

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

DIVISION OF WATER RIGHTS

ORDER WR 2021-0098-EXEC

In the Matter of Petition for Reconsideration of

Montague Water Conservation District

ORDER DISMISSING PETITION FOR RECONSIDERATION

Source: Shasta River

County: Siskiyou

BY THE EXECUTIVE DIRECTOR:¹

1.0 BACKGROUND

On August 17, 2021, the State Water Resources Control Board (State Water Board or Board) adopted an [emergency regulation](#) establishing drought emergency minimum flows in the Scott River and Shasta River watersheds. (Cal. Code Regs., tit. 23, §§ 875-875.9.) The regulation was reviewed and approved by the Office of Administrative Law and went into effect upon filing with the Secretary of State August 30, 2021. The regulation will remain in effect for one year, but could be repealed earlier if water supply conditions improve. The State Water Board may readopt the regulation if drought conditions continue into next year.

On September 10, 2021, the State Water Board issued a curtailment order ([Order WR 2021-0082-DWR](#)) to the most junior water right holders in the Shasta River watershed, including post-Adjudication appropriative surface water and groundwater rights, as well

¹ State Water Board [Resolution No. 2012-0061](#) delegates to the Executive Director the authority to supervise the activities of the State Water Board. Unless a petition for reconsideration raises matters that the State Water Board wishes to address or requires an evidentiary hearing before the State Water Board, the Executive Director's consideration of a petition for reconsideration of a water right curtailment order falls within the scope of the authority delegated under Resolution No. 2012-0061. Accordingly, the Executive Director has the authority to refuse to reconsider the petition for reconsideration, deny the petition, or set aside or modify the order.

as surface water rights in the Shasta Adjudication with priority dates later than November 1912. Based on forecasted precipitation and other factors, the State Water Board issued addenda to Order WR 2021-0082-DWR on September 23, October 21, and October 29, that partially suspended curtailment of some water rights in order of priority contingent on the required drought emergency minimum flow at the Yreka United States Geological Survey (USGS) gage.

The Montague Water Conservation District (MWCD) is an irrigation district that owns and operates Dwinnell Reservoir (also known as Lake Shastina) on the Shasta River. MWCD holds several water rights in the Shasta River watershed that were curtailed pursuant to Order WR 2021-0082-DWR, including Permits 2452 and 2453 for the diversion of water to storage in Dwinnell Reservoir. Permit 2452 authorizes the diversion of up to 35,000 acre-feet (AF) per year from the Shasta River to storage in Dwinnell Reservoir, and Permit 2453 authorizes the diversion of up to 14,000 AF per year from Parks Creek to storage in Dwinnell Reservoir.

2.0 MWCD SUBMITTALS

On September 23, 2021, the State Water Board received an email from MWCD following up on various reporting requirements pursuant to the emergency regulation. MWCD indicated that it has completed its certification of compliance with the curtailment order for various water rights and claimed exceptions under 874.1 (non-consumptive use) and 875.2 (minimum human health and safety). MWCD also indicated that it is releasing stored water from Dwinnell Reservoir for beneficial uses, including water pursuant to prior rights agreements and environmental flows. The September 23 email requests reconsideration “due to the following [aforementioned] exceptions.”

On October 11, 2021, the State Water Board received a follow-up email from MWCD as a “supplement” to MWCD’s “previously submitted request for reconsideration.” This and other documents attached to the October 11 email contain information on a separate Safe Harbor Agreement (SHA) process, which is intended to ultimately protect signatories from prosecution for “take” of the threatened coho salmon under the federal Endangered Species Act. The SHA is a long-term collaborative effort between certain water right holders and fisheries agencies to “implement specific and surgical conservation plans to protect and expand habitat for Coho salmon and improve water quality and flow conditions for all cold water dependent species on a reach scale basis.” MWCD’s e-mail emphasizes that curtailment of fall, winter, and spring storage in Dwinnell Reservoir could impact the ability to carry out SHA commitments next year.

