

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

ORDER WR 2022-XXXX

In the Matter of the Petition for Reconsideration of Order WR 2019-0149

from

G. Scott Fahey and Sugar Pine Spring Water, LP

ORDER DENYING RECONSIDERATION

BY THE BOARD¹

1.0 INTRODUCTION

G. Scott Fahey and Sugar Pine Spring Water LP (collectively Fahey) petition the State Water Resources Control Board (State Water Board or Board) for reconsideration of State Water Board Order WR 2019-0149 (Order 2019-0149 or Order). Fahey holds permits 20784 and 21289 (applications 29977 and 31491) (collectively the Permits). Order 2019-0149, adopted by the Board on September 17, 2019, found that Fahey unlawfully diverted 25.33 acre-feet of water over 178 days between 2014 and 2015. The Order imposed Administrative Civil Liability (ACL) against Fahey in the amount of \$215,000. The Order includes a final Cease and Desist Order (CDO) requiring that

¹ The State Water Board is directed to order or deny reconsideration on a petition within 90 days from the date on which the Board adopts the decision or order. (Wat. Code, § 1122.) If the State Water Board fails to act within that 90-day period, a petitioner may seek judicial review, but the Board is not divested of jurisdiction to act upon the petition simply because it failed to complete its review of the petition on time. (Order WR 2009-0061 at p. 2, fn. 1; see *California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1147–1148, 1150–1151; Order WQ 98-05-UST at pp. 3–4.)

Fahey cease unlawful diversion, comply with his permits, and complete certain corrective actions according to a schedule.

Fahey's petition asserts the following nine arguments.

1. The State Water Board violated Fahey's right to due process when it allowed representatives for the City and County of San Francisco (CCSF), Modesto Irrigation District (MID) and Turlock Irrigation District (TID) (collectively the Interveners) to submit written errata at the September 17, 2019 Board meeting, which it then allegedly relied upon to modify the September 6, 2019 staff draft order ([Draft Order](#)).
2. The Order is "arbitrary" and violates Fahey's due process rights because of alleged deficiencies in the September 1, 2015 ACL Complaint filed by the Division of Water Rights (Division) against Fahey.
3. The Order's interpretation of certain language in the Permits regarding Fahey's duty to provide replacement water to the Interveners constitutes an abuse of discretion and an arbitrary rationale.
4. The Board abused its discretion and committed a due process violation by not finding that "Fahey had 34AF of replacement water credit to mitigate" diversions that the Order determined were unlawful.
5. Changes between the Draft Order presented to the State Water Board at the adoption meeting and the final adopted Order are contrary to law and an abuse of discretion because "the Decision results in a single member of the Non-Curtailed Class (CCSF) being allowed to waive protection of the entire Non-Curtailed Class (MID/TID and unnamed downstream water right holders) for the duration of the entire curtailment period." The Board's determination of whether Fahey unlawfully diverted during the FAS and non-FAS periods in 2014 and 2015 should instead rely on Fahey's "34AF of replacement water credit," and it is an error in law for the Board to have found otherwise. In addition, the Board abused its discretion by requiring Fahey to provide restitution to MID and TID for his 2014 and 2015 FAS Period diversions and that the conclusion is contrary to law, an abuse of discretion, and unjustly enriches MID and TID.

6. The Order's findings related to bypass flows are not supported by evidence and the corrective actions required by the Order are an unlawful overreach and an error in law. New evidence exists that would support different findings.
7. "[T]here is no substantial evidence to make a finding or legal conclusion that Fahey is unlawfully diverting now or has threatened to do so in the future" and new evidence would establish a different conclusion.
8. It is an abuse of discretion and an unlawful impairment of contractual obligations for the Board to provide for the indefinite suspension of a portion of the ACL penalty if Fahey meets certain compliance milestones set forth in the Order.
9. The Board violated Fahey's due process rights because it circulated a draft order and errata sheet instead of making a formal, final copy of the Order available within 30 days of adoption.

These arguments lack merit for the reasons explained below. Accordingly, Fahey's petition for reconsideration is denied.

2.0 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) Irregularity in the proceedings, or any ruling, or abuse of discretion, by which the person was prevented from having a fair hearing;
- (b) The decision or order is not supported by substantial evidence;
- (c) There is relevant evidence which, in the exercise of reasonable diligence, could not have been produced;
- (d) Error in law.

(Cal. Code Regs., tit. 23, § 768.)²

A petition must specify the specific State Water Board action for which the petitioner requests reconsideration, "the reason the action was inappropriate or improper," and

² All further references to Regulations are to title 23 of the California Code of Regulations unless otherwise indicated.

“the specific action which petitioner requests” as well as contain “a statement that copies of the petition and accompanying materials have been sent to all interested parties.” (Regulations, § 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).)

A petition for reconsideration must be timely filed within 30 days of the decision or order at issue. (Regulations, § 768.) The State Water Board may refuse to reconsider a decision or order if the petition for reconsideration fails to raise substantial issues related to the causes for reconsideration set forth in section 768 of the State Water Board’s regulations. (Regulations, § 770, subd. (a)(1).) Alternatively, after review of the record, the State Water Board also may deny the petition if the State Water Board finds that the decision or order in question was appropriate and proper, set aside or modify the decision or order, or take other appropriate action. (*Id.*, subds. (a)(2)(A)–(C).) The State Water Board may elect whether or not to hold a hearing on the petition for reconsideration. (Wat. Code, § 1123.)

