

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

DIVISION OF WATER RIGHTS

ORDER WR 2022-0XXX-DWR

DRAFT CEASE AND DESIST ORDER

In the Matter of Violations or Threatened Violations of Emergency Regulations and
Orders WR 2021-0083-DWR and WR 2021-0084-DWR

LANCE BATISTICH (S025829, S025819, S025820, S025830, S028076)

SOURCE: Scott River

COUNTY: Siskiyou

The State Water Resources Control Board (“State Water Board” or “Board”) is authorized under Water Code section 1831 to issue a Cease and Desist Order (“CDO”) requiring Lance Batistich (“Diverter”) to cease and desist from an ongoing, or a threatened, violation of the Klamath River Watershed Drought Emergency Regulations (“Emergency Regulations”), which were properly adopted in accordance with Water Code section 1058.5 and approved by the Office of Administrative Law.

Water Code section 1831, subdivision (d), states in part that the State Water Board is authorized to issue a CDO when it determines that any person is violating or threatening to violate “[a] regulation adopted under [Water Code] section 1058.5.”

On September 30, 2022, and in accordance with the provisions of section 1834 of the Water Code, the State Water Board, Division of Water Rights (“Division”), provided notice of the CDO against the Diverter for the violation and/or threatened violation of the Emergency Regulations.¹

¹ Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized to issue a notice of cease and desist, and when a hearing has not been timely requested, issue a CDO in accordance with Water Code section 1831, et seq. State Water Board Resolution 2012-0029 authorizes re-delegation of this authority from the Deputy Director for Water Rights to the Assistant Deputy Director for Water Rights (Assistant Deputy Director). This authority has been re-delegated.

BACKGROUND INFORMATION

1. On May 10, 2021, the Governor issued Executive Order N-10-21 declaring a state of emergency based on drought conditions in the Scott River and Shasta River watersheds.
2. On August 17, 2021, the State Water Resources Control Board (“State Water Board” or “Board”) adopted the Regulations, titled Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Authority in the Klamath River Watershed. The Emergency Regulations provide curtailment authority throughout the Klamath River watershed and establish minimum instream flow requirements and information order authority in the Scott River and Shasta River watersheds. The minimum instream flow requirements were established to protect fall-run Chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon. The Emergency Regulations went into effect on August 30, 2021, when they were approved by the Office of Administrative Law and filed with the Secretary of State. The State Water Board adopted the Emergency Regulations and described the need for the Emergency Regulations and their intent. [Resolution No. 2021-0029](#) adopted the Emergency Regulations and describes the need for the Emergency Regulations and their intent.
3. On June 21, 2022, the State Water Board readopted the Emergency Regulations, which went into effect on July 29, 2022. The updated regulations contains a provision that extends previously issued curtailment orders under the amended regulation. (Cal. Code Regs., tit. 23, § 875, subd. (d)(3).)
4. The Emergency Regulations prohibit inefficient surface water diversion for livestock watering to protect the fall-run for Chinook and Coho salmon. Inefficient surface water diversions are defined as diverting “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...,” as measured at the point of diversion. (Cal. Code Regs., tit. 23, § 875.7, subd. (a).) For the 2021-2022 season, this prohibition operated from September 1, 2021, until January 31, 2022.
5. When curtailments are in place, diversions for the purpose of stockwatering are limited to those which do not result in seepage losses and will not exceed reasonable stockwatering amounts as set forth in Article 5, section 697. (Cal. Code Regs., tit. 23, §§875.3, subd. (a), (b).)
6. Title 23, Chapter 2.8, Sections 931–938 of the California Code of Regulations dictate requirements for measurement devices upon certain diversions. Section 932, subdivision (a) states that specified classes of diverters “shall install and maintain a measuring device or employ a measurement method capable of measuring the rate of diversion, rate of collection to storage, the rate of withdrawal or release from storage, and the total volume of water diverted or

collected to storage.” These regulations were adopted by the Office of Administrative Law on March 21, 2016.

