
State Water Resources Control Board

NOTICE OF PUBLIC HEARING

The State Water Resources Control Board
Administrative Hearings Office
will hold a Public Hearing on the
Administrative Civil Liability Complaint
Issued by the Assistant Deputy Director of the
Division of Water Rights Permitting & Enforcement Branch
under Water Code section 1055
against

Stella Vivanco (“Respondent”).

The **Public Hearing** will commence on
Wednesday, May 11, 2022 at 9:00 am
and will be held by Zoom teleconference.

Please access Zoom by using the link:

<https://waterboards.zoom.us/j/93942308686?pwd=Qm02MXRNbFFZeWQwa1MzVU14eIpBdz09>

with Meeting ID: 939 4230 8686 and Passcode: 182388

or by calling in at +16699009128,,93942308686#,,,,*182388# US (San Jose)

Interested members of the public who would like to watch this hearing without participating may do so through the Administrative Hearings Office YouTube channel, accessible by clicking on “Watch AHO Hearings” at:
https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

BACKGROUND

Water Code section 1055 provides that the Executive Director of the State Water Resources Control Board (State Water Board or Board) may issue a complaint to any person or entity on which administrative civil liability may be imposed under Water Code section 1052, Article 4, Chapter 12, Part 2, Division 2 of the Water Code (Water Code

E. JOAQUIN ESQUIVEL, CHAIR | EILEEN SOBECK, EXECUTIVE DIRECTOR

sections 1845-1848), or Water Code section 5107. (Wat. Code, § 1055, subd. (a).) This authority has been delegated to the Assistant Deputy Director for the State Water Board's Division of Water Rights Permitting & Enforcement Branch. Following the issuance of such a complaint and after any necessary hearing, the Board may adopt an order setting administrative civil liability or determining that a liability shall not be imposed. (*Id.* at subd. (c).)

Water Code section 5101 requires, subject to some listed exceptions, that any person who diverts water file a Statement of Water Diversion and Use with the Board by July 1 of the succeeding year. Water Code section 5107, subdivision (c)(1) provides that the Board may impose liability, under Water Code section 1055, for failure to file such a statement. The Board may impose administrative civil liability in the amount of \$1,000 per violation plus \$500 per day for each additional day on which the violation continues if the person fails to file a statement within 30 days after the Board has called the violation to the person's attention. (Wat. Code, § 5107, subd. (c)(1).)

Water Code section 1052, subdivision (a) provides that the diversion or use of water subject to the State Water Board's authority under Division 2 (Water Code sections 1000-1851) other than as authorized in this division is a trespass. The Board may impose administrative civil liability, under section 1055, on any person or entity committing a trespass under section 1052. (Wat. Code, § 1052, subd. (c) & (d).) The Board may impose liability of \$500 per day for each day in which the unauthorized diversion occurs. (*Id.* at subd. (c)(2).)

On October 17, 2017, the State Water Board adopted Resolution No. 2017-0063, which adopted an initial Cannabis Cultivation Policy. The Resolution notes that Water Code section 13149, subdivisions (a)(1)(A) and (b)(2), provide that the Board "shall adopt principles and guidelines (requirements), as part of a state policy for water quality control...for diversion and use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flows" and that "[t]hese requirements may include, but are not limited to: instream flow objectives, limits on diversions, and requirements for screening of diversions and elimination of fish passage barriers." (Res. No. 2017-0063, p. 1, ¶ 2.) This policy became effective on December 18, 2017.¹ Attachment A, Section 2, Term 82 of the policy prohibits onstream storage reservoirs unless the cannabis cultivator has an existing right or obtains an appropriative water permit. Attachment A, Section 2, Term 84 of the policy requires each cannabis cultivator to install and maintain a measuring device for surface water or subterranean stream diversions, maintain daily records for water diverted for cannabis

¹The Administrative Civil Liability Complaint in this matter alleges that the relevant events occurred in September 2018. (2021-12-15 Stella Vivanco package, ¶¶ 10-14.) The Complaint alleges violations under the Cannabis Cultivation Policy that was in effect at the time, which the Board adopted by Resolution 2017-0063. (2021-12-15 Stella Vivanco Package, n. 6.) The Board has since amended this policy. More information about the Board's current Cannabis Cultivation Policy is available at https://www.waterboards.ca.gov/water_issues/programs/cannabis/cannabis_policy.html.

cultivation, and make those records available for review or by request of the Water Boards, California Department of Fish and Wildlife, or their agents.

The Board may impose administrative civil liability, under section 1055, on any person or entity that violates a principle, guideline or requirement established by the Board under Water Code section 13149. (Wat. Code, § 1847, subd. (a) and (b)(1).) The Board also may impose administrative civil liability, under section 1055, on any person or entity that diverts or uses water for cannabis cultivation for which a license is required, but has not obtained a license under Business and Professions Code, Division 10, Chapter 6 (sections 26060-26060 - 26066.2) or Chapter 7 (sections 26070-26071). (Wat. Code, § 1847, subd. (b)(4).) Water Code section 1847 provides that the Board may impose liability in amounts up to \$500 per violation plus \$250 for each additional day of violation within 30 days after being notified to correct the violation. (*Id.*, subd. (a).)