3.0 BACKGROUND

Fahey holds water right Permits 20784 (Application 29977) and 21289 (Application 31491), with priority dates of 1991 and 2004, respectively. The Permits conditionally authorize Fahey to divert water year-round for industrial use from several spring sources tributary to the Tuolumne River in Tuolumne County, California. The State Water Board adopted Order 2019-0149 on September 17, 2019. The Order found that Fahey unlawfully diverted 25.33 acre-feet of water over 178 days between 2014 and 2015 and imposed ACL in the amount of \$215,000. The Order includes a final CDO requiring that Fahey cease unlawful diversion, comply with his permits, and complete certain corrective actions according to a schedule. The final Order followed an evidentiary hearing held on January 25 and 26, 2016 in which Fahey, a staff Prosecution Team, and the Interveners (MID, TID, and CCSF) participated. MID and TID jointly operate New Don Pedro Reservoir (NDPR) on the Tuolumne River downstream from Fahey’s point of diversion, and CCSF maintains a water bank account in NDPR that is administered in accordance with the requirements of the Raker Act (Act

of Dec. 19, 1913, Pub.L. No. 63–41, 38 Stat. 242) and a series of agreements between MID, TID, and CCSF.

Order 2019-0149 summarizes the history and requirements of the Permits, describes Fahey’s diversions in 2014 and 2015, and evaluates whether Fahey unlawfully diverted water during either of those years. The Order separately evaluates Fahey’s diversions from June 16 through October 31, the fully appropriated stream period, or “FAS Period,” and from November 1 through June 15, the “non-FAS Period,” due to differences in the way Fahey’s permit terms apply to each period. The Order found that the Permits require Fahey to provide “make-up” water to MID and TID for his diversions during the FAS Period, pursuant to a water exchange agreement dated December 12, 1992 (the Water Exchange Agreement). Other conditions in the Permits require Fahey, upon receiving appropriate notice, to provide “replacement water” for diversions during the non-FAS Period when those diversions adversely impact MID, TID, or CCSF’s diversions, as applicable. Fahey’s permits allow him to pre-position replacement water for his non-FAS Period diversions in NDPR. The Water Exchange Agreement requires him to provide MID and TID’s FAS Period make-up water to NDPR during the same year that he diverts.

Order 2019-0149 found that water was not available for diversion under Fahey’s rights and that Fahey violated his permit terms by diverting during the FAS Period in 2014 and 2015. The Prosecution Team presented expert testimony and computational analyses comparing supply and demand in the Sacramento-San Joaquin Delta watershed (Delta watershed) to indicate that water supplies were insufficient to support Fahey’s diversions in 2014 from May 27 through October 30, inclusive, and from November 4 through 18, inclusive, and again in 2015 from April 23 through November 1, inclusive. Fahey claimed a defense to unlawful diversion and claimed to have complied with the Permits because he pre-positioned 88.31 acre-feet of water in NDPR between 2009 and 2011 and that this water was available to offset his diversions in 2014 and 2015. The Order rejected this argument for the FAS Period because the Water Exchange Agreement for FAS Period “make-up” water states that “no carryover” of water “will be allowed to subsequent years.” (See PT-19, p. 2, ¶ 4.)

Order WR 2019-0149 found that Fahey unlawfully diverted 25.33 acre-feet of water over 178 days during the FAS Period in 2014 and 2015. Evidence in the record also suggested that Fahey did not provide FAS Period make-up water, as required by his permits, on a consistent basis prior to 2014. The maximum penalty allowed by section 1052 of the Water Code for Fahey's unlawful FAS Period diversions in 2014 and 2015 is \$241,325. After applying the ACL factors identified in section 1055.3 of the Water Code, the Order assesses ACL in the amount of \$215,000 against Fahey. Of this amount, \$50,000 is due immediately. The remaining \$165,000 will be indefinitely suspended if Fahey timely completes certain actions necessary to correct his unlawful diversion and prevent future violations. Specifically, the remaining penalty will be suspended if Fahey timely provides restitution to MID and TID equivalent to his 2014 and 2015 FAS Period diversions and prepares and implements a detailed Curtailment Operations Plan for future periods of water unavailability.

The CDO requires Fahey to cease continued and threatened unauthorized diversion under the Permits and the December 12, 1992 Water Exchange Agreement, as it may be amended; file reports related to his compliance with bypass flow requirements; file reports with MID and TID showing his diversion amounts and replacement water deliveries; report the source, amount, and location at NDPR of replacement water discharged into NDPR to the Board along with his annual Progress Report of Permittee; prepare a Curtailment Operations Plan for approval by the Deputy Director of the Division; and timely implement the final approved Curtailment Operations Plan during the FAS Period and any period when water is not available to serve his priority of right.

