

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Violations of Orders Curtailing Diversions in the Scott River Watershed

Lance Batistich

Water Right IDs: S025829, S025819, S025820, S025830, S028076

SOURCE: Oro Fino Creek thence Scott River

COUNTY: Siskiyou

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Lance Batistich (“Respondent”) is alleged to have violated Title 23, Division 3, Chapter 2, Article 24, section 875.8 of the California Code of Regulations.
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 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](#).) On June 21, 2022, the State Water Board readopted the Emergency Regulations, which went into effect on July 29, 2022. The updated regulations extend previously issued curtailment orders under the amended regulation. (Cal. Code Regs., tit. 23, § 875, subd. (d)(3).)
3. 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. They prevent the diversion of water that would unreasonably interfere with an emergency minimum level of protection for commercially and culturally significant fall-run Chinook salmon, threatened Southern Oregon/Northern California Coast coho salmon, and culturally significant steelhead by prohibiting surface water and groundwater diversion subject to a curtailment order. (Cal. Code Regs., tit. 23, §

875, subd. (a).) The Emergency Regulations grant the Deputy Director for the Division of Water Rights (“Division”) the authority to issue orders curtailing diversion (“Curtailed Orders”). (Cal. Code Regs., tit. 23, § 875.) Exceptions to curtailment are available for diverters enrolled in a Local Cooperative Solution (“LCS”), for non-consumptive diversions, and for minimum health and human safety needs. (Cal. Code Regs., tit. 23, §§ 875, subd. (f), 875.1, and 875.2.)

4. Under Water Code section 1846, subdivision (a)(2), “a person or entity may be liable... in an amount not to exceed five hundred dollars (\$500) for each day” the violation of a “regulation or order adopted by the Board” occurs.
5. Water Code section 1055 grants the Executive Director for the State Water Board authority to issue an Administrative Civil Liability (“ACL”) Complaint to any person or entity to whom administrative civil liability may be imposed.
6. The Executive Director delegated authority to issue an ACL Complaint to the Deputy Director for Water Rights. Pursuant to State Water Board Resolution 2012-0029, the Deputy Director for Water Rights is authorized to issue an order imposing an ACL when a complaint has been issued and no hearing has been requested within 20 days of receipt of the complaint. This authority has been redelegated to the Assistant Deputy Director.

ALLEGATIONS

7. The Respondent 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 250 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 Respondent’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 Respondent received Order WR 2021-0083-DWR on September 14, 2021. The respondent received WR 2021-0084-DWR through email on November 3, 2022.

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 Respondent submitted a Curtailment Certification Form on October 4, 2021. The Respondent claimed exemptions to curtailment for minimum livestock diversion, but these exemptions do not apply to irrigation.
11. The Division learned that the Respondent 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 Respondent on August 10, 2022.
12. On August 23, 2022, Division staff inspected the Respondent's property after asking for, and receiving consent from the Respondent. The Respondent showed staff the point of diversion ("POD") and the place of use. The Respondent 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 Respondent 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. During the inspection, staff spoke to the Respondent and the ranch foreman. The Respondent expressed disagreement with the Curtailment Orders with hostility and voiced skepticism about the State and Federal agencies. The Respondent repeatedly stated that he would continue diverting regardless of the Curtailment Orders.
13. Based on their observations during the inspection, the Respondent's statements, and other information, staff determined violations of the Curtailment Orders had occurred or were threatening to occur and issued a Draft Cease and Desist Order ("CDO"). They issued an Information Order with the Draft CDO to obtain additional information about the Respondent's curtailment violations. When the Respondent failed to respond to the Information Order, the Division issued an ACL Complaint. The Respondent eventually agreed to accept the CDO and ACL through a settlement with the Division approved through Order WR 2022-0171-DWR. The Respondent provided the Information Order's required response. Staff assessed the response, which showed the Respondent had diverted approximately 202 acre-feet of water for 79 days while curtailed.

