

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER WR 2025-0006

**In the Matter of the Draft Cease and Desist Order Issued Against David Collenberg
for Violations for Failure to Comply with Diversion Measurement and Reporting
Regulations**

SOURCE: Oro Fino and Kidder Creek, tributary to Scott River

COUNTY: Siskiyou

1.0 INTRODUCTION

David Collenberg (Respondent) claims the right to divert water from Kidder and Oro Fino Creeks as reported in Statements of Water Diversion and Use Nos. S019640 and S000774. On April 26, 2024, the State Water Resources Control Board (Board) Division of Water Rights (Division) issued a draft Cease and Desist Order (Draft CDO) to Respondent alleging that he failed to comply with the Board's measurement and reporting requirements set forth in title 23, sections 932 to 938, of the California Code of Regulations. At Respondent's request, the Board's Administrative Hearings Office conducted a hearing on the Draft CDO on October 14, 2024. Respondent submitted no testimony or other evidence at the hearing, and declined to file a closing brief explaining his opposition to the Draft CDO.

The Board adopts the AHO's proposed order in its entirety as set forth herein. (Wat. Code, § 1114 subd. (c)(2)(A).) As described in this order, Respondent shall cease all diversions from Oro Fino and Kidder Creeks until he has installed measuring devices at his points of diversion in compliance with the Board's measurement and monitoring regulations. (See Cal. Code Regs., tit. 23, § 932 *et seq.*)

2.0 LEGAL BACKGROUND AND PROCEDURAL HISTORY

Water Code section 5103 subdivision (e)(1)(B)(i) requires water right holders who divert ten or more acre-feet of water per year under a riparian or pre-1914 claim of right to comply with the Board's monitoring and measurement regulations. The Board's regulations mandate that diverters with claimed rights that directly divert 1,000 acre-feet

of water per year or more from the same point of diversion or to serve the same place of use to either install a measuring device that can record diversion data on an hourly or more frequent basis or measure their diversions using a measurement method that meets specific standards. (Cal. Code Regs., tit. 23, §§ 933 subd. (b)(1)(B)(i), 934.) If strict compliance with sections 933 and 934 is infeasible or otherwise unreasonable, a diverter may submit an alternative compliance plan to the Deputy Director for the Division. (Wat. Code § 935.)

After conducting a curtailment inspection in 2022, the Division found that Respondent had not submitted information regarding his measurement device with Respondent's annual Statement of Diversion and Use as required by the Board's regulations. (PT-1, ¶ 12; Cal. Code Regs., tit. 23, § 920, subd. (c)(6).)¹ After issuing notices of violation and an administrative civil liability order to attempt to obtain Respondent's compliance with Board's measurement regulations, the Division issued the Draft CDO on April 29, 2024. (*Id.* at ¶¶ 12-17; Wat. Code § 1831.) On May 16, 2024, Respondent requested a hearing on the Draft CDO.

The AHO conducted a hearing on October 14, 2024. Although Respondent participated in the hearing by cross-examining the Prosecution Team's witness, he did not offer written or oral testimony during the hearing, or submit a closing brief by the November 1, 2024, deadline. (See Amended Notice of Public Hearing and Pre-Hearing Conference (Jul. 12, 2024), at p. 2.)

3.0 FINDINGS OF FACT AND CONCLUSIONS OF LAW

3.1 Respondent is obligated to install a measurement device or use a method of measurement capable of measuring diversions on at least an hourly basis.

Under section 933 of the Board's regulations, diverters who divert 1,000 acre-feet of water per year or more from the same point of diversion or to serve the same place of use under claimed rights are required to either install a measuring device or utilize a method of measurement capable of recording their diversion data on at least an hourly basis. (Cal. Code Regs., tit. 23, § 933 subd. (b)(1)(B)(i).) Such diverters were required to have a water measuring device installed at each point of diversion by

¹ The Prosecution Team's exhibits are labeled "PT-" followed by the exhibit number. Respondent did not submit any exhibits for the hearing. Electronic copies of exhibits are available in a subfolder in the administrative record for this matter. The AHO has posted this administrative record on the AHO-FTP site. Unless otherwise noted, references to page numbers in documents, including exhibits, refer to the page numbers at the top of the screen reading software used to view the pdf files of these documents. References to 2024-10-14 Hearing Recording (Collenberg) are to the audio plus visual recording, which is the official record of the proceeding.