Fahey filed a petition for reconsideration on October 7, 2019.³

4.0 ANALYSIS

³ Fahey submitted a Supplemental Brief in Support of Motion to Reconsider Decision dated June 17, 2021. MID, TID, and CCSF filed an Opposition in response dated July 1, 2021. The Supplemental Brief and Opposition are untimely and to the extent they raise new issues that were not raised in the petition for reconsideration, such new issues are not appropriate for review as part of the petition for reconsideration.

4.1 The Petition is Procedurally Deficient

The State Water Board received Fahey's petition on October 7, 2019, 20 days from the Board's adoption of Order WR 2019-0149. Therefore, the petition is timely. (See Wat. Code, § 1122.) However, Fahey failed to fully comply with procedural requirements specified in the Board's regulations. Specifically, the petition is deficient because it is not accompanied by a statement of points and authorities in support of legal issues raised in the petition. (Regulations, § 769, subd. (c).) In addition, arguments to the effect that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced are not accompanied by a supporting affidavit as required by the Board's regulations. (See *id.*, subd. (b).) Accordingly, the Board denies the petition. Nevertheless, the arguments presented in the petition are addressed below to provide clarity regarding the procedures at the September 17, 2019 Board meeting and the Order's requirements.

4.2 Displaying a Proposed Errata Sheet During Oral Comments at the September 17, 2019 Board Meeting Did Not Violate Fahey's Due Process Rights

Fahey argues that the State Water Board violated his right to due process when it allegedly allowed representatives for the Interveners to submit written errata at the September 17, 2019 Board meeting, noting that the Division's Hearings Unit Chief, in a September 14, 2019 email, had stated that additional written public comments would not be accepted ahead of the meeting. Fahey's petition does not fully quote the September 14 email, which stated that written comments would not be accepted ahead of the meeting "unless otherwise directed." Fahey and the Interveners had previously been allowed to provide written comments regarding a February 8, 2019 version of the draft order and later written supplemental briefs in response to a prompt from staff on April 10, 2019.

At the September 17, 2019 Board meeting, both Fahey and the Interveners presented oral comments. To supplement their oral comments, counsel for the Interveners provided the Clerk to the Board with a proposed errata sheet to staff's September 6, 2019 Draft Order. Counsel for the Board requested that the proposed errata sheet be projected using audiovisual equipment available to all parties in attendance and that the

Interveners' counsel summarize the proposed changes as a part of their oral comments using the projected errata as a visual aid. Projecting the errata was consistent with the prior decision not to accept written comments in advance of the Board meeting and simultaneously made the errata available for inspection by the Board, Board staff, the Prosecution Team, Fahey, and the general public.

In general, the errata related to proposed changes to the Draft Order that resolved questions about Fahey's non-FAS Period diversions without interpreting language in the Permits related to replacement water. This issue was also the subject of the supplemental briefing opportunity in April 2019. Fahey did not object to the Interveners' proposed changes at the State Water Board meeting, and the Board directed staff to resolve the non-FAS Period replacement water issue in the manner the Interveners proposed in their oral comments instead of the manner that staff had proposed in the Draft Order. The Board did not simply adopt the Interveners' errata sheet as its own, however. Instead, at the Board's direction, staff prepared their own errata sheet implementing the Board's direction, which incorporated some of the Interveners' proposed changes, rejected others, made additional changes of their own, and presented the final staff errata sheet orally to the Board during the open session of the Board meeting. The Board then adopted the Draft Order, as modified by the staff errata sheet, as Order 2019-0149.

Fahey's petition requests reconsideration of the Order because Fahey "had no reasonable time to review the suggested changes to the proposed Decision," which, according to Fahey, thereby violated his due process rights. The Fourteenth Amendment to the United States Constitution commands that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const., 14th Amend., § 1; see also *id.*, art. VI, cl. 2 [Supremacy Clause].) The California Constitution likewise guarantees the right to due process of law. (Cal. Const., art. I, §§ 7, subd. (a), 15.) The fundamental requirement of due process is the right to be heard at a meaningful time and in a meaningful manner. (*Mathews v. Eldridge* (hereinafter *Mathews*) (1976) 424 U.S. 319, 333.) Due process is not a technical conception with a fixed content unrelated to time, place, or circumstances. (*Id.* at p. 334; accord *Cafeteria Workers v. McElroy* (1961) 367 U.S. 886, 895; *Machado v. State Water Resources*

Control Bd. (2001) 90 Cal.App.4th 720, 725–726.) Instead, “due process is flexible and calls for such procedural protections as the particular situation demands.” (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481.) In determining what process is due, courts weigh the following factors:

The private interest that will be affected by the official action;

The risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

The Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

(*Mathews*, 324 U.S. at 335.)

Fahey’s petition claims Fahey was “blindsided” by the projection of the errata, but Fahey did not object to the Interveners’ request to use the projected errata sheet as a visual aid during the hearing at the time the request was made, and did not ask for additional time to respond to the errata sheet. Projecting the errata sheet at the Board meeting was consistent with the prior decision not to accept written comments in advance of the Board meeting. The errata sheet was projected using audiovisual equipment as a visual aid to oral comments, not submitted as a separate written comment. In addition, Fahey was given an opportunity to provide oral comments on the proposed changes at the September 17, 2019 Board meeting but declined to do so.⁴

Fahey’s petition does not identify additional procedures that he believes the State Water Board should have provided with respect to the projection of the Interveners’ errata sheet, especially in the absence of any objection from Fahey when the errata sheet was made available. And as the staff changes to the Draft Order were broadly consistent with changes that Fahey, the Interveners, and the Prosecution Team had the opportunity to debate in their April 2019 supplemental briefs and to discuss at the September 17th hearing, holding yet another round of briefing or written comments and

⁴ In his petition for reconsideration, Fahey does raise objections to the changes in the staff errata. These arguments are considered in sections 4.4, 4.5, and 4.6, below.

another hearing on those changes was not necessary to provide Fahey with due process.

