

**12/19/2023 BOARD MEETING – ITEM #5
CHANGE SHEET #1 (CIRCULATED 12/19/2023)**

This change sheet shows revisions to the Proposed Emergency Regulation released as part of the agenda for the State Water Resources Control Board's December 19, 2023 meeting released on December 8, 2023 and revisions to the draft Resolution released on December 15, 2023. Additions are shown as underline and deletions are shown as ~~strikethrough~~, except where an entire section is being replaced.

CHANGES TO THE PROPOSED REGULATION

On page 1 of the proposed Emergency Regulation, change the title as follows:

Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the ~~Klamath Watershed~~ Scott River and Shasta River Watersheds

On page 1 of the proposed Emergency Regulation, change the title of the article as follows:

Article 23.5. Scott River and Shasta ~~Klamath~~ River Watersheds Drought Emergency Requirements

On page 14 of the proposed Emergency Regulation, change section 875.2(a)(1) as follows:

- (1) Minimum domestic water uses, including water for human consumption, cooking, or sanitation purposes. Further, minimum domestic water uses include incidental uses necessary for sustenance, such as non-commercial vegetable gardens, and domestic animals but do not include commercial irrigation or commercial livestock. As necessary to provide for minimum domestic water use, water diverted for minimum human health and safety needs may include water hauling and bulk water deliveries, so long as the diverter maintains records of such deliveries and complies with the reporting requirements of section 875.6, and so long as such diversion and use is consistent with a valid water right.

On page 16 of the proposed Emergency Regulation, change section 875.2(c)(1)(C) as follows:

- (C) The diverter and all end users of the diverted water ~~have implemented all available conservation measures and are~~ operating under the strictest existing conservation plan for that place of use, if such a plan exists for the area or service provider. If additional approvals are required before implementation of the conservation regime, the diverter must certify that all possible steps will be taken immediately to ensure prompt approval.

On page 16 of the proposed Emergency Regulation, change section 875.2(c)(1)(E) as follows:

- (E) The diverter, or the end user where the end user is purchasing water for human health and safety use, has either pursued steps to acquire other sources of water, but has not yet been completely successful, as described in an attached report, or the diverter or end user, where appropriate, will pursue the steps in an attached plan to identify and secure additional water.

On page 16 of the proposed Emergency Regulation, change section 875.2(c)(2)(D) as follows:

- (D) Describe conservation steps already taken and any other additional steps the diverter will take to reduce diversions and consumption.

On page 19-20 of the proposed Emergency Regulation, remove section 875.4 as follows:

~~§ 875.4 Emergency Curtailments Due to Lack of Water Availability in the Klamath River Watershed~~

- ~~(a) This section applies to water diversions in the California portions of the Klamath River watershed.~~
- ~~(b) After the effective date of this regulation, when flows in the Klamath River watershed as a whole or in the individual tributaries to the Klamath River are insufficient to support all water rights, the Deputy Director may issue curtailment orders to water right holders, requiring the curtailment of water diversion and use, under the same procedures as set forth in section 875, subdivisions (d) and (e).~~
- ~~(c) In determining the extent to which water is available under a diverter's priority of right, as set forth in section 875.5, for the purposes of issuing, suspending, reinstating, or rescinding curtailment orders, the Deputy Director shall consider:~~

- ~~(1) Monthly water right demand projections based on reliable relevant information, including but not limited to: reports of water diversion and use for permits and licenses; statements of water diversion and use; judicial determinations concerning water rights; State Water Board decisions and orders; and other information regarding water needs and use contained in the Division of Water Rights files;~~
- ~~(2) Water availability projections, based on best available information, including but not limited to, one or more of the following:
 - ~~(A) Forecast estimates of precipitation and streamflow;~~
 - ~~(B) Historical periods of comparable conditions with respect to daily temperatures, precipitation, or surface flows;~~
 - ~~(C) Stream gage data, where available; or~~
 - ~~(D) Information in Division of Water Rights files on the extent to which flows are protected under Water Code section 1707.~~~~
- ~~(3) The Deputy Director may also consider additional pertinent and reliable information when determining water right priorities, water availability, and demand projections, including hydrologic models (as applicable and available), water allocation models, available information on crop needs, well logs and related information, and demand projections provided in response to information orders or other sources.~~
- ~~(4) Evaluation of available supplies against demands may be performed at a watershed wide level, or at a smaller sub watershed scale.~~