3.0 GROUNDS FOR RECONSIDERATION

Any interested person may petition the State Water Board for reconsideration of a water rights decision or order within 30 days on any of the following grounds:

- (a) [i]rregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) [t]he decision or order is not supported by substantial evidence;
- (c) [t]here is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) [e]rror in law. (Cal. Code Regs., tit. 23, §768.)

A petition must specify the specific Board action for which the petitioner requests reconsideration, “the reason the action was inappropriate or improper,” “the specific action which petitioner requests,” and must contain “a statement that copies of the petition and accompanying materials have been sent to all interested parties.” (Cal. Code of Regs., tit. 23, § 769, subds. (a)(2), (4)-(6).) Additionally, “a petition shall be accompanied by a statement of points and authorities in support of legal issues raised in the petition.” (*Id.*, subd. (c).) The State Water Board may refuse to reconsider a decision or order if the petition fails to raise substantial issues related to the causes for reconsideration set out in section 768. (Cal. Code Regs., tit. 23, §770, subd. (a)(2).

4.0 ANALYSIS

Neither of MWCD’s emails dated September 23 and October 11 provide a valid basis for reconsideration. MWCD does not articulate any irregularity in proceedings, or articulate why the State Water Board’s actions under the emergency regulation is not supported by substantial evidence or is an error of law. While the correspondence includes the words “request for reconsideration,” they do not meet the minimum requirements for petition submittal and as a result do not contain sufficient explanation of issues that would be capable of evaluation. Accordingly, the State Water Board refuses to reconsider Order WR 2021-0082-DWR because MWCD’s petition fails to raise substantial issues related to the causes for reconsideration set forth above. Moreover, MWCD’s submittals generally express the need for exceptions to curtailment that are provided for within the order and emergency regulation itself. To the extent that MWCD is desiring to petition from any denial of these exceptions to its operations, no such denial has occurred and such a petition would be premature at this point.

What can be gleaned from MWCD’s submittals is a general discontent with the curtailment order as applied to MWCD’s operations. The State Water Board will attempt to address MWCD’s concerns as follows. MWCD’s September 23 email lists Shasta health and safety needs of 1,200 AF of water for the City of Montague and for firefighting, Shasta non-consumptive use for environmental flows and leakage to groundwater/springs and evaporation, and stored water for pre-1900 prior rights agreement of 3,382 AF. We will assume that MWCD’s concern is regarding its ability to divert and store water for these uses in 2022, and not the releases of previously stored water that occurred before the emergency regulation went into effect. The curtailment order does not apply to the release of stored water, and therefore MWCD’s deliveries of

stored water for beneficial use, including using stored water in the reservoir for firefighting, are not in violation of the curtailment order.

The State Water Board confirms that MWCD has complied with the reporting requirements in WR 2021-0082-DWR, including claimed exceptions under 874.1 for non-consumptive use and 875.2 for minimum human health and safety. The State Water Board is in the process of reviewing MWCD's petition for diversion and storage in excess of the minimum standards provided in the human health and safety exception. To the extent that MWCD's September 23 email was intended to support a petition to divert in excess of minimum human health and safety exception provisions, this matter is under consideration and the State Water Board has requested additional information needed to process this request. Regarding the prior rights agreement for 3,382 AF of stored water, it appears that this agreement is for diversions starting in March. For the purpose of this emergency regulation, diversion to storage can occur pursuant to the season and priority dates of those rights (pre-1900) so long as those more senior water rights are not curtailed. (See Report on Determination of the Amounts of Water to be Delivered from the Montague Water Conservation District Storage Reservoir to the McKee Company, J.L. Jones, Wm. P. and Albert Dunlap, John Soule, J.W. and Mary L. Dennis and E.D. Terwilliger, In Lieu of the Amounts of Water Naturally Available to the Said Parties from Shasta River Under Their Riparian and Appropriative Rights, May 28, 1928.) If diversions pursuant to the prior rights agreement occur in 2022, MWCD will need to keep records of these separate diversions.

The State Water Board appreciates and understands that emergency drought restrictions on the ability to store water at Dwinnell Reservoir in the winter and spring will impact the amount of water available for beneficial use later in the season. The State Water Board has made modifications to the curtailment order so that MWCD can maximize diversions to storage to the extent allowable under the emergency regulation. On October 21, based on the flows and forecasted precipitation in the Shasta River watershed, the State Water Board issued [Addendum 2](#) to Order WR 2021-0082-DWR, which temporarily suspended curtailment of MWCD's permitted water right No. 2452 (A003544) from the Shasta River. MWCD, in coordination with the Scott Valley and Shasta Valley Watermaster District (Watermaster), was able to manage its diversion to storage in Dwinnell Reservoir in real time and make adjustments as necessary to ensure that the required October drought emergency minimum flow requirement of 125 cubic feet per second (cfs) was met at the Yreka USGS gage. From October 21- 24, flows spiked due to recent storms, resulting in approximately 746 AF of increased storage in Dwinnell Reservoir.

On October 29, the State Water Board issued [Addendum 3](#) to Order WR 2021-0082-DWR, which provides for the partial suspension of the curtailment of both MWCD's permitted water right No. 2452 (A003544) from the Shasta River and its water right No. 2453 (A003555) from Parks Creek. Since October 24, storage increased another 1,552 AF, and the State Water Board estimates a total of 2,258 AF of additional water has been stored in Dwinnell Reservoir under Addenda 2 and 3. The temporary suspension of curtailments that allows MCWD to divert to storage is conditioned on the

required November and December drought emergency flow requirement of 150 cfs being met at the Yreka USGS gage. The curtailment suspension under Addendum 3 was not in effect until the Yreka USGS gage increased to 150 cfs. Beginning November 1, MWCD continued to divert some water to storage even though the Yreka USGS gage was below the required minimum and it was not until November 6 that the November drought emergency minimum flow of 150 cfs was met. Nevertheless, the State Water Board is generally satisfied with MWCD's effort and compliance. Since that time, flows at the Yreka USGS gage have been maintained above 150 cfs.² As of November 18, 2021, Dwinnell Reservoir storage was estimated at 3,553 AF. While this volume is far below the capacity of Dwinnell Reservoir in normal years, MWCD can continue to divert to storage above what is required to maintain flows at the Yreka USGS gage, including capturing any precipitation events that hopefully will occur through December.

On November 12, 2021, the State Water Board was copied on a correspondence between MWCD and California Department of Fish and Wildlife (CDFW) titled "Reconsideration of the Shasta River Curtailment Order" containing several substantive attachments including a draft proposal for a cooperative solution based in part on SHA commitments and a request to consider lowering the flow requirements through December. This draft proposal is currently under consideration, and if necessary, can be evaluated in a separate order. The State Water Board appreciates MWCD's efforts to improve conditions in the watershed for water users and the environment. State Water Board staff have and will continue to engage with MWCD, other SHA parties, and other parties in the watershed to understand and integrate SHA and other actions with emergency regulation implementation to the extent possible.

5.0 CONCLUSION

MWCD's petition for reconsideration is DISMISSED because it fails to meet the minimum regulatory requirements for a petition for reconsideration, or to raise substantial issues related to the causes for reconsideration in California Code of Regulations, title 23, section 768, and is premature insofar as it relates to petitions currently under consideration under Order WR 2021-0082-DWR.

November 24, 2021

Date



Eileen Sobeck
Executive Director

² As this Order was being finalized for issuance, flow at the Yreka USGS gage dropped below the 150 cfs drought emergency flow requirement. The cause of the November 21 drop is under investigation. State Water Board staff have been in communication with MWCD and the Watermaster to ensure the drought emergency minimum flow of 150 cfs is again met at the Yreka USGS gage.