For these reasons, the Board finds that displaying the Interveners' proposed errata sheet during their oral comments at the September 17, 2019 Board meeting did not violate Fahey's due process rights.

4.3 Fahey Received Appropriate Notice of the Alleged Unlawful Diversion at Issue in the Hearing

Fahey argues that he was not provided notice that, in the Order, the Board might evaluate his compliance with Water Code section 1052 beyond violations resulting from diversion of water when it was unavailable at his priority of right. The petition states that "none of [the] provisions in the ACL gave [him] notice . . . that any Decision that the SWRCB would issue might penalize Fahey for matters not within the allegations of the ACL," i.e., permit term violations. (Petition, p. 2.)

The ACL Complaint does not propose administrative liability on the basis of permit term violations because such violations were not known at the time of the complaint. However, the Information Order that accompanied the ACL Complaint requested that Fahey provide documentation of his compliance with bypass amounts, the purchase and use of replacement water required under the permits, and a copy of the Water Exchange Agreement, thereby providing Fahey notice of the Board's interest in these matters. Furthermore, the first key hearing issue in the October 16, 2015 Notice of Public Hearing clearly states that the hearing will cover violations of Water Code section 1052, including but not limited to diversion when water was unavailable under a priority of right. Violation of Water Code section 1052 is the basis of both the allegations in the ACL Complaint and the Board's findings in the Order. Section 1052 states: "[t]he diversion or use of water subject to this division other than as authorized in this division is a trespass." Unauthorized diversion under this section includes diversion while in violation of certain permit terms. (See Order WR 1999-01, p. 8 [using water outside the authorized place of use for an appropriative right is trespass]; Order WR 2008-0017, pp. 14–15 [violating permit terms to the effect that water shall not be diverted until certain requirements are met, such as constructing a fish screen and

entering into an operating agreement with fish agencies, is an unlawful diversion].) Therefore, the ACL Complaint, Information Order, and Notice of Public Hearing provided Fahey with appropriate notice of the alleged unlawful diversion at issue in the hearing.

Notably, the Board's inclusion of permit term violations in its consideration of key hearing issue 1 resulted in an increase in the number of days of violation considered in the ACL calculation by only a single day, October 31, 2014.

4.4 The Board's Interpretation of Permit 20784 Term 20 and Permit 21289 Term 34 is Consistent with Fahey's Conclusion Regarding These Terms

In his petition, Fahey argues that the Board incorrectly used the "errata" language provided by the Interveners at the adoption meeting and the 1992 Water Exchange Agreement to interpret Term 20 of Permit 20784 and Term 34 of Permit 21289. He states that the Board's conclusion should be that the Interveners must first request replacement water before Fahey has any duty to provide replacement water.

Contrary to Fahey's assertion, the Board's interpretation of Terms 20 and 34 in the Order is not reliant on the Intervener's "errata" language or the 1992 Water Exchange Agreement. (See Order, pp. 42–43, 62–66.) During the adoption meeting, the Board did reduce the scope of staff's September 6, 2019 Draft Order based on public comment from the Interveners; however, this did not result in an interpretation of the terms to mean that an obligation by Fahey to provide replacement water arose in the absence of notification of the need to do so from the Interveners. The Order is, instead, consistent with Fahey's conclusion. The Board's interpretation is described, as follows, in section 5.3.1.1 of the Order.

Under Permit 20784, the notification of the need for replacement water must be made by one of the Interveners, while Permit 21289 requires that CCSF must provide the notice. Having never received a qualifying call for replacement water, Fahey could not be faulted under Water Code section 1052 if he failed to provide it during the non-FAS Period in 2014 and 2015. As a consequence, consistent with section 5.1.4.1, there is insufficient information to conclude that Fahey unlawfully diverted water during this period. For the foregoing reason, the State Water Board finds that there is not sufficient evidence in the record to support a finding that Fahey diverted water during the non-FAS Period when water was not

available to serve his priority of right and in violation of his permit terms in a manner that rises to a violation of section 1052 of the Water Code. Consequently, there is no need to address Fahey's defenses that he pre-positioned water in NDPR in 2009 and 2011 sufficient to meet his non-FAS replacement water obligations since the notice required to invoke his obligation to provide replacement water never arose.

Therefore, Fahey's allegations that the Order's interpretation of Terms 20 and 34 is arbitrary and constitutes an abuse of discretion are erroneous.

4.5 The Order Does Not Find That Fahey Was Required to Provide Replacement Water and Therefore Does Not Consider Whether Fahey Had Replacement Water Available Should It Have Been Required

Fahey argues in his petition that the Board abused its discretion and committed a due process violation by not finding that "Fahey had 34AF of replacement water credit to mitigate" diversions when water was unavailable to Fahey's priority of right.

