

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

DIVISION OF WATER RIGHTS

ORDER WR 2022-0XXX-DWR

CEASE AND DESIST ORDER

In the Matter of Violations or Threatened Violations of Emergency Regulations and
Order WR 2021-0082-DWR

DARRELL SOUSA (SG005956)

SOURCE: Groundwater in the Shasta River Watershed

COUNTY: Siskiyou

STATEMENT OF FACTS AND INFORMATION

The State Water Resources Control Board (“State Water Board” or “Board”) is authorized under Water Code section 1831 to issue a Cease and Desist Order (“CDO”) requiring Darrell Sousa (hereinafter “Diverter”) to cease and desist from an ongoing, or a threatened, violation of the Klamath River Watershed Drought Emergency Regulations (“Emergency Regulations”), which were properly adopted in accordance with Water Code section 1058.5 and approved by the Office of Administrative Law.

Background

1. On August 17, 2021, the State Water Resources Control Board (“State Water Board” or “Board”) adopted Resolution No. 2021-0029 and the Emergency Regulations, titled *Establishment of Minimum Instream Flow Requirements, Curtailment Authority, and Information Order Authority in the Klamath Watershed*. 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. The minimum instream flow requirements were established to protect fall-run Chinook salmon and threatened Southern Oregon/Northern California Coast coho salmon. 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.

2. On June 21, 2022, the State Water Board updated and readopted the Emergency Regulations, effective July 29, 2022. The updated regulations contain a provision that extends previously issued curtailment orders under the amended regulation. (Cal. Code Regs., tit. 23, § 875, subd. (d)(3).) Because surface water and groundwater are interconnected in the Shasta River watershed, the Emergency Regulation addresses surface water and groundwater rights, in the order of priority.
3. The Emergency Regulations distinguish overlying groundwater rights from appropriative groundwater rights and assign them different water right priorities for purposes of curtailment. An appropriative groundwater right is distinguished from an overlying groundwater right when the diverter: 1) does not own land overlying the basin, 2) owns overlying land but uses the water on non-overlying land, or 3) sells or distributes the water to another party. (Cal. Code Regs., tit. 23, §875 .5 (b)(1)(A).)
4. 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, including post-adjudication appropriative surface water and groundwater rights. For the purpose of determining whether groundwater appropriators are subject to curtailment, the Emergency Regulations assign a priority date based on the date the well was constructed and the water was first used for appropriative uses. (Cal. Code Regs., tit. 23 § 875.5, subd. (b)(1)(A).) State Water Board staff reviewed the Department of Water Resources Well Completion Reports as well as county records to determine construction dates; however, these resources are often flawed or missing information which in many instances required staff to make reasonable assumptions about groundwater wells which have been identified as being used for appropriative uses.
5. The Diverter owns Siskiyou County Assessor's Parcel Number (APN) 019-661-120-000 and was identified as a groundwater appropriator. State Water Board staff were unable to locate the well completion report for the Diverter's groundwater well. Lacking the construction date of the Diverter's groundwater well, State Water Board staff reviewed the Department of Water Resources Well Completion Reports for construction dates of groundwater wells for the surrounding area of the Diverter's property. The year 1950 is the earliest a groundwater well was constructed near the Diverter's property and there is no evidence that the Diverter's groundwater well was constructed earlier than 1950. Therefore, based on available data, a priority date of no earlier than 1950 can be applied to the Diverter's well. Curtailments in the watershed currently reach back to 1885; thus the Diverter is subject Order WR 2021-0082-DWR.
6. The Emergency Regulations provide that "[d]iversions for human health and safety may be authorized to continue after receipt of a curtailment as described in Article 24, section 878.1." (Cal. Code Regs., tit. 23 § 875.2, subd. (b).)
7. Diversion for minimum human health and safety needs under any valid basis of right not greater than 55 gallons per person per day may continue notwithstanding curtailment of that right without further approval from the Deputy

Director if the diverter submits a certification that provides the necessary information to certify compliance with the Emergency Regulations. (Cal. Code Regs., tit. 23, § 878.1, subd. (b)(1).)

8. To the extent that a diversion for minimum human health and safety needs requires more than 55 gallons per person per day or *cannot be quantified on the basis of gallons per person per day*, continued diversion of water notwithstanding curtailment of the applicable water right requires submission of a petition demonstrating compliance with the Emergency Regulations and approval by the Deputy Director. (Cal. Code Regs., tit. 23, § 878.1, subd. (b)(1)-(2).)
9. All Californians have the right to accessible, safe, clean, and affordable drinking water. The State Water Board's goal is to ensure that the uses of water in the State are consistent with the laws and policies of the State and are appropriate for the stated needs.