INVESTIGATION

7. The Diverter is the primary owner for Statements of Diversion and Use, Water Right IDs S025829, S025819, S025820, S025830, and S028076. The statements are under Court Decree No. 30662. Statements S025819, S025820, and S025830 divert water from Oro Fino Creek for irrigation and stockwatering for 300 head of cattle. S028076 diverts water from Kidder Creek for irrigation and stockwatering for 250 head of cattle. S025829 is an adjudicated groundwater diversion from Oro Fino Creek for irrigation and stockwatering. None of the Diverter’s claims of right include a right to divert and use stored water.
8. On September 10, 2021, pursuant to the Emergency Regulations, the State Water Board issued two orders pursuant to the Emergency Regulations. The first order was an Order Imposing Water Right Curtailment, Increased Coordination, and Reporting Requirements for Adjudicated Groundwater Rights in the Scott River Watershed (Order WR 2021-0083-DWR). The second order was an Order Imposing Water Right Curtailment and Reporting Requirements in the Scott River Watershed for Water Right(s) Associated with the Parcel(s) Listed in Attachment A and not Otherwise Curtailed (Order WR 2021-0084-DWR). The Diverter received both orders on September 14, 2021.
9. Based on forecasted precipitation and other factors, the State Water Board issued various addenda partially suspending curtailment of water rights in the Scott River watershed. In 2022, curtailments went into effect on July 2, 2022 for all surface water rights. On July 6, 2022, curtailments were partially suspended, allowing each first priority water right to divert up to 15% of their right. On July 8, 2022, each first priority right was allowed to divert up to 30% of their right. Finally, on July 14, 2022, all rights (surface and groundwater) were fully curtailed.
10. The Diverter submitted a Curtailment Certification Form on October 4, 2021. The Diverter claimed exemptions to curtailment for minimum livestock diversion, but these exemptions do not apply to irrigation.
11. The Division learned that the Diverter was in violation of the Curtailment Order through photographic evidence received from California Department of Fish & Wildlife staff. The Division staff issued a Notice of Violation to the Diverter on August 10, 2022.
12. On August 23, 2022, Division staff inspected the Diverter’s property after asking for, and receiving consent from the Diverter. The Diverter showed staff the point of diversion (“POD”) and the place of use. The Diverter stated that they have been diverting water once a week to irrigate a 47-acre crop since spring 2022. The POD is a large reservoir on the property. Staff photographed the reservoir, which appeared nearly full in volume. The Diverter claimed that the reservoir was

last filled in the winter from precipitation and runoff. This was, however, not a credible claim. It is unlikely the reservoir would have stored a significant amount of water for at least six months after winter, and throughout the high temperatures of the summer months, while the creeks and surrounding area were dry.

13. During the inspection, staff spoke to the Diverter and the ranch foreman. The Diverter expressed their disagreement with the Curtailment Orders with hostility and voiced skepticism about the State and Federal agencies. The Diverter repeatedly stated that they would continue diverting regardless of the Curtailment Orders.

