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STATE WATER RESOURCES CONTROL BOARD RESOLUTION NO. 2021-

TO ADOPT 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

WHEREAS:

1. California and the entire western United States are facing a significant drought in the wake of one of the driest periods on record, driven by climate change and unprecedented hydrologic conditions. Water supply in many parts of California, including the Klamath River watershed, is insufficient to meet demands and requires urgent action to ensure the protection of health, safety, and the environment;
2. On April 21, 2021, Governor Gavin Newsom issued a [Proclamation of a State of Emergency for Mendocino and Sonoma counties](#), in response to drought conditions in the Russian River watershed. On May 10, 2021, Governor Newsom issued an expanded Proclamation of a State of Emergency for 41 counties, including those within the Klamath River watershed ([May 2021 Proclamation](#)), in response to drought conditions. The May 2021 Proclamation finds that it is necessary to act expeditiously to mitigate the effects of drought conditions in the Klamath River watershed, both to ensure the protection of health, safety, and the environment and to prepare for potential sustained drought conditions. On July 8, 2021, the Governor [expanded the emergency declaration](#) to nine additional counties and called upon Californians to voluntarily reduce their water use by 15 percent;
3. The May 2021 Proclamation directs the State Water Resources Control Board (State Water Board or Board) to consider adopting an emergency regulation to curtail water diversions when water is not available at water right holders' priority of right in the Klamath River watershed. For purposes of approving an emergency regulation pursuant to this directive, the May 2021 Proclamation also suspends the California Environmental Quality Act (CEQA) in Public Resources Code, Division 13 (commencing with section 21000) and regulations adopted pursuant to that Division;
4. The May 2021 Proclamation further directs the Board and California Department of Fish and Wildlife (CDFW) to evaluate minimum instream flows and other actions to protect salmon, steelhead, and other native fishes in critical systems in the state and work with water users and other parties on voluntary measures to implement those actions. To the extent voluntary actions are not sufficient, the State Water Board, in coordination with CDFW, is to consider emergency regulations to establish minimum drought instream flows;

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5. The Klamath River watershed has experienced two consecutive extremely dry years. Precipitation to date is approximately half of normal across much of the Klamath Basin. The Scott River and Shasta River watersheds, which are tributaries to the Klamath River, are experiencing one of the most severe droughts on record. Water Years 2019-2020 and 202-2021 are the driest two-year period on record for the Scott River and Shasta River watersheds. The Scott River is experiencing one of the three driest years on record, with flows in the lowest four percent of the historical record. Flows in the Scott River are expected to remain at record low levels through the fall, and the Scott River has become disconnected during July in the past two dry years, and are expected to remain at near record low levels through fall of 2021. The current water year is the driest on record for the Shasta River. Flows are in the lowest one percent of the historical record, and have on multiple occasions dropped to historic lows, and reached recorded high temperatures. Flows in the Shasta River are also expected to remain at these record low levels through the fall.
6. Due to extreme drought conditions, there is not enough water for all users or uses in most streams, and diversions under junior water rights will need to be curtailed to preserve flows for senior water right holders. On June 1, 2021, the State Water Board issued [notices of water unavailability](#) to 102 water right holders in the Scott River watershed, urging them to stop diverting amid worsening hydrologic conditions. In addition, some streams that provide habitat and migration corridors for federally- and state-listed endangered species will not maintain the minimum flows for these species to survive unless water diverters curtail use. There is an urgent need to address severe water shortages in the Scott and Shasta River watersheds to protect minimum flows for critical fish species, as well as to meet human health and safety needs, and preserve minimum water supplies for livestock watering.
7. The Southern Oregon/Northern California Coast (SONCC) coho salmon is listed as a threatened species under both the federal and state Endangered Species Acts (ESAs) and are identified as being at high and moderate risk of extinction in the Shasta River and Scott River, respectively. The species spawns, hatches, and rears in tributaries to the Klamath River, including the Scott River and Shasta River, and is divided into three run-years or “cohorts.” The Scott River and Shasta River coho salmon are both “core, functionally independent” populations of the SONCC Evolutionarily Significant Unit under the federal ESA, indicating that the Scott River and Shasta River have a critical role in the continuation and recovery of SONCC coho.
8. The Scott River and Shasta River are key streams in the Klamath Basin for the culturally and commercially significant fall-run Chinook salmon. The fall-run Chinook is a fish species of high commercial importance, as the major salmon stocks targeted by ocean fisheries south of Cape Falcon are Sacramento River fall-run Chinook and Klamath River fall-run Chinook salmon. For most of the past three decades, Klamath River fall-run Chinook has been more constraining on the troll fishery than the Sacramento River fall-run Chinook, and low returns of

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Klamath fall-run Chinook have resulted in a complete closure of hundreds of miles of the coast to commercial fishing multiple times in the past 15 years. Coastal ocean fishing-dependent communities have suffered severe economic impacts due to decreases in fish numbers and related harvest limitations. The species also supports commercial and tribal river fishing. The river fisheries have also been closed multiple times in the past decade when the numbers of returning fall-run Chinook are low.