Investigation

10. The Diverter submitted a Curtailment Certification, a Livestock Diversion Certification, and a Health and Safety Needs Certification for SG005956 on November 18, 2021.
11. On the Health and Safety Needs Certification, the Diverter claimed exemptions to curtailment for minimum human health and safety needs. On the certification form, the Diverter indicated his diversions will be used for "indoor domestic water uses including water for human consumption, cooking, or sanitation purposes, or water provided outdoors for human consumption, cooking, or sanitation. Bulk water deliveries or water hauling for these purposes should also use this option." For "indoor domestic use" the certification form asks the diverter to provide the number of households served by the diverter. The Diverter did not provide this information. On the certification form, the Diverter also checked the box to certify that the water diverted will only be used for domestic purposes and will not be more than 55 gallons per person per day. However, the Diverter lacks information about the number of people who are served by the water haulers who obtain water from the Diverter.
12. On the Livestock Diversion Certification, the Diverter certified that the diversion was necessary to provide adequate water to livestock. Diversions for the purposes of livestock watering are limited based on type of livestock and the amounts listed in California Code of Regulations, Title 23, Section 697, or other amount if the Diverter can provide sufficient justification for that amount. The Diverter did not indicate source of water, location of diversion, means of conveyance, number and type of livestock served, or estimate of daily diversion quantity.
13. In July 2022, the Division of Water Rights (Division) received a water rights complaint alleging that the Diverter was selling a substantial amount of water from his groundwater well to water haulers. The complaint alleged that the water pumped from the Diverter's groundwater well and hauled off the property is

primarily used for cannabis cultivation on nearby properties.

14. On August 5, 2022, Division staff issued a Notice of Complaint to the Diverter requesting information about the amount of water diverted, information regarding the sales of water, where water is used, and for what purpose.
15. On August 29, 2022, Division staff inspected the Diverter's property with consent from the Diverter. The Diverter met with Division staff and explained the water diversion and water sales at the property. The Diverter showed Division staff the water truck filling station and the groundwater well. The Diverter explained that groundwater is pumped from the well into five 20,000-gallon storage containers. The filling station is near the storage tanks and includes a diesel pump which is used by water haulers to transfer water into their water trucks. The Diverter estimated that he sells 5 to 40 truckloads of water per day, with most trucks having capacities of 2,000 to 4,000 gallons.
16. During the inspection, the Diverter admitted he does not keep records of how much water is sold to water haulers, where the water haulers deliver the water, how many people are served by the water, nor for what purposes the water is used. There are no measurement devices on the groundwater well nor at the filling station. The property does not have a gate, and the Diverter allows water haulers free access to the filling station even when the Diverter is away from the property. The water haulers fill their water trucks on their own and pay the Diverter on the "honor system." During the inspection, the Diverter provided paper copies of the electric utility bills which are specific for the groundwater well. Division staff observed that there was a mobile home, a greenhouse, and a pond on the property. Division staff did not observe livestock of any type on the Diverter's property.
17. During the inspection, the Diverter stated he verbally tells the water haulers that the water is to only be used for human health and safety needs; however, he stated he could not do much more than that. There is no written memorialization of the understanding nor formal agreements between the Diverter and the water haulers that water is to only go to human health and safety needs. The Diverter further elaborated that he wants to help his neighbors in the nearby Shasta Vista community who, to his knowledge, lack access to a sufficient amount of water to meet domestic needs and have encountered difficulties obtaining water from other sources.
18. On September 2, 2022, the Diverter emailed copies of the electricity bills associated with the operation of the groundwater well, which had also been provided during the inspection, and a photo of the groundwater well pump plate which displays technical specifications of the groundwater well pump.
19. On October 3, 2022, Division staff issued the Report of Inspection with a Notice of Violation to the Diverter for a threatened violation of California Code of Regulations, title 23, section 878.1 which limits diversions of appropriative groundwater for the purpose of human health and safety to 55 gallons per day per person unless a diverter files a petition for a different amount and that petition

is approved by the Deputy Director of the Division. It is unknown how many people are served by this water; therefore, it is not possible to know if the water from the Diverter's property meets the 55 gallons per person per day standard and thus requires a higher reporting burden in order to continue diverting. The Diverter confirmed that most of the diverted water is sold and used outside of the Diverter's property. Further, the Diverter has no means of determining exactly how much water is being diverted as neither the groundwater well nor filling station is equipped with a measurement device.

