

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

ADMINISTRATIVE CIVIL LIABILITY COMPLAINT

In the Matter of Violations or Threatened Violations of Scott River and Shasta River Watersheds Drought Emergency Requirements, Order WR 2024-0024-DWR, and Order WR 2024-0025-DWR

RICHARD M. BERRY

S024360, SG003902

SOURCE: Scott River

COUNTY: Siskiyou

YOU ARE HEREBY GIVEN NOTICE THAT:

1. Richard M. Berry (Respondent) is alleged to have violated Title 23, Division 3, Chapter 2, Article 24, section 875 of the California Code of Regulations which prohibit diversions of surface water and groundwater when curtailments are in place.
2. On December 19, 2023, the State Water Resources Control Board (State Water Board or Board) adopted the Scott River and Shasta River Watersheds Drought Emergency Requirements (Emergency Regulation) which went into effect February 1, 2024. The Emergency Regulation provides curtailment authority in the Scott and Shasta watersheds, establishes minimum instream flow requirements, and provides information order authority in the Scott River and Shasta River watersheds. The minimum instream flow requirements were established to protect fall-run Chinook salmon, threatened Southern Oregon/Northern California Coast coho salmon, and culturally significant steelhead. Resolution No. 2023-0047 adopted the Emergency Regulation and describes the need for the Emergency Regulation and its intent.
3. Section 875 of the Emergency Regulation grants the Deputy Director for the Division of Water Rights (Division) the authority to issue Curtailment Orders requiring diverters to cease or limit their diversions.

4. On July 23, 2024, the Deputy Director issued Order Imposing Water Right Curtailments and Requiring Reporting for Surface Water Rights in the Scott River Watershed (Order WR 2024-0024-DWR). This imposed curtailments on all surface water rights in the Scott River Watershed.
5. On July 24, 2024, the Deputy Director issued Order Imposing Water Right Curtailment and Requiring Reporting for Adjudicated Groundwater Rights and Known Groundwater Diversions Associated with Parcels Listed in Attachment A in the Scott River Watershed (Order WR 2024-0025-DWR). This imposed curtailments on adjudicated groundwater rights and groundwater rights associated with parcels in the Scott River watershed outside of municipal service areas.
6. Both Order WR 2024-0024-DWR and Order WR 2024-0025-DWR required submission of an online Curtailment Certification Form in accordance with section 875.6 subdivision (a) and allowed for curtailment exceptions applicable to non-consumptive instream uses, human health and safety needs, and livestock watering, as described in sections 875.1, 875.2, and 875.3 of the Emergency Regulation. If an exception was claimed, the Respondent must also self-certify or submit a petition online at <https://public.waterboards.ca.gov/WRInfo>.
7. On August 9, 2024, the Deputy Director issued “Addendum To Attachment A: Groundwater Rights In The Scott River Watershed Associated With Order WR 2024-0025-DWR: Water Right Curtailment And Requiring Reporting For Groundwater Rights In The Scott River Watershed.” (Parcel Addendum). This Addendum updated Attachment A of the Order and clarified the parcels subject to curtailment. No additional diverters were included in the Parcel Addendum.
8. On August 23, 2024, “Addendum 1 – Temporary and Conditional Suspension to Scott River Curtailments Orders” (Addendum 1) to Order WR 2024-0024-DWR and Order WR 2024-0025-DWR was sent ahead of an expected storm event suspending curtailments subject to flows reaching, and maintaining, a rate of 35 cfs. Should flows have met this condition, diverters were directed to notify the State Water Board of their diversions and update the diversion amounts daily. However, the storm event did not result in increased flows above 35 cfs, and therefore diversions remained curtailed.
9. On September 6, 2024, “Addendum 2 – Scott River Groundwater Curtailment Suspension and Required Information for Potential Future Surface Water Diversions” (Addendum 2) was sent to Scott River water right holders. Curtailments were conditionally suspended for groundwater diverters upon the diverter contacting State Water Board staff indicating they are diverting and upon the Drought Emergency Minimum Flows being met at the USGS Fort Jones gage.
10. On September 17, 2024, “Addendum 3: Update to Scott River Surface Water Curtailments for Farmer’s Ditch Company” (Addendum 3) was sent to Scott River

water right holders. The addendum applies only to Farmer's Ditch Company, as that was the only surface water diverter that submitted a request to the State Water Board under the provisions of Addendum 2. Addendum 3 allows Farmer's Ditch Company to divert under certain conditions set to expire at 11:59 pm on September 30, 2024.