~~Authority: Sections 1058, 1058.5, Water Code~~

~~Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; National Audubon Society v. Superior Court (1983) 33 Cal.3d 419; Stanford Vina Ranch Irrigation Company v. California (2020) 50 Cal.App.5th 976.~~

On pages 27-30 of the proposed Emergency Regulation, replace section 875.7 as follows:

§ 875.7 Inefficient Livestock Watering

- (a) For the purposes of this regulation, inefficient surface water diversions for livestock watering are those that divert, as measured at the point of diversion, more than ten times the amount of water needed to support the number of livestock and reasonable water quantities set forth in Article 5, section 697 (or, for livestock not addressed in Article 5, section 697, the closest analogous livestock to those listed in Article 5, section 697).
- (b) From September through March 31, inefficient surface water diversions in the Scott River and Shasta River watersheds for livestock watering, which result in excessive water diversion for a small amount of water delivered for beneficial use, are not reasonable and are therefore prohibited in light of the

alternatives available and competing uses unless all of the following minimum flow requirements are met:

- (1) The minimum flow requirements in Section 875, subsection (c) are met without any active curtailment orders in the relevant watershed.
 - (2) The diversions do not occur in the fall until the California Department of Fish and Wildlife has determined there has been flow sufficient to stimulate fall-run Chinook salmon migration.
 - (3) The diversions do not occur after November 1 until the California Department of Fish and Wildlife has determined there has been a flow sufficient to stimulate coho salmon migration, including in the relevant tributary if applicable.
 - (4) For tributary diversions, except those from Moffett Creek in the Scott River Watershed, the relevant tributary is and remains connected to the mainstem.
 - (5) The diversions are operated to bypass 90 percent of flow at the point of diversion, except that when flows exceed those listed below in the relevant watershed, the diversions may operate to bypass 80 percent of flow:
 - (A) In the Scott River watershed when flows at the United States Geological Survey gage 11519500 located downstream of the city of Fort Jones at the northern end of Scott Valley (Scott River Mile 21), in cubic feet per second, are greater than 62 in September; 134 from October 1-15; 139 from October 16-31; 266 in November; 337 in December; 362 in January and February, and 354 in March.
 - (B) In the Shasta River watershed when flows are greater than 220 cubic feet per second at the United States Geological Survey gage 11517500 located near Yreka.
 - (6) The diversions are operated to bypass amounts greater than those described in subdivision (5) as necessary to avoid disturbing redds.
- (c) For diversions occurring under the flow conditions described in subdivision (b)(1)-(6):
- (1) Diversers shall notify the State Water Board of the intent to divert by e-mailing ScottShastaDrought@waterboards.ca.gov, including: the diverter's name and contact information; the point of diversion and water right under which the diversion will occur and the anticipated diversion amount; and the means by which the

diverter will track compliance with the minimum flow requirements in (b); and

- (2) Diversers shall maintain records of such diversions and provide them to the State Water Board upon request.
- (d) The requirements for diversions in subdivision (b)(4)-(6) do not apply to diversions upstream of Dwinell Dam in the Shasta River watershed.
- (e) Livestock diversions that would otherwise be prohibited under this section may be included in a proposal for a local cooperative solution, either on their own or as either part of a proposal under section 875 (f)(4)(B) or (C). For a local cooperative solution under section 875(f)(4)(B)(ii) or (C)(ii), California Department of Fish and Wildlife or National Marine Fisheries Service may make an alternative finding that a diversion under a local cooperative solution solely for livestock watering that is otherwise prohibited under this section will not result in redd dewatering or unreasonably interfere with adult or juvenile migration or rearing. The Deputy Director may approve such a local cooperative solution where lifting the prohibition will not cause or substantially contribute to tributary or mainstem disconnection.
- (f) The Deputy Director may suspend operation of this provision as to a particular diverter for a limited period of time upon a demonstration that the diverter's existing alternative watering system has failed.