January 1, 2017. (*Id.* at § 932, subd. (c)(2)(A).) When filing supplemental statements of diversion and use (*id.* at § 920), diverters must include information about the device or method used to calculate the amount of water diverted and identify who installed the device. (*Id.* at § 920, subd. (f)(12).)

If a diverter concludes that installation of a measurement device or use of a measurement method that complies with the Board’s regulations is “not feasible, would be unreasonably expensive, would unreasonably affect public trust uses, or would result in the waste or unreasonable use of water,” the diverter may submit an alternative compliance plan certified by a qualified individual. (*Id.* at § 935 subds. (a) & (b).) Such alternative compliance plans are subject to approval by the Deputy Director of the Division and expire after five years. (*Id.* at § 935 subd. (h), (k).)

Here, Respondent has filed supplemental statements of diversion and use indicating that he claims a right to directly divert more than 1,000 acre-feet of water per year. (PT-18, PT-19; see also PT-11 [emails from Respondent disclaiming diversions to storage under Statement Nos. S019640 and S000774].)² Although Respondent seemed to contend that installing a measurement device was not financially feasible, the only exception to compliance with sections 933 or 934 of the Board’s measurement and monitoring regulations requires the submission of an alternative compliance plan.³ (See Cal. Code Regs., tit. 23, § 935; see also 2024-10-14 Hearing Recording (Collenberg) at 34:34-36:40.) There is no evidence in the record that Respondent ever submitted or implemented an alternative compliance plan.

We thus conclude that Respondent was obligated to either install a measuring device or measure his diversions using a measurement method, other than through a measuring device, in compliance with sections 933 and 934 of title 23 of the California Code of Regulations.

3.2 Respondent failed to comply with his obligations under the Board’s measurement and monitoring regulations.

There is no dispute that Respondent has failed to install a measurement device or measure his diversions using a method authorized under section 934 of the Board’s regulations despite the Division’s two-year effort to bring Respondent into compliance

² Although the Statements of Diversion and use most recently filed by respondent indicates that he diverts water both directly and to storage, Respondent asserted in an email to Board staff that he did not divert water to storage in the pond located on his property. We thus conclude based on the evidence before us that Respondent directly diverts all water reported under Statement Nos. S000774 and S019640.

³ Any claim that an alternative compliance plan is justified by the unreasonable expense of installing a measurement device must be “accompanied by a cost analysis.” (Cal. Code Regs., tit. 23, § 935, subd. (b)(3).)

with the Boards' measurement and monitoring regulations before issuing the Draft CDO. (PT-1, ¶¶ 12-17; PT-7, PT-9, p. 7, ¶ 18(c); PT-17; PT-10; PT-11.). Even after the Draft CDO was issued, Respondent had nearly six months to install a measurement device or propose an alternative compliance plan. He admitted that he failed to do so, and did not submit any evidence or argument to the contrary during the October 14, 2024 hearing. (See e.g., PT-11, p. 15 (admitting to Division staff and the AHO that he did not have a measurement device installed as of June 24, 2024).) We therefore find that Respondent has failed to comply with the Board's measurement and reporting regulations. (See Cal. Code Regs., tit. 23, § 932 *et seq.*)

3.3 The Prosecution Team's proposed Cease and Desist Order is the appropriate remedy for Respondent's violation of the Board's measurement and monitoring regulations.

The State Water Board has discretion to issue a cease and desist order for any violation or threatened violation of a regulation adopted by the Board (Wat. Code, § 1831, subd. (d)(4).) The circumstances here strongly favor the issuance of an order directing Respondent to install a measurement device and cease all diversions under Statement Nos. S000774 and S019640.

