

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

DIVISION OF WATER RIGHTS

ORDER WR 2023-0003-DWR

**TEMPORARY CONDITIONAL SUSPENSION OF
CALIFORNIA CODE OF REGULATIONS, TITLE 23, SECTION 875.5
DURING HIGH FLOWS IN THE SCOTT RIVER WATERSHED**

ISSUED JANUARY 9, 2023

SOURCE: Scott River Watershed

COUNTY: Siskiyou

BY THE DEPUTY DIRECTOR

FINDINGS:

1. On June 21, 2022, the State Water Resources Control Board (State Water Board or Board) readopted an emergency regulation, titled Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath River Watershed (hereinafter "**Regulation**"). The Regulation provides curtailment authority throughout the Klamath River watershed and establishes minimum instream flow requirements, minimum livestock-watering efficiency, and information order authority in the Scott River and Shasta River watersheds. **State Water Board Resolution No. 2022-0025** adopted the Regulation and describes the need for the Regulation and its intent. State Water Board Resolution No. 2022-0025 is incorporated by reference into this Order. The readoption of the Regulation went into effect on July 29, 2022, when it was approved by the Office of Administrative Law and filed with the Secretary of State.
2. The Regulation includes California Code of Regulations, title 23¹, section 875.7, which generally provides that, in the months of September through March, diversions in the Scott River and Shasta River watersheds for livestock watering must meet a threshold of efficiency in order to be reasonable uses under Article X, Section 2 of the California Constitution. The Regulation allows the prohibition to be lifted if certain findings are made. Specifically, subdivision (c) provides for the

¹ All subsequent section references in this order are to California Code of Regulations, title 23 unless otherwise noted.

Deputy Director for the Division of Water Rights to suspend the efficiency limitations “upon a finding that suspending the provision will not result in a decrease in flows that would: (1) require curtailment; (2) unreasonably inhibit adult or juvenile salmonid migration, incubation, or rearing; or (3) unreasonably impact competing uses.” While it is not possible to make these findings for a permanent suspension of the prohibition for the rest of the 2022-2023 water year, this order makes these findings to allow a conditional and temporary suspension of the prohibition in the Scott River watershed to allow diversions during the upcoming wet hydrology occurring in the region when certain conditions are met.

3. In addition to this broad lifting of the prohibition during high flows under this order, the Regulation also provides flexibility for local cooperative solutions for exceptions to the inefficient livestock watering prohibition based on other, more locally-specific criteria. While there have been some initial proposals and discussions regarding tributaries in the Scott River watershed, so far none of these has developed quickly enough to be useful in the current high flow conditions. The type of conditions for diversion here can provide a model for such continued discussion.
4. Storms this winter season have been more frequent and of greater magnitude than we have seen in many years, and as a result flows in the Scott River watershed are significantly higher than anticipated. All curtailments were suspended on December 27, 2022.² While it is not possible to determine at this point how long flows will remain greater than the drought emergency minimum flow of 200 cubic feet per second (cfs) at the [Fort Jones United States Geological Survey \(USGS\) gage](#), curtailments are currently suspended through January 17, 2023.
5. Winter livestock watering is overwhelmingly the largest source of surface water demand in the Scott River watershed in winter. While information regarding livestock watering demands in the Scott River watershed is imperfect, the best estimate for maximum winter livestock watering demand based on prior reporting is 45 cfs throughout the watershed. This demand may be higher where ditches have dried during the drought and curtailment period; however, recent rains have also provided for wetting of soils. In light of the current flows at the Fort Jones USGS gage of 1,140 cfs (as of 7:30 am on January 9, 2023), imposition of a temporary suspension of the inefficient livestock watering prohibition would not require reimposition of curtailments. Additionally, allowing diversions to occur only if flows are at or greater than 500 cfs will ensure that the temporary suspension of the prohibition will not result in a need to reimpose curtailment.

² [Addendum 36](#) to the Order for Reported Water Rights in the Scott River Watershed issued September 9, 2021, Order WR 2021-0083-DWR, and Order WR 2021-0084-DWR suspended curtailments through January 4, 2023. [Addendum 37](#) extended the suspension through January 17, 2023.

