time may, because of changed conditions, become a waste of water at a later time.” (Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist. (1935) 3 Cal.2d 489, 567.) The reasonable use doctrine applies to the diversion and use of both surface water and groundwater, and it applies irrespective of the type of water right held by the diverter or user. (Peabody v. City of Vallejo (1935) 2 Cal.2d 351, 367.) Further, the reasonable use doctrine extends to the adoption of drought emergency minimum instream flows under Water Code, section 1058.5 to protect specific species in critical watersheds, and to implementation of these through curtailment of diversions based on water rights priority. (Stanford Vina Ranch Irrigation Co. v. State of California (2020) 50 Cal.App.5th 976.) This regulation is in furtherance of article X, section 2 during this drought emergency.

31. Both the Scott River and Shasta River watersheds have groundwater that is closely interconnected with surface flows. Because of this, it is necessary to address both groundwater and surface-water in a curtailment regulation. Where groundwater and surface waters are interconnected, the “common source” doctrine applies, integrating the water rights and applying priorities without regard to whether the diversion is from surface water or groundwater. (Hudson v. Dailey (1909) 156 Cal. 617, 627–628.).

32. Adoption of an emergency regulation is necessary to address ongoing dire water shortages in the Klamath River watershed. The amended emergency regulation will enable the State Water Board to continue to act in a timely manner to protect vital flows for fisheries, and to enforce the water right priority system with respect to all water right holders and claimants, including groundwater diversions, while assuring water remains available for minimum health and safety and livestock watering needs.

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

34. Pursuant to Water Code, section 7, the State Water Board is authorized to delegate authority to staff.

**Add new Resolved No 8 to Resolution and update subsequent numbering:**

7. The State Water Board directs staff to continue work with stakeholders this year and in future years on voluntary efforts to meet instream flow needs and avoid curtailments; and

8. The State Water Board directs staff to continue to develop and use hydrologic modeling tools in the Scott River watershed to better understand and support the planning and implementation of groundwater recharge projects, curtailments, local cooperative solutions, and other water management strategies, and

9. Except for purposes of enforcement of a curtailment order issued pursuant to this regulation, this regulation and any curtailment order issued hereunder shall not be cited as authority for, or evidence of, the validity or priority of any water right or claim affected or protected by this regulation. Given this, it would be inappropriate to consider compliance with the regulation to be an admission or waiver of any rights or claims of affected parties.

**PROPOSED CHANGES TO PROPOSED REGULATION**

**On pages 6 and 7 of the Proposed Draft Regulation, modify Section 875, subdivision (f)(4)(B)(iii) of the Proposed Regulation as follows:**

1. **For livestock diversions that would otherwise be prohibited under Section 875.7, and are included on their own or as part of a proposal under (i) or (ii):**
	* + - 1. **tThe California Department of Fish and Wildlife finds that the proposal will adequately protect fishery resources, including consideration of whether the proposal allows sufficient water to provide for a natural hydrologic flow regime in the watershed, including pulse flows; whether redds are dewatered; whether the resulting flows support juvenile and adult salmon migration, incubation, and rearing; and whether the proposal results in a material decrease in available tributary or mainstem habitat; and**
				2. **The Deputy Director finds there is sufficient water available under the proposal for competing uses, including consideration of storage for human health and safety and environmental needs; the risk that the proposal would result in additional curtailments; and the potential impact on the flows in subdivision (c)(1) or (c)(2) being met.**
				3. **To the extent appropriate to the above findings, the local cooperative solution must include monitoring for and protection of redds and verification of flows.**

**This type of local cooperative solution can result in benefits that make the less efficient diversion reasonable, such as providing for more economic livestock watering, reducing ditch-drying and associated repair needs, and potentially allowing for difficult-to-quantify or otherwise uncertain groundwater recharge with associated support for other beneficial uses during high flow events with assurances that such diversion will not result in curtailments or unreasonablyinhibit adult or juvenile salmonid migration, incubation, or rearing.**

**This type of local cooperative solution can also be developed for a particular mainstem reach, in addition to a tributary-wide basis.**

**On page 20 of the Proposed Draft Regulation, add text to the References for Section 875.5 as follows:**

Reference:  Sections 1058, 1058.5, **Cal. Const., Art. X, § 4**; Water Code; Hudson v. Dailey (1909) 156 Cal. 617; Shasta River Adjudication; Shackleford Adjudication; French Creek Adjudication; Scott River Adjudication; Stanford Vina Ranch Irrigation. Co v. State of California (2020) 50 Cal.App.5th 976.

**On page 23 of the Proposed Draft Regulation, add text to Section 875.7, subdivision (f)(i) as follows:**

* + 1. **A determination that lifting the prohibition will not cause or substantially contribute to tributary or mainstem disconnection;**