11. On September 27, 2024, "Addendum 4: Update to Scott River Surface Water Curtailments for Farmer's Ditch Company and Scott Valley Irrigation District" (Addendum 4) was sent to Scott River water right holders. Addendum 4 applied only to Farmer's Ditch Company and Scott Valley Irrigation District, as they were the only surface water diverters that submitted a request to the State Water Board under the provisions of the previous addenda. Addendum 4 further states, "If you did not submit a request under the addendum (issued September 6, 2024 and September 17, 2024), your surface water right(s) remains curtailed (unless you have a local cooperative solution or meet an exception to curtailment like human health and safety or minimum livestock watering)." Addendum 4 expired on September 30, 2024 at 11:59pm.
12. 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."
13. 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.
14. The Executive Director delegated this authority to the Deputy Director for the Division of 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

15. The Respondent is the primary owner of Water Right IDs S024360 and SG003902. Respondent's Initial Statement of Diversion and Use for Water Right ID S024360 is claimed as Diversion #18 under Court Decree No. 13775. Water Right ID S024360 is subject to Order WR 2024-0024-DWR. Water Right ID SG003902 was assigned to the Respondent's parcel identified in, and subject to, Order WR 2024-0025-DWR and the Parcel Addendum.
16. United States Postal Service (USPS) certified mail tracking indicate that the Respondent received Orders WR 2024-0024-DWR and WR 2024-0025-DWR on July 25, 2024 and July 29, 2024, respectively.

17. Division staff observed active irrigation occurring on the Respondent's property, identified as Siskiyou County Assessor Parcel Numbers (APN) [REDACTED] and [REDACTED], from a public road on August 1, August 13, and August 29, 2024. The Respondent submitted Scott Shasta Curtailment Certification forms for Water Right IDs S024360 and SG003902 on August 8, 2024. Division staff issued a Notice of Violation (NOV) to the Respondent on August 14, 2024.
18. Local Cooperative Solutions (LCS) grant water right holders the opportunity to propose alternative means of reducing water use to meet minimum flows, or to provide other fishery benefits, in lieu of curtailment, as described in the Emergency Regulation. The Respondent is not currently enrolled in a LCS nor were they enrolled as of the date of the alleged violations.
19. On August 8, 2024, the Respondent submitted a 2024 Scott & Shasta Non-Consumptive Use certification and a 2024 Curtailment Certification form for Water Right ID SG003902. The Respondent also submitted a 2024 Scott Curtailment Certification Form for S024360. In the Non-Consumptive Use certification, the Respondent stated that he had an "old well in back-yard..." that he is, "not currently using or diverting". The Respondent provided no other information, nor did he allege a legitimate basis for a non-consumptive use exception from curtailment. In the Respondent's SG003902 Curtailment Certification, information was provided that "there is no water used on the lands associated with the parcels listed in Attachment A." In the Respondent's S024360 Curtailment Certification, information was provided that "certify that diversion under the water right identified has ceased."
20. USPS certified mail tracking indicate that the Respondent received the NOV on August 16, 2024.
21. To date, the Respondent has not contacted the State Water Board indicating they are diverting under Addendum 2 nor provided evidence of qualifying under any other exception as stated in sections 875.1, 875.2, and 875.3 of the Emergency Regulation and thus curtailments are still in effect.