9. The coho and Chinook salmon in the Klamath River watershed are of particular cultural and spiritual significance to many Klamath Basin tribes, including the Karuk Tribe, the Yurok Tribe, the Hoopa Valley Tribe, and the Quartz Valley Indian Reservation, which have all raised concerns regarding the species in government-to-government consultations with the State Water Board in recent years. The Quartz Valley Indian Reservation's land base is on the Scott River. Traditionally used fish resources of the Scott River include Chinook and coho salmon, steelhead, and Pacific lamprey. The Quartz Valley Indian Reservation relies on these fish for sustenance and their spiritual well-being.
10. Because of the fragile nature of the coho and Chinook salmon in the Scott River and Shasta River watersheds, regulatory action to protect this public trust resource is warranted. Drought conditions present particular risks to the SONCC coho and the fall-run Chinook, which require sufficient cold water to provide migration passage, adequate spawning areas, egg incubation, rearing, juvenile redistribution, and juvenile outmigration. During the most recent 2014-2016 drought, localized efforts to manage the coho salmon fishery were insufficient to address the impacts of low flows and high temperatures associated with ongoing diversions and extreme dry conditions. The prior drought resulted in a significant population drop in the strongest coho cohort, from which the cohort has still not recovered. In fall and winter of 2020, coho and Chinook salmon both faced significant migration barriers from reduced flows. It is not yet clear the degree of impact this delay had on the species. Repeated stress events, such as drought conditions affecting multiple cohorts or affecting the same cohort in short succession, can reduce the resilience of a species.
11. On June 15, 2021, in response to emergency drought conditions persisting throughout the Shasta River and Scott River watersheds (tributaries to the Klamath River), and insufficient water supply to meet the needs of all water uses, CDFW requested that the State Water Board consider adoption of a drought emergency regulation to protect coho and Chinook salmon and provided drought minimum instream flows for the two watersheds, and emphasized the importance of providing flows for coho and Chinook salmon during this drought emergency.
12. The flows recommended by CDFW reflect minimum flows during this drought emergency, based on the best available science. However, during the effective period of even this temporary drought emergency regulation, new information regarding minimum drought flow needs may be developed. Additionally, it may be possible to further refine these flows based on the observed presence of

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particular life-stages of SONCC coho and fall-run Chinook salmon in particular areas of the watersheds. In light of the vital importance of water for all uses during an extreme drought, it is important to provide for CDFW with the ability to adjust the minimum drought flow recommendations, if possible, to make more water available for other uses.

13. This year, as in past years, the State Water Board, CDFW, diverters, and other stakeholders have undertaken efforts to protect the fish in the Scott River and Shasta River watersheds, short of curtailments for minimum instream flows. These efforts include: sending notices of water unavailability in the Scott River basin; distributing educational materials to promote voluntary conservation efforts; providing information on funding availability at public meetings; making planting decisions for a dry year; contracting to cease diversions earlier in the year; coordination of diversions to protect redds and juvenile salmon; dedication of water to instream use; and groundwater substitutions to improve water temperatures. Such efforts have improved the availability of water, including for instream uses, but have not resulted in meeting levels necessary to adequately protect fish in this extreme drought situation. Without the ability to protect instream flows or to provide greater incentives for voluntary action and cooperation, these voluntary efforts have not yet been sufficient to adequately support important fisheries in the Scott River and Shasta River watersheds. The proposed regulation is drafted to build on, support, and allow for expansion of voluntary efforts;
14. It is necessary to ensure that water remains available for minimum stockwatering purposes, notwithstanding the drought conditions. Cattle ranching is a primary economic activity in the Scott River and Shasta River watersheds, with pasture and growing of alfalfa comprising the predominant manner of land cultivation. California law recognizes the obligation to provide sufficient water for livestock (see Penal Code, section 597, subdivision (b)), and the State Water Board emergency regulation provides for reasonable amounts of water for stockwatering. (See Cal. Code Regs., tit. 23, section 697, subdivision (c).) In light of the dry conditions and the need to curtail other uses of water in order to ensure drought emergency minimum flows to support fish in the critical Shasta River and Scott River watersheds, additional efforts are needed in the Klamath watershed this year to ensure that minimum stockwatering needs continue to be met under these critical drought conditions;
15. It is further necessary to prevent excessive diversions for stockwatering during the time when such water is needed instream for adult salmon migration. A number of diversions in the Scott River and Shasta River watersheds involve surface diversions of water through unlined, porous ditches for a long distance in order to provide for relatively small amounts of water for stock. This can result in removing several times the amount of water from the stream than is actually used for stock at the time when the water is required throughout the watershed to enable adult salmon migration. While it can be costly over the long term, it is possible to divert water to trucks for delivery to stock on a short-term basis during