Authority: Sections 1058, 1058.5, Water Code

Reference: Cal. Const., Art. X, § 2; Sections 100, 100.5, 104, 105, 275, 1058.5, Water Code; Environmental Defense Fund v. East Bay Muni. Util. Dist. (1980) 26 Cal.3d 183; Light v. State Water Resources Control Board (2014) 226 Cal.App.4th 1463; Stanford Vina Ranch Irrigation Co. v. State of California (2020) 50 Cal.App.5th 976.

CHANGES TO DRAFT RESOLUTION

On page 1 of the draft Resolution, change the title as follows:

TO ADOPT AN EMERGENCY REGULATION THAT ~~PROVIDES CURTAILMENT AUTHORITY IN THE KLAMATH RIVER WATERSHED, AND ESTABLISHES MINIMUM INSTREAM FLOW REQUIREMENTS, CURTAILMENT AUTHORITY, AND~~ INFORMATION ORDER AUTHORITY IN THE SCOTT RIVER AND SHASTA RIVER WATERSHEDS

On page 1 of the draft Resolution, change Whereas 1 as follows:

1. Western North America is experiencing an ongoing and persistent mega-drought. Across California and within the Klamath Basin, the water years from 2013-2015 and 2020-2022 were some of the driest on record. Even after more normal precipitation in the Klamath basin in water year 2022-2023, the Klamath River watershed continues to experience drought effects. The Scott and Shasta rivers, important tributaries to the Klamath river, specifically continue to experience drought effects. Increases in weather extremes on a global and more local scale, as well as the extended ~~mega-~~drought conditions, heighten the risk of continued or worsening drought effects in 2024.

On page 5 of the draft Resolution, change Whereas 19 as follows:

19. The drought minimum flows adopted in 2021 were based on recommendations provided by CDFW in a letter dated June 15, 2021, and were supported by the National Marine Fisheries Service (NMFS). These flows were based on best available information regarding the survival-level minimum flows required for fisheries, even in a severe drought. In light of continued information development, the regulations include the ability to modify the minimum flow requirements during implementation. During the drought, the State Water Board implemented small amendments to the 2021 CDFW flow recommendations as refinements as new information was developed. These changes were based on CDFW recommendations to lowered winter flow requirements in the Shasta River and established transitional flows in both watersheds for key months to avoid harm to fish from a rapid change in flows. The Board and CDFW also considered and rejected other recommendations for flow modifications, as insufficiently supported or contraindicated by available evidence. In light of the importance of water for all uses, this drought emergency regulation maintains the provision included in the previous drought emergency regulations that CDFW, after coordination with the ~~National Marine Fisheries Service (NMFS)~~, may notify the Deputy Director if lower alternative flows at the compliance gage provide equal or better protection for the pertinent species' relevant life stages.

On pages 8-9 of the draft Resolution, change Whereas 32 as follows:

32. In the Shasta watershed in particular, Asian-American community members and advocates have noted that it is difficult for sellers of water hauled to areas not served by public water systems or private wells, to certify the amount of water needed for human health and safety purposes, as opposed to commercial agriculture. Additionally, community members and representatives expressed frustration at the difficulty of certification. Modifications to the minimum human health and human safety exemption adopted in previous drought emergency regulations are being proposed to reduce the complexity of the certification requirements and to allow a qualified nonprofit or governmental entity to submit certifications related to the use of curtailed water for human health and safety. This change is designed to prevent curtailment orders from resulting in reduced access to water for basic human needs, while also ensuring that any continued diversion under curtailed rights for other uses is curtailed.