Applicable Law

20. When the State Water Board determines that a person is violating or threatening to violate a regulation adopted under Water Code section 1058.5, the board may issue an order to that person to cease and desist from that violation. (Wat. Code, § 1831, subd. (d)(4).)
21. Water Code section 1834, subdivision (a), provides that the State Water Board shall give notice informing the party that he or she may request a hearing not later than 20 days from the date on which the notice is received. If the party does not timely request a hearing, section 1834, subdivision (a) authorizes the State Water Board to adopt a cease-and-desist order based on the statement of facts and information set forth in the notice without a hearing. The State Water Board delegated this authority to the Deputy Director for Water Rights in Resolution 2012-0029. The Deputy Director has redelegated this authority to the Assistant Deputy Director for Water Rights.
22. The State Water Board duly adopted the Emergency Regulations pursuant to Water Code section 1058.5 on August 17, 2021, and again on June 21, 2022, which became effective on August 30, 2021, and July 29, 2022, respectively.
23. The Emergency Regulations recognize that diversions to meet human health and safety needs may need to continue even after a curtailment order has been issued. Human health and safety needs are defined in the Emergency Regulations as incorporating both indoor domestic needs as well as for outdoor irrigation for non-commercial farming and domestic animals. (Cal. Code Regs. tit. 23, § 875.2 (a)(1).) Human health and safety needs may be met through water hauling, "so long as the diverter maintains records of such deliveries and complies with the reporting requirements of section 875.6, and so long as such diversion and use is consistent with a valid water right." (Cal. Code Regs., tit. 23, § 875.2 subd. (a)(1).)
24. The Emergency Regulations limit the amount of water that can be diverted and used for human health and safety needs and establish requirements diverters must follow if greater than the minimum amount is diverted. The Emergency Regulations require diverters "To the extent that a diversion for minimum human health and safety needs requires more than 55 gallons per person per day, or cannot be quantified on the basis of gallons per person per day, continued diversion of water notwithstanding curtailment of the applicable water right requires submission of a petition demonstrating compliance..." (Cal. Code Regs.,

tit. 23, § 878.1 subd. (a) and (b).) Diverter has not filed a petition for approval by the Deputy Director of Water Rights.

25. As a condition of continued diversion under a claim of human health and safety needs as authorized under California Code of Regulations section 878.1, the Deputy Director of the Division of Water Rights may require the submission of additional information on a specified schedule. The required information may include, but is not limited to: how the diverter is complying with the conditions of their human health and safety certification; if any failures to comply with the conditions have occurred, what the diverter is doing to prevent future issues; and efforts to obtain alternative water sources. (See Cal. Code Regs., tit. 23 § 879 subd. (a)(1)-(6).) If the diverter is claiming a right to divert more than 55 gallons per person per day or is unable to quantify the amount of water on that basis, heightened reporting requirements may apply.

Findings

26. While the Diverter has a valid water right, he has failed to demonstrate compliance with the requirements for continued diversions under the human health and safety exemption to curtailment to which he previously certified to.
27. The Diverter filed a human health and safety certification, but failed to include critical information such as the number of households served by the water haulers taking water from Diverter's property. For a diverter to avail him or herself of the human health and safety certification, a diverter needs to be able to certify that they are complying with the 55 gallons per person per day standard.
28. The Diverter said he has no means of determining how much water is being diverted as neither the groundwater well nor transfer station is equipped with a measurement device. Thus, the Diverter is unable to demonstrate that the continued diversions meet the human health and safety requirements he previously certified to.
29. The Diverter said he does not maintain sales or distribution records or have any other system in place to track where the water that is pumped from his property is going, how many people it may be serving, or whether the water is being used for the certified human health and safety uses in his November 18, 2021, certification form. Without such information, the diverter threatens to violate Water Code section 1058.5.
30. Further, if the Diverter is unable to quantify the amount of water being diverted on the basis of gallons per person per day, in order to continue appropriating groundwater, the Diverter is required to file a petition to the Deputy Director of the Division requesting approval for his continued diversions. (Cal. Code Regs., tit. 23, § 878.1 subd. (b)(2).)