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the adult salmon migration season. There are also financial resources available that may assist ranchers in implementing long-term water conservation solutions for post-irrigation-season stockwatering, such as developing wells, purchasing heated troughs, lining ditches, or switching to piped diversions. In light of the severe drought, the fisheries need, and the alternatives available, the use of irrigation ditches for stockwatering that result in a 50 percent or greater loss of water is not reasonable during this time;

16. Further, there is a need to ensure that continued minimum human health and safety needs are met, notwithstanding the shortage conditions. The California Water Code declares water supplies for consumption, sanitation, and cooking as a human right (Wat. Code, § 106.3); identifies domestic use as the highest water use (Wat. Code, § 106); and provides water suppliers with authority to declare a water shortage emergency to allow sufficient water for human consumption, sanitation, and fire protection (Wat. Code, § 350). In light of the dry conditions and the need to curtail other uses of water in order to ensure drought emergency minimum flows to support fish in the critical Shasta River and Scott River watersheds, additional efforts are needed in the Klamath River watershed this year to ensure that water right holders and claimants without other means to access water for basic human health and safety, and fire prevention and recovery efforts are able to continue to access water for these uses under critical drought conditions;
17. 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 stockwatering uses cease diversions of water that is needed for the minimal protection of fisheries resources and more senior water rights;
18. 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;
19. 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

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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;

20. 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 or groundwater. (*Hudson v. Dailey* (1909) 156 Cal. 617, 627–628.);
21. Adoption of an emergency regulation is necessary to address the immediate and dire water shortages in the Klamath River watershed. An emergency regulation will enable the State Water Board 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 stockwatering needs;
22. The State Water Board is adopting the emergency regulation due to severe emergency drought conditions and the need for prompt action;
23. The regulation supports cooperative solutions among water right holders and claimants in the Scott River and Shasta River watersheds to work together to develop local cooperative solutions to avoid curtailment through the emergency regulation, including agreements to coordinate diversions to support critical life stages of salmonids in tributaries, to divide local shortages to provide water with the minimum impact, and to plan early in the year for conservation measures for diverters to contribute their share to basin supplies with increased certainty. When approved, such agreements are expected to achieve the overall objectives that would otherwise be served by curtailment;
24. Emergency regulations adopted under Water Code section 1058.5 may remain in effect for up to one year; and
25. Pursuant to Water Code section 7, the State Water Board is authorized to delegate authority to staff.

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THEREFORE BE IT RESOLVED THAT:

1. The State Water Board adopts California Code of Regulations, title 23, Division 3, Chapter 2, Article 23.5, Sections 875, 875.1, 875.2, 875.3, 875.4, 875.5, 875.6, 875.7, 875.8, and 875.9, as appended to this resolution as an emergency regulation;
2. State Water Board staff will submit the regulation to the Office of Administrative Law (OAL) for final approval;
3. If, during the approval process, State Water Board staff, the State Water Board, or OAL determines that minor corrections to the language of the regulation or supporting documentation are needed for clarity or consistency, the State Water Board Executive Director, the Deputy Director for the Division of Water Rights, or their designee, may make such changes;
4. This regulation shall remain in effect for one year after filing with the Secretary of State unless: (i) the State Water Board determines that it is no longer necessary due to changed conditions, (ii) the conditions specified in Water Code section 1058.5 subdivision (a)(2) are no longer in effect, in which case this regulation is deemed repealed, or (iii) the State Water Board renews the regulation due to continued drought conditions as described in Water Code section 1058.5;
5. The State Water Board directs staff to process as expeditiously as possible any proposals for cooperative solutions which may be offered as alternatives to curtailments;
6. The State Water Board directs staff to continue to work with CDFW to evaluate and refine the drought minimum instream flows adopted in this regulation if new scientifically-defensible information becomes available, and to continue to engage in longer term efforts to establish instream flows for the Scott River and Shasta River watersheds beyond this drought emergency;
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

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8. 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.

CERTIFICATION

The undersigned Clerk to the Board does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on August 17, 2021.

Jeanine Townsend
Clerk to the Board