On page 9 of the draft Resolution, change Whereas 34 as follows:

34. A number of diversions in the Scott River and Shasta River watersheds involve surface diversions of water through long, unlined ditches in order to provide for relatively small amounts of water for livestock use. Diverting into these inefficient ditches can result in removing orders of magnitude greater amounts of water from the stream than will actually be used for livestock. These livestock diversions typically occur during the winter-early spring months, at the time when the water is required throughout the watershed to enable adult salmon migration, as well as rearing, incubation, and juvenile migration. Water is needed in the adult salmon migration periods to provide cues to the salmon that it is time to migrate upstream, as well as ensure there are adequate flows for fish to move upstream and access tributaries where the salmon will incubate and rear. Water is needed during and after the adult salmon migration period to ensure redds are not dewatered and tributaries remain connected so juvenile salmon can move within the system. ~~Additionally, in drought years, inefficient livestock diversions have the potential to interfere with seasonal storage needed to support minimum human health and safety needs and the environment.~~

On page 9-10 of the draft Resolution, change Whereas 35 as follows:

35. Alternatives exist to provide water for livestock more efficiently and many people in both watersheds have developed other methods for livestock water delivery in recent decades. While it can be costly over the long term, it is possible for those who do not currently have such an alternative, to divert water to trucks for delivery to livestock on a short-term basis. Ranchers may also implement long-term water conservation solutions for post-irrigation-season livestock watering, such as developing groundwater wells, purchasing heated troughs, lining ditches, or switching to piped diversions. There are

financial resources available to assist ranchers in finding alternative livestock watering systems during the drought emergency. Such funding has been provided in the past and funding opportunities focused on installation and use of such livestock systems remains available to diverters in these watersheds.

On page 10 of the draft Resolution, create a new Whereas 37 as follows:

37. Diversion for livestock water is the largest water use following the conclusion of the irrigation season and can cause or contribute to tributary or mainstem disconnection or other conditions that prevent salmon from accessing appropriate spawning habitat. Additionally, diverting substantial portions of streamflow can inhibit juvenile migration or dewater of redds.

On pages 10-11 of the draft Resolution, combine and change Whereas 37 and Whereas 38 as follows:

~~38. 37.~~ In light of the ongoing emergency, the flow fisheries need, ~~the importance of assuring minimum amounts of storage,~~ and the availability of alternative livestock water supply options, it is generally not reasonable to divert more than 10 times the amount of water that livestock require for drinking, as described in the reasonable water quantities for water rights applications (See Cal. Code Regs., tit. 23, section 697, subdivision (c).), during the September through March period unless certain flow conditions are met to protect the various fish life stages. Changes to the proposed regulation from the prior drought emergency regulation build on the experience of implementation of the prohibition on inefficient livestock watering diversions, and the determination that such diversions are not unreasonable during certain conditions. Such conditions include high flow periods, ensuring sufficient flows for the migration of fall-run Chinook salmon and coho salmon prior to diversions for inefficient livestock watering, there is sufficient flow to establish and maintain tributary connectivity with the mainstem river, at least 90 percent of flow is bypassed at the point of diversion unless higher flows are present that provide for up to 80 percent bypass of flows at the point of diversion, diversions are managed to avoid disturbing redds, and after the adult coho salmon peak migration season has concluded, under conditions to preserve tributary connectivity and protect redds, when accompanied by appropriate reporting requirements.

~~The regulation provides a new local cooperative solution option for livestock diversions during the prohibition period. This local cooperative solution provides for continued diversions for livestock via inefficient methods (i.e., greater than the 10 times the amount livestock require) under conditions that avoid unreasonable harm to adult or juvenile salmonids and redds. Provisions for this new local cooperative solution option provide that such diversions will not impact the attainment of the drought emergency regulation's minimum flow requirements.~~

On page 11 of the draft Resolution, change Whereas 42 as follows:

42. During emergency drought conditions in the Klamath River Scott River and Shasta River watersheds, 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 to protect more senior water rights.~~

On page 14 of the draft Resolution, change Resolved 8 as follows:

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

On page 14 of the draft Resolution, create a new Resolved 9 as follows:

9. The State Water Board directs the Division of Financial Assistance to continue to work with communities in the areas covered by the regulation to assess their drinking water needs and provide assistance consistent with established programs and policies, and directs Division of Water Rights staff to continue working with the Office of Public Participation to provide appropriate language access in compliance assistance efforts related to the regulation. Staff is directed to coordinate across divisions as appropriate and continue engagement and bring the matter back to the Board expeditiously if this regulation constitutes a barrier to accessing human health and safety water; and

On page 14 of the draft Resolution, update Resolved 9 as follows:

10. ~~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.