THE STATE WATER RESOURCES CONTROL BOARD THEREFORE ORDERS,
pursuant to sections 1831 through 1836 of the California Water Code, that:

1. Within ten (10) days of receiving this Order, the Diverter shall submit to the Division of Water Rights Enforcement Section information about how the Diverter is or was complying with the human health and safety conditions for diversions during the period of September 2021 to the present (or whenever diversions last occurred), specifically, how the Diverter determines that not more than 55 gallons per person per day will be diverted under all bases of right. If diversions under the claim of human health and safety are not currently occurring, please provide information about past practices. Please provide information that covers the following topics:
 - a. Total quantity (in gallons) per month of groundwater you sold for human health and safety purposes,
 - b. Assessor Parcel Number (APN) or address of each water delivery location or places where the water is being used for human health and safety,
 - c. Number of people served at each location by water diverted from your property,
 - d. All records of who you sold water to, including frequency and quantities,
 - e. For each sale, demonstrate how you verified the water was being used for human health and safety.
 - f. Pump specifications and utility bills for each well used to divert water for health and human safety purposes
2. If the Diverter is unable to provide the information required in Ordered Paragraph 1 because the Diverter did not keep records, then within 10 days of receiving this Order, the Diverter must submit a petition, pursuant to the California Code of Regulations, title 23, section 878.1(b)(2), and obtain approval from the Deputy Director of the Division. Groundwater appropriations must cease pending petition review and Deputy Director approval unless the Diverter provides information, as part of the petition, that continued diversions are necessary to resolve immediate public health or safety threats.
3. Within thirty (30) days of receiving this Order, the Diverter shall develop, and submit to the Division, a compliance plan that addresses record keeping to determine compliance with the human health and safety limit. At a minimum, the compliance plan must address record keeping of the following information for each sale or distribution:
 - a. the amount of water
 - b. the dates the water is sold or distributed and delivered,
 - c. the number of households and persons served,
 - d. the place of use for the water, and
 - e. the purpose of use for the water.

Implementation of the compliance plan shall correspond to the resumption of diversions for human health and safety notwithstanding curtailment, regardless of

whether diversions occur 1) under a human health and safety certification or 2) under an approved human health and safety petition (if applicable).

4. Within thirty (30) days of receipt of this Order the Diverter must install and maintain working measurement devices on the groundwater well and on the filling station pump to keep an accurate count of how much groundwater is being diverted, sold, or distributed. Measurement information shall be recorded at a minimum frequency of weekly and shall be provided to the Division upon request.
5. Appropriate groundwater diversions for human health and safety may resume:
 - a. Upon implementation of a compliance plan that demonstrates the Diverter's diversions are no greater than 55 gallons per person per day; or
 - b. Upon implementation of a compliance plan and the Deputy Director's approval of a petition pursuant to the California Code Regulations, title 23, section 878.1(b)(2).

Notice and Opportunity for Hearing

This draft CDO serves as notice pursuant to Water Code section 1834 that a violation is occurring or threatening to occur. You may request a hearing not later than 20 days after receipt. Unless a written request for a hearing is delivered to or received by mail by the State Water Board within 20 days after receipt of the notice, the State Water Board may adopt the CDO based on the statement of facts and information contained herein. (Water Code § 1834, subdivision (b).)

Consequences of Non-Compliance

In the event the Diverter fails to comply with the requirements of this Order, they shall be in violation of this CDO and subject to additional enforcement, which may include the imposition of administrative civil liability. Violation of a CDO may be referred to the Attorney General to take further injunctive enforcement actions as described in Water Code section 1845, subdivision (a):

Upon the failure of any person to comply with a cease-and-desist order issued by the board pursuant to this chapter [California Water Code division 2, part 2, chapter 12] the Attorney General, upon request of the board, shall petition the superior court for the issuance of prohibitory or mandatory injunctive relief as appropriate, including a temporary restraining order, preliminary injunction, or permanent injunction.

Failure to comply with this Order may subject the Diverter to civil liability in an amount not to exceed \$10,000 for each day in which the violation occurs pursuant to Water Code section 1845, subdivision (b)(1)(A).

Reservation of Enforcement Authority and Discretion

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, the authority to bring enforcement against the Diverter for infractions under Water Code section 1058.5, subdivision (d), and Water Code section 1052.

Regulatory Changes

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.

Compliance with Other Regulatory Requirements

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.

Exemption from CEQA

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.

STATE WATER RESOURCES CONTROL BOARD

ORIGINAL SIGNED BY

JULE RIZZARDO

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

Dated: November 16, 2022