6. After an extremely dry fall, recent storms have resulted in two flushing flow events in the Scott River of greater than 2,000 cfs at the Fort Jones USGS gage, with a peak flow of 3,720 cfs on December 31, 2022. Such flows have provided water quality and fisheries benefits, including movement of sediment and gravels, flushing of algae, tributary connectivity, and increased habitat quality. As of the most recent survey, the tailings reach of the Scott River and all surveyed tributaries except for Moffett Creek are connected.
7. Division of Water Rights and California Department of Fish and Wildlife (CDFW) staff have coordinated regarding what level of flows and what associated conditions could allow for diverters to take advantage of high flows for livestock watering without causing a drop in flows that would unreasonably inhibit salmonid migration, incubation, or rearing. CDFW staff additionally consulted with internal subject-matter experts, the National Marine Fisheries Service, Quartz Valley Tribe, Karuk Tribe, and Yurok Tribe regarding the potential conditions that would allow approval of a watershed-wide lifting of the inefficient livestock watering prohibition. Lifting the prohibition against inefficient livestock watering depends on conditions that reasonably: protect redds that could be impacted by reductions in flow downstream of diversions; ensure that migration is not impaired through a loss of mainstem-tributary connectivity; and limit the impact that diversions have on overall flows in any one area. Similarly, it depends on access and accounting provisions that will allow the State Water Board and CDFW to monitor the conditions allowing for diversion. The conditions that enable a finding that a suspension of the inefficient livestock watering prohibition are:
 - (a) Diversions shall not result in the dewatering of redds, and diverters shall provide access to CDFW and State Water Board staff to inspect the diversion and surrounding area;
 - (b) Diversions shall be no more than 20 percent of the instream flow at the point of diversion (i.e., the diverter shall bypass at least 80 percent of instream flow), recognizing that such percentage will be estimated, rather than measured, in most instances, due to the limited availability of requisite infrastructure for measurement of instream flows;
 - (c) Diversions on tributaries shall only occur if existing connectivity with the mainstem is maintained; and
 - (d) Diverters shall notify the State Water Board of their intent to divert under these conditions and are required to maintain records of such diversions and provide them to the State Water Board and CDFW upon request.
8. The conditions imposed under this Order relate solely to flow efficiency and do not constitute compliance with Fish & Game Code section 1600, *et seq.* Dependent on an individual diverter's circumstances, a lake and streambed alteration agreement (LSA) may be required for diverting or obstructing the natural flow of, or changing or using any material from the bed, channel, or bank of any river, stream, or lake.

Diversers without an LSA from CDFW are encouraged to reach out to CDFW Region 1 to discuss whether notification under Fish & Game Code section 1602 is necessary.

9. For the reasons discussed above, I therefore find that, so long as the conditions below are met, temporarily suspending section 875.5 will not result in a decrease in flows that would: (1) require curtailment; (2) unreasonably inhibit adult or juvenile salmonid migration, incubation, or rearing; or (3) unreasonably impact competing uses.

THEREFORE, IT IS HEREBY ORDERED that:

1. **Until March 31, 2023, as long as the flows as measured at the Fort Jones USGS gage are at least 500 cfs**, water users in the Scott River Watershed may divert surface water for livestock watering without complying with the efficiency requirements in Section 875.7, subdivision (b) **so long as the following conditions are met:**
 - (a) Diversions shall not result in the dewatering of redds, and diversers shall provide access to California Department of Fish and Wildlife and State Water Board staff to inspect the diversion and surrounding area;
 - (b) Diversions shall be no more than 20 percent of the instream flow at the point of diversion (i.e., the diverter shall bypass at least 80 percent of instream flow), recognizing that such percentage will be estimated, rather than measured, in most instances;
 - (c) Diversions on tributaries shall only occur if existing connectivity with the mainstem (at the time this Order is issued) is maintained;
 - (d) Diversers shall notify the State Water Board of their intent to divert under these conditions by e-mailing ScottShastaDrought@waterboards.ca.gov. The notification shall include:
 - (i) The diverter's name and contact information;
 - (ii) Point of diversion and water right under which the diversion will occur; and
 - (iii) Anticipated diversion amount; and
 - (e) Diversers shall maintain records of such diversions and provide them to the State Water Board and CDFW upon request.
2. Violation of this Order shall be subject to enforcement and any applicable penalties pursuant to Water Code sections 1052, 1058.5, 1831, 1845, and 1846. To the extent of any conflict between the requirements of this Order and any other applicable orders or conditions of approval, the diverter must comply with the requirements that are most stringent.

3. Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law, including but not limited to, the authority to bring enforcement against diverters for unauthorized diversion or use in violation of Water Code section 1052.
4. Nothing in this Order shall excuse individual water right holders from meeting any more stringent requirements that may be imposed by applicable legally binding legislation, water right adjudication, regulation, or a water right or lake and streambed alteration permit requirement. This Order does not authorize any act which results in the taking of a threatened, endangered, or candidate species or any act which is now prohibited, or becomes prohibited in the future, under either the California Endangered Species Act (Fish and Game Code sections 2050 to 2097) or the federal Endangered Species Act (16 U.S.C.A sections 1531 to 1544).

STATE WATER RESOURCES CONTROL BOARD

A handwritten signature in black ink, appearing to read "Erik Ekdahl", with a long, sweeping horizontal stroke extending to the right.

Erik Ekdahl, Deputy Director
Division of Water Rights

Dated: January 9, 2023