In the section 5.3.1.2 of the Order, the Board finds that Fahey did not have a defense to unlawful diversion during the FAS period in 2014 and 2015 because the conditions by which Fahey can lawfully provide replacement water for his FAS period diversions adverse to MID and TID were not met, namely he did not deliver same-year make-up water to New Don Pedro reservoir for his 2014 and 2015 FAS Period diversions. The Water Exchange Agreement between Fahey, MID, and TID, which is incorporated into Fahey's permits, defines these conditions. (See Order, pp. 41–42.) The Board did not make a finding in the Order regarding the availability of replacement water to cover non-FAS diversions because the Board did not find that Fahey unlawfully diverted water during those periods in 2014 and 2015 as he did not receive notice from the Interveners that replacement water was required, as required by his permit terms. (See section 4.4, *supra*.)

During the September 17, 2019 Board meeting, the Board narrowed the scope of the September 6, 2019 staff Draft Order to exclude any ruling regarding Fahey's ability to carry over non-FAS replacement water credit year to year under the terms of his permits. The Draft Order did describe that Fahey had approximately 34 acre-feet of available replacement water credit; however, it also noted that the issue of spill had been excluded from the hearing and, therefore, any finding regarding the availability of

replacement water credit should not be used as evidence of the available credit to meet any future water replacement requirements. (Draft Order, pp. 84, 89.) If Fahey does have replacement water credit available to meet future water replacement requirements, the Order does not diminish those credits. As a result, Fahey's due process rights have not been violated and the Order does not constitute an abuse of discretion by the Board.

4.6 Changes Between the Staff Draft Order and Final Adopted Order Were Within the State Water Board's Discretion

In his petition, Fahey argues that changes between the September 6, 2019 staff Draft Order presented to the State Water Board at the adoption meeting and the final adopted version of the order are contrary to law and an abuse of discretion because "the Decision results in a single member of the Non-Curtailed Class (CCSF) being allowed to waive protection of the entire Non-Curtailed Class (MID/TID and unnamed downstream water right holders) for the duration of the entire curtailment period." This is not the case.

During the adoption meeting CCSF attorney Robert Donlan presented a joint proposal from CCSF, MID, and TID requesting that the Board remove language from the Draft Order that interpreted the meaning of Fahey's permits with regard to the ability to carry replacement water credit over year to year to compensate the Interveners for future non-FAS period diversions when water is unavailable to serve Fahey's priority of right. In the Order, the Board concludes, based on the available evidence, that Fahey's non-FAS period diversions were adverse to MID and TID. (Order, pp. 70–71.)

Therefore, the Board's decision to narrow the scope of the order in keeping with the Interveners' request did not likely impact any member of the "Non-Curtailed Class" other than MID and TID, to the best of the Board's knowledge, with the exception of perhaps CCSF due to their complex water banking arrangement with MID and TID. At the adoption meeting, the Interveners advocated for the Board to rely on their obligation to notify Fahey of the need to provide replacement water for his non-FAS period diversions as a threshold issue when considering whether Fahey unlawfully diverted during the non-FAS periods in 2014 and 2015 when water was unavailable to serve his priority of

right. If this constitutes a waiver of protection, its impact is limited to the parties that advocated for this position.

Contrary to Fahey's arguments elsewhere in his petition for reconsideration (see Section 4.4), Fahey goes on to argue that the non-curtailed class cannot be obligated to notify the curtailed class when replacement water is required. However, Fahey's permit terms, which originated from protest settlement agreements, do state that the Interveners will notify Fahey when replacement water is required to make them whole due to the complex water accounting arrangement between the Districts (MID and TID) and CCSF. As described above, an obligation on Fahey's part to provide replacement water did not arise because the Interveners did not request replacement water. Therefore, the Order does not, and need not, examine the availability of replacement water credit to cover Fahey's non-FAS period diversions in 2014 and 2015 when water was unavailable to serve his priority of right. (See sections 4.4 and 4.5, *supra*.)

Fahey further argues that it is an error in law for the Board to find that he unlawfully diverted water during the FAS periods in 2014 and 2015 because it was simultaneous⁵ with the periods when water was unavailable to serve Fahey's priority of right and he claims he had 34 acre-feet of replacement water credit available to compensate senior diverters for these diversions. This is not the case. Replacement water only provides a defense to unlawful diversion if it offsets the potential injury caused by the diversions for all of the parties to whom the diversions are adverse through an established and lawful process, such as that established by a water exchange agreement. Fahey did have a water exchange agreement in place for the FAS period with MID and TID, to whom his 2014 and 2015 FAS period diversions were most likely adverse; however, it required that Fahey provide make-up water for FAS period diversions within the same calendar year as the diversions. Fahey's most recent replacement water deliveries, according to the hearing record, occurred in 2011, three and four years prior to the FAS period

⁵ The FAS periods in 2014 and 2015 were not entirely simultaneous with the period of water unavailability. On October 31, 2014, part of the FAS period, water was allegedly available to serve Fahey's priority of right. (Order, p. 49.)

diversions in question. Therefore, this replacement water, if available, would be unable to provide a defense for unlawful diversion during the 2014 and 2015 FAS periods.

In addition, Fahey argues that the Board abused its discretion by requiring that Fahey provide restitution to MID and TID for his 2014 and 2015 FAS Period diversions when he allegedly had replacement water credit available and that the conclusion is contrary to law and an abuse of discretion. As described above, Fahey's replacement water deliveries in years prior to his FAS period diversions are not eligible to compensate MID and TID for this loss of water according to the Water Exchange Agreement. As discussed in section 4.5 above, if Fahey has any replacement water credit available, the Order does not diminish that credit. In addition, MID and TID are not unjustly enriched by the requirements of the Order as Fahey claims. Upon review of the evidence the Board found that they were deprived of 25.33 acre-feet of water during 2014 and 2015, part of a severe, multi-year drought. The Order requires that Fahey provide restitution to MID and TID by delivering an equivalent amount of water or via another mutually agreeable means. This requirement is not unlawful and does not represent an abuse of discretion by the Board.

4.7 The Evidence Supports the Order's Provisions Regarding Documentation and the Substantiation of Compliance with Bypass Flow Requirements and the Corrective Actions Required by the Order are Lawful

Fahey's petition argues that the Order's findings related to bypass flows are not supported by evidence, the corrective actions required by the Order are an unlawful overreach and an error in law, and that new evidence exists that would support different findings.

The Order explains the evidentiary support for the Board's finding that Fahey failed to take sufficient measures to demonstrate compliance with his bypass flow obligations, detailed in Term 20 of Permit 21289, in response to a September 1, 2015 Information Order issued by the Assistant Deputy Director for the Division of Water Rights. (Order, pp. 88–89.) The term requires Fahey to bypass a minimum of five gallons per minute, or the entire streamflow if flows are less than five gallons per minute, at each point of diversion. The Prosecution Team alleged that Fahey failed to comply with this

requirement based upon Fahey's response to the Information Order and invoices, supported by video surveillance, of his diversion activities over the period. (Order, p. 79.) In oral testimony, Fahey disputed the allegation that he had failed to comply with bypass flow requirements but did not provide documents or other evidence to support his testimony. (Order, p. 88.) Based on the hearing record, the State Water Board found that Fahey had failed to demonstrate compliance with his bypass flow obligations but declined to evaluate this violation as a separate trespass. (Order, pp. 88–89, 97.) As a result of this determination, and to ensure compliance with the bypass flow requirements in the future, the Order directs Fahey to file annual reports documenting and substantiating compliance with the bypass flow requirements for diversions occurring in 2018 and thereafter. (Order, pp. 100, 103.)

Fahey argues in his petition that new evidence exists to support a different finding; specifically, that the completion of a report required by Term 24 of Permit 21289, which occurred after the hearing, found that “there was no-net change to the Marco and Polo Springs’ wetland areas” after five consecutive years. Fahey’s petition does not meet the requirements for raising an argument regarding the existence of new evidence on reconsideration, as listed in section 2.0, above. According to these requirements, an interested party may petition the State Water Board for reconsideration of a decision on the ground that “there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced” prior to the decision. (Regulations, § 768, subd. (c).) When a petitioner relies on Section 768, subdivision (c), the petitioner is required to include both a general statement of the additional evidence and the facts to be proved by that evidence and an affidavit or declaration under penalty of perjury stating both that additional evidence is available that was not presented to the Board and the reason it was not presented. The Petition does not include the necessary affidavit or declaration and so reconsideration of the Board’s finding related to bypass flows based on additional evidence has not been properly presented to the State Water Board. The discussion below is provided to offer clarity regarding the Order and the bypass flow requirement.

Term 20 of Permit 21289 has been in effect for the life of the permit and remains in effect now. Diverting water under Permit 21289 without complying with the bypass flow

requirements is a violation of the permit terms. Fahey appears to conclude that the termination of a monitoring requirement (Term 24 of Permit 21289) means that he no longer must comply with the separate requirement to continuously bypass five gallons per minute at each point of diversion (Term 20 of Permit 21289). (Petition, pp. 5–6.) This conclusion is incorrect. The bypass flow requirement in Term 20 is distinct from the monitoring and management provisions of Term 24, and the former is in full force and effect even if the latter has been terminated. This requirement is the result of the permitting process, not the hearing or Order, and cannot be challenged through Fahey’s petition for reconsideration.

As noted in Order 2019-0149, violation of the bypass flow requirement provided an independent basis for civil liability, but the State Water Board declined to evaluate it as a separate trespass. (Order 2019-0149, pp. 79–80.) Instead, based on evidence that Fahey has failed to demonstrate his compliance with the bypass flow requirement upon the Division’s request, the Order requires Fahey to file annual reports that document and substantiate his compliance with that pre-existing requirement. (Order, pp. 103–104.) Requiring documentation of compliance with a pre-existing permit requirement, particularly following failure to do so in response to an information order from the Division of Water Rights, is neither an overreach nor an error of law.

4.8 The Evidence Supports the Order’s Conclusions Regarding Unlawful Diversions

Fahey’s petition argues that “there is no substantial evidence to make a finding or legal conclusion that Fahey is unlawfully diverting now or has threatened to do so in the future” and that new evidence would establish a different conclusion.

As with Fahey’s argument regarding the bypass flow requirement discussed above, this argument is based in part on the claim that there is additional relevant evidence (Fahey’s Post-Hearing FAS Diversion and Replacement table) that could not have been produced prior to the decision, but the petition for reconsideration does not include the necessary affidavit or declaration that is required to request reconsideration on that ground. Accordingly, reconsideration of the finding of unlawful diversion based on additional evidence has not been properly presented to the State Water Board. The

discussion below is provided to aid in the identification and understanding of the evidence that supports the Order's conclusions regarding unlawful diversions.

Fahey asserts that the "only" evidence on the issue of present or threatened future unlawful diversions is "Fahey's Post-Hearing FAS Diversion and Replacement table." (Petition, p. 6.) This is incorrect. The conclusions regarding Fahey's unlawful diversions were based on the extensive evidence that was developed through the investigation and hearing process. This evidence is described in detail in Section 5 of the Order and includes video surveillance, water use reports, invoices, data analysis, and live testimony. (Order, pp. 58–68, 73–74.) Fahey does not challenge this evidence other than by entirely disregarding it. Evidence of Fahey's unlawful diversions in 2014 and 2015, particularly when considered in light of Fahey's assertions that his actions, deemed to be violations by the Board, were, in fact, compliant, constitutes a threat of future unlawful diversion and supports the Order's requirement for Fahey to develop a compliance plan to be reviewed and approved by the Division to ensure that his future diversions during periods of limited water supply are lawfully conducted. Furthermore, the table that Fahey argues provides the only evidence of his present or future compliance covers the years 2016 through 2018, which were not years in which the Board found insufficient supply to meet Fahey's water demands outside of the FAS period; therefore, this evidence could not establish a pattern of compliance under the full range of circumstances of the Board's concern in this case.

For these reasons, even if Fahey had submitted the required affidavit to accompany the assertion that the Post-Hearing FAS Diversion and Replacement table is relevant evidence that could not have been produced prior to the hearing, the table is not sufficient to rebut the body of evidence that supports the finding of unlawful and threatened unauthorized diversions⁶.

⁶ Fahey suggests that the Post-Hearing FAS Diversion and Replacement table satisfies the requirements of sections C and D of the Order because it includes annual use reports for the years 2016, 2017, and 2018. Section 1.C requires Fahey to file annual reports with the Division of Water Rights documenting and substantiating Fahey's compliance with bypass flow obligations under his permits for diversions occurring in 2018 and thereafter. Section 1.D requires Fahey to file reports with MID and TID

4.9 Suspending Portions of ACL Penalties Upon Completion of Other Required Actions Does Not Violate Due Process

Fahey argues that his ability to effect a reduction of the ACL penalty imposed by the Order by timely complying with the Order's other requirements violates both his rights to due process and the constitutional prohibition against the impairment of contractual obligations. (Petition, pp. 6–7.) These arguments are misplaced.

Under the statutory authority set forth in Water Code section 1831 through 1836, the Order includes a CDO that requires Fahey to take actions including providing restitution to injured parties and submitting draft and final Curtailment Operations Plans. These orders are the consequence of the Board's determination that Fahey has violated, or is threatening to violate, the prohibition against unauthorized diversion and use of water and limitations on Fahey's water rights. These actions are required independently of the payment of an ACL.

The Order also imposes an ACL in the amount of \$215,000 under Water Code sections 1052 and 1055.3. This amount was calculated based on the volume of water improperly diverted and the number of days the improper diversion occurred (the maximum penalty for which would total \$241,325), adjusted to take into consideration other factors identified in Water Code section 1055.3. In other words, based on Fahey's violation, it would be appropriate to assess the penalty of \$215,000 in full. Whatever the amount, the penalty applies independently of the other actions required by the CDO; Fahey must take those actions and Fahey must also pay the ACL penalty.

However, the Board is authorized to adjust the amount of the ACL based on several factors, including corrective action, if any, taken by the violator. (Wat. Code, § 1055.3.)

The provisions of the Order providing for suspension of a portion of the civil liability

showing diversion amounts and replacement water deliveries, in accordance with the Water Exchange Agreement. Even if the Post-Hearing FAS Diversion and Replacement table satisfies sections 1.C and 1.D of the Order, satisfaction of a requirement in the Order does not rebut the evidence upon which the Order relies. It is separately noted that on November 4, 2020, Fahey electronically submitted documentation of water diversion, replacement, and carry over for the years 2016 through 2020 to Board staff and representatives of TID and MID. This Order on the petition for reconsideration does not address that submittal.

penalty are a means of allowing the Board to adjust Fahey's penalty based on corrective actions he is expected to take in the future. Allowing for the potential partial suspension of monetary penalties is a benefit to those who are the subject of an ACL because it allows them to reduce the amounts they would otherwise be required to pay. Providing a violator with the means to reduce, in accordance with Water Code section 1055.3, a monetary penalty that would otherwise apply is not an abuse of discretion, nor does it violate due process.

Fahey also argues that the Order manipulates the civil penalty in a manner that impairs Fahey's contractual obligations because it will force changes to the existing Water Exchange Agreement between Fahey, MID, and TID. This is not the case. The Order requires Fahey to take actions to ensure that Fahey complies with the Water Exchange Agreement, which actions may, but are not necessarily required to, include measures mutually agreed upon and memorialized by Fahey, MID, and TID in writing. Requiring Fahey to describe how he will comply with the Water Exchange Agreement does not impair or change Fahey's obligations under the Water Exchange Agreement.

Finally, Fahey also argues that this case is like *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.* (E.D. Cal. 2018) 307 F.Supp.3d. 1010 (*Hardesty*).⁷ *Hardesty* involved allegations that the county of Sacramento and certain county officials improperly revoked a vested right of property owners to mine their property and, when the property owners filed a lawsuit challenging the decision, the county illegally retaliated by increasing the monetary amount the property owners would have to provide to continue mining from \$177,942 to \$8,817,074 without justification. Here, Fahey's right to divert and use water under Permits 20784 and 21289 has always been limited by the terms of Permits 20784 and 21289. The portions of the Order Fahey targets in this argument — sections I.G through III — require Fahey to develop a Curtailment Operations Plan that describes measures that will ensure Fahey complies

⁷ In the period between Fahey's filing of the petition for reconsideration and the issuance of this Order, portions of *Hardesty* were reversed and remanded by the Ninth Circuit Court of Appeals. (*Hardesty v. Sacramento County* (2020) 824 Fed.Appx. 474 [nonpub. opn.]; *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.* (E.D. Cal. 2021) 2021 WL 4523849.)

with the terms of Permits 20784 and 21289 (as well as the Water Exchange Agreement) and to pay an ACL penalty that was calculated according to statute, a portion of which will be suspended if Fahey timely completes the other required actions. Because Fahey has never had a right to divert and use water in violation of his permit terms, requiring Fahey to prepare a plan that describes how he will exercise his water right without violating the permit terms does not constitute a deprivation of rights. Moreover, providing for a potential *reduction* in the amount of the ACL penalty by \$165,000 in response to corrective action, as is the case here, is not at all similar to *increasing* a monetary exactment by more than eight and a half million dollars in response to a lawsuit, as occurred in *Hardesty*.

It is worth noting that filing a petition for reconsideration of an order does not stay any deadlines set forth in the order. The requirements established in a CDO or order imposing ACL become effective upon issuance of the order. (Wat. Code, §§ 1055(d) (orders setting ACL); 1832 (CDOs).) Fahey has not completed the actions that would result in a suspension of portions of the ACL penalty by the deadlines set forth in the Order. As a result, the Order requires Fahey to pay the full amount of the penalty, \$215,000, and to complete the required corrective actions. Fahey's failure to complete any of the actions required by the Order may constitute a violation of Water Code section 1846 and may result in the imposition of additional ACL fines subject to the Board's enforcement discretion.

4.10 The Adoption of the Order in the Form of the Draft Order and Change Sheet Lawfully Triggered A 30-Day Period for Filing Petitions for Reconsideration

Fahey argues that it was erroneous and unfair for the 30-day period for filing a petition for reconsideration to run from September 17, 2019 — the day the Board adopted the Order — instead of running from the date the Order was made available in its final format. (Petition, p. 7.) Fahey does not assert any manner in which these circumstances denied him a fair hearing, violated the law, or otherwise constitute a proper subject of a petition for reconsideration under section 768 of the Board's regulations. The discussion below is provided to help clarify the effect of the of the Board's adoption of the Order on September 17, 2019

On September 17, 2019, the State Water Board held a hearing at which it adopted the Order. At that time, the Order was in the form of a draft order and the change sheet. In other words, the Draft Order and change sheet, collectively, comprise what was approved by the Board at the hearing. Together, the Draft Order and change sheet provide all of the information that is included in the final format of the Order, which was posted on the Board's website on October 25, 2019, other than potentially necessary, conforming, non-substantive changes as described in the October 2, 2019 email quoted in Fahey's petition. Because the Board adopted the Order on September 17, 2019, the 30-day period for filing a petition for reconsideration ran from that date. (Regulations, § 768.) It is the adoption of an order, not the issuance of the final format of the order, that triggers the 30-day reconsideration period.

As noted above, Fahey does not assert any manner in which these circumstances denied him a fair hearing or violated the law. Fahey does not identify any changes he would have made to his petition for reconsideration if he had filed it at a later date. Fahey did not attempt to amend his petition for reconsideration to include modified or additional arguments after the Order was issued in its final format. Nor did Fahey seek to file a second petition for reconsideration to present such modified or additional arguments after the Order was issued in its final format. And as demonstrated by Fahey's petition for reconsideration itself, issuance of the final format of the Order 38 days after the Board's adoption thereof did not deny Fahey the ability to make his arguments about the conclusions regarding his permit term violations.

5.0 CONCLUSION

For the reasons discussed above, the State Water Board finds that the challenged actions were appropriate and proper. Accordingly, Fahey's petition for reconsideration is denied.

ORDER

NOW, THEREFORE, IT IS HEREBY ORDERED that Fahey's petition for reconsideration is denied.