APPLICABLE LAW AND FINDINGS

14. Water Code section 1846, “[a] A person or entity may be liable for a violation of...” a regulation or order adopted by the State Water Board “in an amount not to exceed five hundred dollars (\$500) for each day in which the violation occurs.” Under Water Code section 1058.5, the Board may adopt emergency regulations “during a period for which the Governor has issued a proclamation of a state of emergency... based on drought conditions.” The Board may adopt such emergency regulations “to prevent the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion, of water, to promote water recycling or water conservation, to require curtailment of diversions when water is not available under the diverter’s priority of right, or in furtherance of any of the foregoing, to require reporting of diversion or use or the preparation of monitoring reports.” Following Executive Order N-10-21, the Board issued the Emergency Regulations.
15. Under the Emergency Regulations, the State Water Board issued the Diverter a Curtailment Order on September 9, 2021. All water sources for the Diverter’s water rights are claims of right are subject to the Curtailment Order. The Diverter received the initial Curtailment Order on September 14, 2021. The Diverter had notice of the requirement to cease diversions and comply with minimum flow requirements in the Scott River, as established by the Emergency Regulations. During the August 23, 2022, his statements clearly indicated that he was aware of these requirements.
12. Since July 14, 2022, Curtailment Orders prohibited the Diverter from diverting water from any sources within his water rights and claims of right. The State Water Board has not authorized the Diverter to divert water under any exception to curtailment; neither has the Diverter claimed an exemption to the Curtailment Orders that would authorize irrigation. Yet, during the August 23, 2022, Division staff observed a full reservoir that could not have been filled with, and storing, water the Diverter was not prohibited from diverting under the Curtailment Orders. The Diverter further stated that they had been irrigating a 47-acre crop since spring 2022. The Diverter has therefore diverted water in violation of the Curtailment Orders; a violation subject to a Cease and Desist Order under Water Code section

1831.

13. During the August 23, 2022, inspection, when Division staff stated to the Diverter that the diversion is a violation of the Curtailment Order, the Diverter stated they would continue diverting regardless of any Curtailment Orders. The Diverter's stated intent to divert and use water in violation of any Curtailment Order the State Water Board issues is a threatened violation subject to a Cease and Desist Order under Water Code section 1831.

THE STATE WATER RESOURCES CONTROL BOARD THEREFORE ORDERS,
pursuant to sections 1831 through 1836 of the California Water Code, that:

1. The Diverter must immediately cease and desist all diversions from the Oro Fino Creek and hydraulically connected groundwater and shall continue to cease diversions until curtailments have lifted or otherwise notified by the State Water Board.
2. The Diverter must maintain, and provide to the Division upon request, records of all surface water diversions.
3. The Diverter must maintain a working flow meter for any future diversions once curtailment is lifted.

Notice and Opportunity for Hearing

This draft CDO serves as notice pursuant to Water Code section 1834 that a violation is occurring or threatening to occur. You may request a hearing not later than 20 days after receipt. Unless a written request for a hearing is delivered to or received by mail by the State Water Board within 20 days after receipt of the notice, the State Water Board may adopt the CDO.

Consequences of Non-Compliance

In the event the Diverter fails to comply with the requirements of this Order, they shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability. Violation of a CDO may be referred to the Attorney General to take further injunctive enforcement actions as described in Water Code section 1845, subdivision (a):

Upon the failure of any person to comply with a cease and desist order issued by the board pursuant to this chapter [California Water Code division 2, part 2, chapter 12] the Attorney General, upon request of the board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

Failure to comply with this Order may subject the Diverter to civil liability in an amount not to exceed \$10,000 for each day in which the violation occurs pursuant to Water Code section 1845, subdivision (b)(1)(A).

Reservation of Enforcement Authority and Discretion

Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board or other entities from exercising its authority under any statute, regulation, ordinance, or other law, including but not limited to, administrative civil liability under Water Code section 1846, the authority to bring enforcement against the Diverter for infractions under Water Code section 1058.5, subdivision (d), and Water Code section 1052.

Regulatory Changes

Nothing in this Order shall excuse the Diverter from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations or water right permit requirements.

Compliance with Other Regulatory Requirements

Nothing in this Order shall excuse the Diverter from meeting any additional regulatory requirement that may be imposed by other local, state, or federal regulatory entities for corrective actions taken by the Diverter to comply with this Order.

Exemption from CEQA

This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), title 14, of the California Code of Regulations.

STATE WATER RESOURCES CONTROL BOARD

*ORIGINAL SIGNED BY
JULE RIZZARDO, FOR*

*Julé Rizzardo, Assistant Deputy Director
Division of Water Rights*

Dated: September 30, 2022