- a. Staff reviewed the Respondent's Information Order response and calculated the number of days of violation. Respondent has multiple water rights and staff determined that diverting either from a single water right or from multiple water rights on the same day counts as one day of violation. Staff's further investigation confirmed that the Respondent diverted approximately 202 acre-feet of water for 79 days while curtailed.
- b. After receiving the Respondent's Information Order response, staff contacted the Respondent to clarify some of the responses. The Respondent stated that the wastewater reservoir collects animal wastewater, precipitation runoff, and 10 to 12 acre-feet of surface water from diversions under S025829 by the end of May. According to the respondent, this wastewater reservoir would be used for irrigation in August when curtailment orders were in effect.

PROPOSED CIVIL LIABILITY

14. Under Water Code section 1846, subdivision (a)(2), 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.
 - a. Under Water Code section 1058.5, the State Water 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."
 - b. Following Executive Order N-10-21, the State Water Board adopted the Emergency Regulations pursuant to Water Code section 1058.5, which authorized the Deputy Director to issue curtailment orders. The Deputy Director for the Division subsequently issued Orders WR 2021-0083-DWR and WR 2021-0084-DWR. The Respondent's water rights are subject to these orders and the Respondent diverted water under those rights when they were in effect. The Respondent received the initial Curtailment Orders on September 14, 2021.
15. The statutory maximum liability for this violation is \$39,500. Curtailment Orders prohibited the Respondent from diverting water from any sources within his water rights and claims of right. The Respondent is not authorized to divert water

under any exception to curtailment. Therefore, each day of diversion when the Curtailment Orders prohibited diversion is a day of violation. Information the Respondent provided pursuant to the Information Order shows that curtailed diversions occurred continuously for 79 days from July 14, 2022, to September 30, 2022. The Respondent has therefore accrued 79 days of violation, resulting in a maximum administrative liability of \$39,500 (79 days x \$500/day).

16. In determining the appropriate amount of a civil liability, Water Code sections 1848, subdivision (d) and Water Code section 1055.3 both provide that the State Water Board shall consider all relevant circumstances, including, but not limited to, all of the following factors: the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action undertaken by the violator.
17. In considering the extent of harm caused by the violation:
 - a. The State Water Board adopted the Emergency Regulations in response to Governor Newsom's Declaration of a State of Emergency due to extreme drought conditions. Water supply shortages were occurring throughout the state. The Emergency Regulations "prevent the diversion of water that would unreasonably interfere with an emergency minimum level of protection for commercially and culturally significant fall-run Chinook salmon, threatened Southern Oregon/Northern California Coast coho salmon, and culturally significant steelhead." (Cal. Code Regs., tit. 23, §875, subd. (a).)
 - i. The Emergency Regulations were adopted to protect fall-run Chinook salmon, threatened Southern Oregon/Northern California Coast coho salmon, and culturally significant steelhead. September to January is a critical period when fall-run Chinook and coho salmon must migrate from the mainstem Klamath River into the Scott and Shasta River watersheds to find safe places to spawn and rear. Most of this period coincides with reduced irrigation requirements, but flow remains a limiting factor in dry years, thus the need for stronger protections during times of drought.
 - ii. Curtailments are imposed by the Deputy Director of the Division of Water Rights when it is determined that without curtailments, flows will drop below drought emergency minimum flows. If water rights users subject to curtailment orders fail to comply, it endangers the health of the Chinook and coho salmon which depend upon a minimum quantity and quality of river water to survive.