PROPOSED CIVIL LIABILITY

22. 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-5-23, the State Water Board adopted the Emergency Regulation pursuant to Water Code section 1058.5, which authorized the Deputy Director to issue curtailment orders. The Deputy Director for the Division subsequently issued the Respondent curtailment orders on July 23, 2024 and July 24, 2024. The Respondent's diversions are subject to these orders and the Respondent diverted water when they were in effect.
23. Each day of diversion when the Curtailment Orders prohibited diversion is a day of violation. Based on observations and photo evidence captured by Division staff, the Respondent violated the Curtailment Orders for at least 3 days. The statutory maximum liability for the alleged violations is \$3,000 (3 days x 2 curtailed water rights x \$500 per day of violation).
 24. In determining the appropriate amount of a civil liability, Water Code section 1848(d) and Water Code section 1055.3 provide that the State Water Board "shall take into consideration all relevant circumstances, including, but not limited to, 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 the corrective action, if any, taken by the violator."
 25. In considering the extent of harm caused by the violation:
 - a. The Emergency Regulation was adopted by the State Water Board in response to Governor Newsom's Declaration of a state of emergency due to drought conditions. The Emergency Regulation "prevent[s] 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. Diversions in violation of the Emergency Regulation may injure other water rights holders by depriving them of water they otherwise would have been entitled to divert.
 - ii. Curtailments are imposed by the Deputy Director of Water Rights when it is determined that without curtailments, flows will drop below drought emergency minimum flows. If water rights holders subject to curtailment orders fail to comply, it endangers the health of the fish the Emergency Regulation was adopted to protect.

- iii. Diversions during the summer are most likely to impact steelhead and coho salmon which rear in the Scott Watershed during the summer.
 - iv. 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 that impacts migration.
- b. The Respondent was found to have been actively diverting for at least three days. Each day of diversion during curtailment deprived other legal users of water, potentially harmed fish protected by the Emergency Regulation, or both. The Respondent's diversions during curtailment further worsened, and therefore further harmed, 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.
26. In considering the nature and persistence of the violation, available facts more than support a reasonable inference that the Respondent intentionally violated Curtailment Orders or willfully neglected them.
- a. This is the third time emergency regulations have been adopted and the third year the Division has issued curtailments in the Scott Watershed (2021, 2022, 2024).
 - b. The Respondent was aware of the Emergency Regulation, and aware of the State Water Board's enhanced regulatory efforts. Respondent submitted a Curtailment Certification for both of his water rights in response to the Curtailment Order. By submitting the Curtailment Certification, the Respondent agreed to monitor the GovDelivery service email for curtailment updates.
 - c. Division staff issued an NOV to the Respondent on August 14, 2024 and the Respondent received the NOV on August 16, 2024. To date, the Respondent has not contacted the Division to dispute the violation.
27. In considering the length of time over which the violation occurred, Division staff observed three separate days of violation on August 1, August 13, and

August 29, 2024. While there may be additional days in which the Respondent diverted in violation of the curtailment orders, these are three days in which the Division has evidence of diversions.

28. In considering other relevant circumstances:
 - a. An ACL should, at a minimum, recover the enforcement costs and economic benefit obtained from a violation, plus an additional nontrivial amount for deterrence. It would be unfair to violators who voluntarily incur the costs of regulatory compliance to impose a lower amount absent exceptional circumstances. Otherwise, liabilities would merely be construed as the cost of doing business and provide no meaningful deterrent to future violations. Since the State Water Board may impose an ACL only up to \$500 a day per water right for this violation, the statutory maximum penalty of \$3,000 is the most appropriate penalty the Board may issue for this violation.
29. Having taken into consideration all relevant circumstances, including but not limited to the failure of the Respondent comply with the curtailment orders, impacts to the watershed, staff costs associated with pursuing compliance, together with the overall need to preserve the integrity of the regulatory program, the Division of Water Rights Prosecution Team recommends the imposition of \$3,000 in administrative civil liability (Proposed Liability).

RIGHT TO HEARING

30. 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).
31. 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.
32. 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.

33. 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 blue ink, appearing to be "Robert P. Cervantes", written over a horizontal line.

*Robert P. Cervantes, Acting Assistant Deputy Director
Division of Water Rights*

Dated: October 9, 2024