Respondent's diversions are taken from tributaries to the Scott River. (PT-1, ¶ 13.) The Scott River provides essential habitat for a variety of salmonids, including Chinook and Coho Salmon. (*Id.* at ¶ 11.) We have issued curtailment orders and established minimum instream flows in the watershed through the adoption of regulations to protect these species. (*Id.*) As the Prosecution Team's witness explained in her written testimony, Respondent's failure to accurately measure his diversions makes it more challenging for the Division to assess compliance with watershed-wide regulations and curtailment orders. (*Id.* at ¶ 25.) That failure also impacts the Board's ability to conduct "water availability modeling for accurate and equitable curtailment determinations." (*Ibid.*) These policy impacts strongly favor the issuance of an order directing Respondent to cease his diversions from Oro Fino and Kidder Creeks until he has installed appropriate measurement devices.

Respondent has also been given repeated opportunities to comply with the measurement and monitoring regulations. More than seven years have passed since Respondent was first required to install a measurement device. (See Cal. Code Regs., tit. 23, § 932 subd. (c)(2)(A).) And since August 2022, Division staff have repeatedly encouraged Respondent to install a measurement device for his diversions, to no avail. (PT-1, ¶¶ 12-17; 26-27.) Respondent's failure to appropriately respond to these repeated opportunities indicates that stronger enforcement measures are necessary. Given the policy implications of Respondent's failure to accurately measure his diversions and his refusal to work with the Division to come into compliance voluntarily,

we conclude that adopting the Prosecution Team’s proposed cease-and-desist order is appropriate here.

Respondent’s implied argument that we cannot issue a cease-and-desist order because the Division had not properly served him with the Draft CDO lacks support in both law and evidence. (See 2024-10-14 Hearing Recording (Collenberg), 1:13:40-1:17:00.) First, Respondent received the Draft CDO as evidenced by the request for a hearing. Any objection to the adequacy of service should have been made well before the commencement of the hearing, and Respondent’s failure to make such an objection and appearance at the pre-hearing conference and the hearing waived any arguments he may have had about the adequacy of service. (See Gov. Code, § 11415.40; see also Code Civ. Proc., § 418.10 subd. (a) (requiring motions to quash service of complaints in civil actions to be brought on or before the last day to file a responsive pleading).) Second, the Division’s service of the Draft CDO clearly complied with Water Code section 1834’s authorization of methods of service “by any method of physical delivery that provides a receipt” (See PT-13; see also Gov. Code, § 11440.20 (service may occur by mailing document to the party’s last known address by first-class mail, registered mail, certified mail, and by mail delivery service).) Thus, even if Respondent had raised the issue of service at the appropriate time, his argument would have failed.

ORDER

IT IS HEREBY ORDERED, pursuant to Water Code sections 1831 through 1836, that Respondent shall:

1. Install a measurement device(s) at the points of diversion for Statement Nos. S000774 and S019640 that complies with the measurement and reporting regulations in Title 23, Chapter 2.7, Article 2, sections 932 through 938 of the California Code of Regulations, within 30 days from the date of this Order.
2. Cease all diversions from Oro Fino and Kidder Creek under Statement Nos. S000774 and S019640 until a measurement device(s) has been installed in accordance with Paragraph 1 of this Order.
3. Submit a report of water measuring device to the State Water Board with the first water use report submitted after installation of the device.
4. Maintain, and provide to the Division upon request, records of all water diversions from Oro Fino and Kidder Creek.
5. 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.

6. 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.
7. 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.
8. 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.

CERTIFICATION

The undersigned, Clerk to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on April 2, 2025.

AYE: Chair E. Joaquin Esquivel
 Vice Chair Dorene D'Adamo
 Board Member Sean Maguire
 Board Member Laurel Firestone
 Board Member Nichole Morgan

NAY: None

ABSENT: None

ABSTAIN: None



Courtney Tyler
Clerk to the Board