- b. Based on the Information Order response, the Respondent diverted approximately 202 AF of water, while curtailed, from July 14, 2022 to September 30, 2022. During the Respondent's curtailed diversions in July 2022, the average stream flow at the USGS Fort Jones gage dropped to approximately 16.5 cfs — 33.5 cfs below the 50 cfs minimum instream flow the Emergency Regulation requires. In August, flows dropped to an average of 11 cfs — 19 cfs below the 30 cfs minimum instream flow the Emergency Regulation requires. In September, average flows were 9 cfs — 24 cfs below the 33 cfs minimum instream flow the Emergency Regulation requires. The Respondent's diversions during curtailment further worsened, and therefore further harmed, commercially and culturally significant fall-run Chinook salmon, threatened Southern Oregon/Northern California Coast coho salmon, and culturally significant steelhead — instream fishery resources the Emergency Regulation was adopted to protect.
 - c. The Respondent's diversions during curtailment harmed water users who were not curtailed. The Respondent's diversions during curtailment reduced or eliminated flows that otherwise would have been available to water users enrolled in a LCS, who must implement alternative means to meet the minimum threshold flows. Diverting water when other users are curtailed or have formally reduced diversion through a LCS creates an unfair advantage over similarly situated diverters in the watershed.
18. In considering the nature and persistence of the violation, available facts more than support a reasonable inference that the Respondent knowingly and intentionally refused to submit the Information Order Form.
- a. The Respondent is aware a drought is occurring, aware of the Emergency Regulations, and aware of the State Water Board's enhanced regulatory efforts. He submitted a Curtailment Certification in response to the initial Curtailment Order. By submitting the Curtailment Certification, the Respondent agreed to monitor the Lyris email for curtailment updates.
 - b. During the inspection on August 23, 2022, the Respondent expressed disagreement with the Curtailment Orders with hostility and voiced skepticism about the State and Federal agencies. The Respondent repeatedly stated that they would continue diverting regardless of the Curtailment Orders and indicated he did not want to join a LCS because he did not want Department of Fish and Wildlife staff on his property.
 - c. The Respondent also has a recent history of failing to comply with Board orders. When issued an Information Order, the Respondent only responded after the Division issued an ACL Complaint and subsequently settled in Order WR 2023-0008-EXEC.

19. In considering the length of time over which the violation occurred, the curtailment violations occurred for continuous period of 79 days, from July 14, 2022, through September 30, 2022.
20. In considering corrective action undertaken by the violator, the Respondent has come into compliance, but not voluntarily. To the extent the Respondent may now be considered compliant with Curtailment Orders, it is because the Respondent is now subject to a CDO pursuant to Order WR 2022-0171-DWR.
21. In considering other relevant circumstances:
 - a. The Respondent has a prior adjudicated violation, having been issued Order WR 2022-0171-DWR. This order was issued recently not just for violating Curtailment Orders, but also for failing to respond to an Information Order issued to investigate the same violation. This recent adjudicated violation, which occurred during drought, is a significant aggravating factor warranting a significantly higher penalty.
22. Having taken into consideration all relevant circumstances, the Division of Water Rights Prosecution Team recommends the imposition of \$39,500 in administrative civil liability ("Proposed Liability"). This Proposed Liability is, however, based on currently available information. Should this matter go to hearing, the Prosecution Team may recommend a different administrative civil liability based on evidence and testimony submitted at the hearing.

RIGHT TO HEARING

23. The Respondent may request a hearing on this matter before the State Water Board. Any such request for hearing must be delivered to or received by mail by the Board within 20 days after the date that this notice is received in accordance with Water Code section 1055, subdivision (b).
24. If the Respondent requests a hearing, the Respondent will have an opportunity to contest the allegations in this complaint and the imposition of a fine by the Board. The Board will issue a notice setting the specific time and place for the hearing. The hearing notice will be mailed not less than 10 days before the hearing date.
25. At the hearing, the Board will consider whether to impose a monetary fine, and if so, whether to adjust the Proposed Liability within the amount authorized by statute. Any Board order imposing an ACL shall be final and effective upon issuance.

26. If the Respondent does not request a hearing within 20 days of receipt of this Complaint, then the right to a hearing on the matter is waived. The Assistant Deputy Director for the Division of Water Rights may then issue a final Administrative Civil Liability Order assessing the Proposed Liability.

STATE WATER RESOURCES CONTROL BOARD

A handwritten signature in black ink that reads "Julé Rizzardo". The signature is written in a cursive, flowing style.

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

Dated: