



**Linda S. Adams**  
Secretary for  
Environmental Protection

# State Water Resources Control Board

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## Division of Water Rights

1001 I Street, 14<sup>th</sup> Floor ♦ Sacramento, California 95814 ♦ 916.341.5300  
P.O. Box 2000 ♦ Sacramento, California 95812-2000  
Fax: 916.341.5400 ♦ [www.waterboards.ca.gov/waterrights](http://www.waterboards.ca.gov/waterrights)



**Arnold Schwarzenegger**  
Governor

## NOTICE OF PUBLIC HEARING and PRE-HEARING CONFERENCE

### Petition to Revise the Declaration of Fully Appropriated Stream System of the Kern River in Kern and Tulare Counties

The State Water Resources Control Board will hold a  
Public Hearing to Determine whether to Revise the Status of the  
Kern River on the Declaration of Fully Appropriated Stream Systems

The **Pre-Hearing Conference**  
will commence on  
**Thursday, September 24, 2009, at 10:00 a.m.**  
in the  
Coastal Hearing Room  
Joe Serna, Jr./Cal-EPA Building  
1001 I Street, Second Floor  
Sacramento, CA

The **Hearing** will commence on  
**Monday, October 26, 2009, at 9:00 a.m.**  
and continue, if necessary, on  
**Tuesday, October 27, 2009, at 9:00 a.m.**  
and  
**Wednesday, October 28, 2009, at 9:00 a.m.**  
in the  
Sierra Hearing Room  
Joe Serna, Jr./Cal-EPA Building  
1001 I Street, Second Floor  
Sacramento, CA

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### **PURPOSE OF HEARING**

The purpose of this hearing is for the State Water Resources Control Board (State Water Board or Board) to receive evidence regarding petitions to revise the Declaration of Fully Appropriated Stream Systems for the Kern River stream system.

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*California Environmental Protection Agency*

## **BACKGROUND**

Pursuant to Water Code sections 1205 through 1207, the State Water Board has adopted and periodically revised a Declaration of Fully Appropriated Stream Systems (Declaration). The Declaration includes a list of stream systems and their reaches that are determined to be fully appropriated either year-round or during specific months. Placing a stream on the Declaration precludes the State Water Board from accepting any application to appropriate water from a specified stream system where the proposed appropriation is inconsistent with the conditions contained in the Declaration. The State Water Board has determined that the Kern River system is fully appropriated throughout the year from the Buena Vista Sink upstream, including all tributaries where hydraulic continuity exists. The Kern River system was included in the original Declaration adopted in State Water Board Order [WR 89-25](#), and it remains listed on the most recent revised Declaration adopted with State Water Board Orders [WR 91-07](#) and [WR 98-08](#).

Five petitions have been filed with the State Water Board's Division of Water Rights (Division), requesting revision of the Kern River's fully appropriated status as listed in the Declaration. The five petitions were received from:

- North Kern Water Storage District (North Kern) and City of Shafter
- City of Bakersfield
- Buena Vista Water Storage District
- Kern Water Bank Authority
- Kern County Water Agency

The Petitioners also filed applications to appropriate water from the Kern River.

The Petitioners cited the Fifth District Court of Appeal's decision in *North Kern Water Storage District v. Kern Delta Water District* (1997) 147 Cal.App.4<sup>th</sup> 555 [54 Cal.Rptr.3d 578] as the basis for filing the petitions. The Fifth District's ruling found that there was a partial forfeiture of Kern Delta Water District's pre-1914 water rights on the Kern River.

In a memorandum dated October 8, 2008, the State Water Board Deputy Director for Water Rights concluded that there is sufficient information to process the petitions and conduct a hearing on the question of whether the Declaration should be revised pursuant to California Code of Regulations, title 23, section 871, subdivision (b). Any action on the petitions would be for purposes of determining whether the Declaration should be revised, and no determination regarding approval of the pending applications will be made until after the Board makes a determination on whether the stream system is fully appropriated.

A copy of the petitions and subsequent Division determination can be found on the Division of Water Rights' website at:

[http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/kernriver\\_fas/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/kernriver_fas/index.shtml)

## KEY ISSUES

1. Should the State Water Board revise the Declaration to allow the Division of Water Rights to accept and process water right applications to appropriate water from the Kern River?
2. Has adequate information been provided to demonstrate that there is a change in circumstances since the Kern River was included in the Declaration?
3. Have the petitioners provided sufficient hydrologic data, water usage data, or other relevant information to support a determination that there is unappropriated water in the Kern River system during the season applied for to justify revising the Declaration for the purpose of accepting and processing water right applications for the Kern River?

The State Water Board may in its discretion modify the scope or content of these key hearing issues following the pre-hearing conference. California Code of Regulations, title 23, section 871, et seq. sets forth the procedure and requirements applicable to revision of the Declaration.

## HEARING OFFICER AND HEARING TEAM

State Water Board Member Arthur G. Baggett, Jr., will preside as hearing officer over this proceeding. Other members of the Board may be present during the hearing. State Water Board staff hearing team members will include David Rose, Staff Counsel; Paul Murphey, Engineering Geologist; and Jane Farwell, Environmental Scientist. The hearing team will assist the hearing officer and other members of the State Water Board throughout this proceeding.

## HEARING PARTICIPATION

IF YOU WANT TO TAKE PART IN THE EVIDENTIARY HEARING, you should carefully read the enclosure entitled "Information Concerning Appearance at Water Right Hearings." As stated in that enclosure, everyone wishing to present evidence at the hearing must submit a **Notice of Intent to Appear**, which must be **received** by the State Water Board no later than the deadline listed below.

Within one week after the deadline for Notices of Intent to Appear, the State Water Board will mail out a list of those who have indicated a desire to participate in the hearing and a copy of all Notices of Intent to Appear that were timely received by the State Water Board. The list is provided in order to facilitate exchange of written testimony, exhibits and witness qualifications in advance of the hearing. Only parties and other participants who are authorized by the hearing officer will be allowed to present evidence. Copies of witnesses' proposed **testimony, exhibits, lists of exhibits, qualifications, and statement of service** must be **received** by the State Water Board and served on each of the parties who have indicated their intent to appear, no later than the deadline listed below.

**12 noon, Tuesday, September 15, 2009**

Deadline for receipt of Notice of Intent to Appear.

**12 noon, Tuesday, October 13, 2009**

Deadline for receipt and service of witnesses' proposed testimony, exhibits, lists of exhibits, qualifications, and statement of service.

**SUBMITTALS TO THE WATER BOARD**

Notices of Intent to Appear, written testimony, and other exhibits submitted to the State Water Board should be addressed as follows:

Division of Water Rights  
State Water Resources Control Board  
Attention: Paul Murphey  
P.O. Box 2000  
Sacramento, CA 95812-2000

Phone: (916) 341-5435  
Fax: (916) 341-5400

Email: [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov)  
With Subject of "Kern River FAS Petition Hearing"

**IF YOU HAVE ANY QUESTIONS**

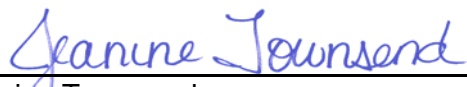
During the pendency of this proceeding, and commencing no later than the issuance of this notice, there shall be no *ex parte* communications between State Water Board members or State Water Board hearing team staff and any of the other participants regarding substantive or controversial procedural matters within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Questions regarding non-controversial procedural matters (Gov. Code, § 11430.20, subd. (b)) should be directed to Staff Counsel David Rose at (916) 341-5196, or by email to [drose@waterboards.ca.gov](mailto:drose@waterboards.ca.gov), or Staff Engineering Geologist Paul Murphey at (916) 341-5435, or by email to [pmurphey@waterboards.ca.gov](mailto:pmurphey@waterboards.ca.gov).

**PARKING, ACCESSIBILITY AND SECURITY**

There is parking across the street from the Joe Serna Jr./Cal-EPA Building in Sacramento. The Joe Serna Jr./Cal-EPA Building is accessible to people with disabilities. Individuals who require special accommodations at the Joe Serna Jr./Cal-EPA Building are requested to contact Catherine Foreman, Office of Employee Assistance, at (916) 341-5881.

Due to enhanced security precautions at the Cal-EPA Headquarters Building, all visitors are required to register with security staff prior to attending any meeting. To sign in and receive a visitor's badge, visitors must go to the Visitor and Environmental Services Center, located just inside and to the left of the building's public entrance. Visitors may be asked to show valid picture identification. Valid picture identification can take the form of a current driver's license, military identification card, or state or federal identification card. Depending on the size and number of meetings scheduled on any given day, the security check-in could take up to fifteen minutes. Please allow adequate time to sign in before being directed to the hearing.

\_\_\_\_\_  
August 24, 2009  
Date

  
\_\_\_\_\_  
Jeanine Townsend  
Clerk to the Board

Enclosures

## INFORMATION CONCERNING APPEARANCE AT WATER RIGHT HEARINGS

The following procedural requirements will apply and will be strictly enforced:

1. **HEARING PROCEDURES GENERALLY:** The hearing will be conducted in accordance with the procedures for hearings set forth at California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760, as they currently exist or may be amended. A copy of the current regulations and the underlying statutes governing adjudicative proceedings before the State Water Board is available upon request or may be viewed at the State Water Board's web site: [http://www.waterboards.ca.gov/laws\\_regulations](http://www.waterboards.ca.gov/laws_regulations).

Each party has the right to call and examine witnesses, introduce exhibits, cross-examine opposing witnesses on any matter relevant to the issues even if that matter was not covered in the direct examination, impeach any witness, rebut adverse evidence, and subpoena, call and examine an adverse party or witness as if under cross-examination. The hearing officer may extend these rights to a non-party participant or may limit the participation of a non-party participant.

Any requests for exceptions to procedural requirements shall be filed in writing with the State Water Board and served on the parties. To provide time for other participants to respond, the hearing officer will rule on procedural requests filed in writing no sooner than fifteen days after receiving the request, unless an earlier ruling is necessary to avoid disrupting the hearing.

2. **PARTIES:** The parties are North Kern Water Storage District & City of Shafter, City of Bakersfield, Buena Vista Water Storage District, Kern Water Bank Authority, and Kern County Water Agency. Other persons or entities wishing to participate as parties may do so only if authorized by the hearing officer. Only parties and other participants who are authorized by the hearing officer will be allowed to present evidence.

A person or entity that appears and presents only a policy statement will not be allowed to make objections, offer evidence, conduct cross-examination, make legal argument or otherwise participate in the evidentiary hearing. The rules for policy statements are discussed below.

3. **NOTICE OF INTENT TO APPEAR:** Participants in this hearing must file either an electronic copy or a paper copy of a Notice of Intent to Appear, which must be **received** by the State Water Board no later than **the deadline prescribed in the Hearing Notice**. Failure to submit a Notice of Intent to Appear and exhibits in a timely manner may be interpreted by the State Water Board as intent not to appear. Any faxed or emailed Notices of Intent to Appear must be followed by a mailed or delivered hard copy with an original signature.

The Notice of Intent to Appear must state: (1) the name and address of the participant; (2) the name of each witness who will testify on the participant's behalf; (3) a brief description of each witness' proposed testimony; and (4) an estimate of the time (not to exceed 20 minutes) that the witness will need to present a brief oral summary of their testimony. The witness's testimony must be submitted in writing as described in section 4 below. Participants who do not intend to present a case-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate on the Notice of Intent to Appear. Participants who decide not to present a case-in-chief after having submitted a Notice of

Intent to Appear should notify the State Water Board and the other participants as soon as possible.

In order to expedite the exchange of information and lower the cost of participating in the hearing, the State Water Board encourages participants to submit written policy statements, written opening statements, written testimony, exhibits, and an Exhibit Identification Index to the State Water Board in electronic form. In addition, participants may exchange the foregoing documents in electronic form. Hearing participants are not required to submit these documents in electronic form or accept electronic service; however, those who choose to submit these documents electronically must comply with the requirements described in section 5, below. If you are willing to accept electronic media service in lieu of receiving hard copies of items, please check the appropriate box on the Notice of Intent to Appear.

The State Water Board will mail a service list of parties to exchange information to each person who has submitted a Notice of Intent to Appear. The service list will indicate which participants agreed to accept electronic service. If there is any change in the hearing schedule, only those persons or entities that have filed a Notice of Intent to Appear will be informed of the change.

4. **WRITTEN TESTIMONY AND OTHER EXHIBITS:** Exhibits include written testimony, statements of qualifications of expert witnesses, and other documents to be used as evidence. Each participant proposing to present testimony on factual or other evidentiary matters at the hearing shall submit such testimony in writing.<sup>1</sup> Written testimony shall be designated as an exhibit, and must be submitted with the other exhibits. Oral testimony that goes beyond the scope of the written testimony may be excluded. A participant who proposes to offer expert testimony must submit an exhibit containing a statement of the expert witness's qualifications.

Each participant shall submit to the State Water Board either: seven paper copies of each of its exhibits; or five paper copies and one electronic copy of each of its exhibits. **All electronic and paper copies must be received by the State Water Board no later than the deadline stated in the hearing notice.** Each participant shall also serve a copy of each exhibit on every participant on the service list. Participants may serve those parties who agree to electronic service with an electronic copy of exhibits. Participants must serve paper copies of exhibits on those participants who do not agree to electronic service. Hearing participants who intend to make only policy statements are not required to exchange information and will not receive copies of written testimony or exhibits from the parties.

With its exhibits, each participant must submit to the State Water Board and serve on the other participants a completed Exhibit Identification Index. If possible, each participant should submit to the State Water Board and serve on the other participants an electronic copy, as well as a paper copy of the Exhibit Identification Index. Please see section 5 for details regarding electronic submissions.

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<sup>1</sup> The hearing officer may make an exception to this rule if the witness is adverse to the participant presenting the testimony and is willing to testify only in response to a subpoena or alternative arrangement. In such a case, the hearing officer may allow presentation of the oral direct testimony without requiring written testimony.

A statement of service with manner of service indicated shall be filed with each participant's exhibits. The exhibits and indexes for this hearing, and a statement of service, must be **received by the State Water Board and served on the other participants no later than the deadline prescribed in the Hearing Notice.**

The following requirements apply to exhibits:

- a. Exhibits based on technical studies or models shall be accompanied by sufficient information to clearly identify and explain the logic, assumptions, development, and operation of the studies or models.
- b. The hearing officer has discretion to receive in evidence by reference relevant, otherwise admissible, public records of the State Water Board and documents or other evidence that have been prepared and published by a public agency, provided that the original or a copy was in the possession of the State Water Board before the notice of the hearing is issued. (Cal. Code Regs., tit. 23, § 648.3.) A participant offering an exhibit by reference shall advise the other participants and the State Water Board of the titles of the documents, the particular portions, including page and paragraph numbers, on which the participant relies, the nature of the contents, the purpose for which the exhibit will be used when offered in evidence, and the specific file folder or other exact location in the State Water Board's files where the document may be found.
- c. A participant seeking to enter in evidence as an exhibit a voluminous document or database may so advise the other participants prior to the filing date for exhibits, and may ask them to respond if they wish to have a copy of the exhibit. If a participant waives the opportunity to obtain a copy of the exhibit, the participant sponsoring the exhibit will not be required to provide a copy to the waiving participant. Additionally, such exhibits may be submitted to the State Water Board in electronic form, using a file format readable by Microsoft Office 2003 software.
- d. Exhibits that rely on unpublished technical documents will be excluded unless the unpublished technical documents are admitted as exhibits.
- e. Participants submitting large format exhibits such as maps, charts, and other graphics shall provide the original for the hearing record in a form that can be folded to 8 ½ x 11 inches. Alternatively, participants may supply, for the hearing record, a reduced copy of a large format original if it is readable.
5. **ELECTRONIC SUBMISSIONS:** Participants are encouraged to submit the following documents to the State Water Board in electronic form: written opening statements; written policy statements; written testimony; exhibits; and Exhibit Identification Indexes. In addition, the foregoing documents may be served electronically on those participants who have agreed to accept electronic service. Paper copies of all other documents must be submitted to the State Water Board and served on the other parties, unless the hearing officer specifies otherwise.

Any documents submitted or served electronically must be in Adobe™ Portable Document Format (PDF), except for Exhibit Identification Indexes, which may be in a version supported by Microsoft Excel or Word. Electronic submittals to the State Water Board of documents less than 11 megabytes in total size (incoming mail server attachment limitation) may be sent via electronic mail to: [wrhearing@waterboards.ca.gov](mailto:wrhearing@waterboards.ca.gov) with a subject of "Kern River FAS Petition Hearing." Electronic submittals to the State Water Board of documents greater

than 11 megabytes in total size should be sent by regular mail in PDF format on compact disk (CD™) media.

Electronic service on participants shall be in the same format as submittals to the State Water Board, and should be submitted to the other participants to the e-mail address provided on the Notices of Intent to Appear. Participants who agree to electronic service may request that specific documents be provided to them in paper copy, or by mail on CD. Requests should be made to the participant who submitted the document, not to the State Water Board. Participants who receive such a request shall provide a paper copy of the requested document within five days of the date the request is received. The State Water Board will post a list of all exhibits submitted for the hearing on its website at: [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/kernriver\\_fas/index.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/kernriver_fas/index.shtml)

6. **ORDER OF PROCEEDING:** The State Water Board member serving as hearing officer will follow the Order of Proceedings specified in California Code of Regulations, title 23, section 648.5. Participants should take note of the following additional information regarding the major hearing events. The time limits specified below may be changed by the hearing officer, at his discretion, as a result of the pre-hearing conference.
  - a. **Policy Statements Within the Evidentiary Hearing:** Pursuant to California Code of Regulations, title 23, section 648.1, subdivision (d), the State Water Board will provide an opportunity for presentation of non-evidentiary policy statements or comments by interested persons who are not hearing participants. Policy statements will be heard at the start of the hearing, immediately after a hearing officer identifies the parties and other participants. Policy statements are subject to the following provisions in addition to the regulation:
    - i. Policy statements are not subject to the pre-hearing requirements noted above for testimony or exhibits, except that persons wishing to make policy statements are requested to file a Notice of Intent to Appear, indicating clearly an intent to make only a policy statement.
    - ii. The State Water Board requests that policy statements be provided in writing before they are presented. Please see section 5, above, for details regarding electronic submittal of policy statements. Oral summaries of the policy statements will be limited to five minutes or such other time as established by the hearing officer.
  - b. **Presentation of Cases-In-Chief:** Each participant may present a case-in-chief addressing the key issues identified in the hearing notice. The case-in-chief will consist of any opening statement provided by the participant, oral testimony, introduction of exhibits, and cross-examination of the participant's witnesses. The hearing officer may allow redirect examination and recross examination. The hearing officer will decide whether to accept the participant's exhibits in evidence upon a motion of the participant after the case-in-chief has been completed.
    - i. **Opening Statements:** At the beginning of a case-in-chief, the participant or the participant's attorney may make an opening statement briefly and concisely stating the objectives of the case-in-chief, the major points that the proposed evidence is intended to establish, and the relationship between the major points and the key issues. Oral opening statements will be limited to 20 minutes per participant. A participant may submit a written opening statement. Please see section 5, above,



for details regarding electronic submittal of written opening statements. Any policy-oriented statements by a participant should be included in the participant's opening statement.

- ii. **Oral Testimony:** All witnesses presenting testimony shall appear at the hearing. Before testifying, witnesses shall swear or affirm that the written and oral testimony they will present is true and correct. Written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. Witnesses will be allowed up to 20 minutes to summarize or emphasize their written testimony on direct examination.<sup>2</sup> Each participant will be allowed up to two hours total to present all of its direct testimony.<sup>3</sup>
- iii. **Cross-Examination:** Cross-examination of a witness will be permitted on the party's written submittals, the witness' oral testimony, and other relevant matters. If a participant presents multiple witnesses, a hearing officer will decide whether the participant's witnesses will be cross-examined as a panel. Cross-examiners initially will be limited to one hour per witness or panel of witnesses. The hearing officer has discretion to allow additional time for cross-examination if there is good cause demonstrated in an offer of proof. Any redirect examination and recross-examination permitted by a hearing officer will be limited to the scope of the cross-examination and the redirect examination, respectively. Witnesses may be cross-examined on relevant subjects that are not covered in the direct testimony. (Gov. Code, § 11513, subd. (b).) Ordinarily, only a participant or the participant's representative will be permitted to examine a witness, but a hearing officer may allow a participant to designate a person technically qualified in the subject being considered to examine a witness. State Water Board members and the State Water Board's counsel may ask questions at any time, and the State Water Board members and staff may cross-examine any witness.
- c. **Rebuttal:** After all participants have presented their cases-in-chief and their witnesses have been cross-examined, the hearing officer will allow participants to present rebuttal evidence. Rebuttal evidence is new evidence used to rebut evidence presented in another participant's case-in-chief. Rebuttal testimony and exhibits need not be submitted prior to the hearing. Rebuttal evidence is limited to evidence that is responsive to evidence presented in a case-in-chief, and it does not include evidence that should have been presented during the presenter's case-in-chief. It also does not include repetitive evidence. Cross-examination of rebuttal evidence will be limited to the scope of the rebuttal evidence.
- d. **Closing Statements and Legal Arguments:** At the close of the hearing or at other times if appropriate, the hearing officer may allow oral arguments or set a schedule for filing briefs or closing statements. If the hearing officer authorizes the participants to file briefs, five copies of each brief shall be submitted to the State Water Board, and one copy shall be served on each of the other participants on the service list. A participant shall not attach a document of an evidentiary nature to a brief unless the document is at the time in the evidentiary hearing record or is the subject of an offer of the document in

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<sup>2</sup> The hearing officer may allow additional time for the oral direct testimony of the witness if the witness is adverse to the participant presenting the testimony and the hearing officer is satisfied that the participant could not produce written direct testimony for the witness.

<sup>3</sup> The hearing officer may, for good cause, approve a party's request to use more than two hours total to present direct testimony during the party's case-in-chief.

evidence. Every participant filing a brief shall file a statement of service with the brief, indicating the manner of service.

7. **EX PARTE CONTACTS:** During the pendency of this proceeding, commencing no later than the issuance of the Notice of Hearing, there shall be no *ex parte* communications between either State Water Board members or State Water Board hearing team staff and supervisors, and any of the other participants regarding substantive or controversial procedural issues within the scope of the proceeding. (Gov. Code, §§ 11430.10-11430.80.) Communications regarding non-controversial procedural matters are permissible and should be directed to staff on the hearing team, not State Water Board members. (Gov. Code, § 11430.20, subd. (b).) A document regarding *ex parte* communications entitled "Ex Parte Questions and Answers" is available upon request or from our website at: [http://www.waterboards.ca.gov/laws\\_regulations/docs/exparte.pdf](http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf).
8. **RULES OF EVIDENCE:** Evidence will be admitted in accordance with Government Code section 11513. Hearsay evidence may be used to supplement or explain other evidence, but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in a civil action.

**NOTICE OF INTENT TO APPEAR**

\_\_\_\_\_ plans to participate in the water right hearing regarding  
(name of party or participant)

**Kern River FAS Petition Hearing**

**scheduled to commence  
Monday, October 26, 2009**

**Check all that apply:**

- I/we intend to present a policy statement only.
- I/we intend to participate by cross-examination or rebuttal only.
- I/we agree to accept electronic service of hearing-related materials.
- I/we plan to call the following witnesses to testify at the hearing.

<b>NAME</b>	<b>SUBJECT OF PROPOSED TESTIMONY</b>	<b>ESTIMATED LENGTH OF DIRECT TESTIMONY</b>	<b>EXPERT WITNESS (YES/NO)</b>

(If more space is required, please add additional pages or use reverse side.)

Name, Address, Phone Number and Fax Number of Attorney or Other Representative:

Signature: \_\_\_\_\_ Dated: \_\_\_\_\_

Name (Print): \_\_\_\_\_

Mailing  
Address: \_\_\_\_\_

Phone Number: ( ) \_\_\_\_\_ Fax Number: ( ) \_\_\_\_\_

E-mail: \_\_\_\_\_