On December 15, 2021, the Assistant Deputy Director for the State Water Board's Division of Water Rights (Division), Permitting & Enforcement Branch, issued an Administrative Civil Liability (ACL) Complaint under Water Code section 1055. This Complaint alleges that Respondent violated Water Code 5101, Water Code section 1052, the two provisions of the Cannabis Cultivation Policy discussed above, and Water Code section 1847, because Respondent: (1) failed to file a Statement of Diversion and Use by July 1, 2019 for water diversion and use observed in September 2018 and from August 21, 2019 to March 17, 2021 after the violation was called to the Respondent's attention on July 22, 2019; (2) diverted or used water without authorization from the State Water Board; (3) stored water without authorization from the State Water Board; (4) failed to install and maintain a measuring device for surface or subterranean stream diversions; and (5) diverted or used water for cannabis cultivation without the required license.

The ACL Complaint recommends the imposition of administrative civil liability in the amount of \$13,500. The ACL Complaint alleges that the maximum potential liability for the alleged violations is \$297,500.

In a January 7, 2022 e-mail to the Administrative Hearings Office (AHO), Respondent requested a hearing in this matter. Water Code section 1112, subdivision (a)(1), provides that an AHO hearing officer shall preside over hearings of ACL Complaints issued under Water Code section 1055. After the hearing, the AHO hearing officer will prepare a proposed order and transmit it to the Clerk of the Board under Water Code section 1114, subdivision (c)(1). The Board then may take any of the actions described in Water Code section 1114, subdivision (c)(2).²

² Water Code section 1114, subdivision (b), provides for the AHO hearing officer to adopt a final order in proceedings under Water Code section 1847 or 5107. While this proceeding is under these statutes, it also is under Water Code section 1052. Because this proceeding is not solely under sections 1847 and 5107, the AHO is conducting this proceeding under Water Code section 1114, subdivision (c)(1).

PURPOSE OF HEARING; HEARING ISSUES

The purpose of this hearing is for the AHO hearing officer to receive evidence and arguments relevant to the following issues:

- 1) Did Water Code section 5101 require Respondent to file a Statement of Water Diversion or Use for water diversions and uses beginning in 2018 and continuing until March 17, 2021? If so, did Respondent violate this statute?
- 2) Did the Respondent violate Water Code section 1052, subdivision (a), which prohibits the unauthorized diversion or use of water subject to Division 2 (sections 1000-1851), of the Water Code?
- 3) Did the Respondent violate Attachment A, Section 2, Term 82 of the Cannabis Cultivation Policy, which the Board adopted by Resolution No. 2017-0063, pursuant to Water Code section 13149, and which prohibits onstream storage reservoirs unless the cannabis cultivator has an existing water right or obtains an appropriate water-right permit?
- 4) Did the Respondent violate Attachment A, Section 2, Term 84 of the Cannabis Cultivation Policy, which the Board adopted by Resolution No. 2017-0063, pursuant to Water Code section 13149, and which requires a cannabis cultivator to install and maintain a measuring device for surface water or subterranean stream diversions?
- 5) Did the Respondent violate Water Code section 1847 subdivision (b)(4), which requires any person or entity that diverts water for commercial cannabis cultivation to obtain a license?
- 6) If a violation of the Water Code has occurred, should the State Water Board impose administrative civil liability?
- 7) If the State Water Board decides to impose administrative civil liability in this matter, what is the appropriate amount for such administrative civil liability³?

ADMINISTRATIVE RECORD

The AHO hearing officer's proposed order in this matter will be based upon evidence and arguments in the administrative record. The AHO may add additional documents, in addition to the parties' exhibits, to the administrative record. The following documents

³ Water Code section 1055.3 provides that, in determining the amount of civil liability, the Board shall take into consideration all relevant circumstances, including, but not limited to: (a) the extent of harm caused by the alleged violation; (b) the nature and persistence of the alleged violation; (c) the length of time over which the alleged violation occurred; and (d) the corrective actions, if any, taken by the violator.

currently are in the AHO administrative record for this matter: (1) December 15, 2021 ACL Complaint and transmittal letter; (2) Respondent's January 7, 2022 request for hearing. These documents are in a file in the Water Board's FTP site in the "AHO Download Folder" for this matter, described in Item 6 below.

Parties may submit additional evidence and make arguments based on the evidence during the hearing concerning the hearing issues outlined above. If a party intends to submit exhibits during the hearing, the party will need to request access to the FTP site by the date listed in the table titled "Deadlines for Hearing Participation" and then follow the procedures described in Item 6 below.

HEARING OFFICER AND HEARING TEAM

Megan Knize, a hearing officer in the State Water Board's Administrative Hearings Office, will be the hearing officer for this proceeding and will prepare a written order, according to the requirements outlined in Water Code section 1114, subdivision (b)(1), within 90 days after the matter is submitted for decision. Other AHO staff may be present and may assist the hearing officer during the hearing and throughout this proceeding.

PROSECUTION TEAM

A State Water Board staff Prosecution Team will be a party to this hearing. The Prosecution Team will be comprised of attorneys from the State Water Board's Office of Enforcement and staff from the State Water Board's Division of Water Rights Enforcement Section.

PROHIBITION ON *EX PARTE* COMMUNICATIONS; SEPARATION OF FUNCTIONS

While this proceeding is pending, *ex parte* communications between any party or interested person and any member of the AHO hearing team are prohibited. *Ex parte* communications are any type of communication regarding this proceeding that occurs between a party or interested person and the hearing officer or a member of the hearing team without notice and an opportunity for all parties to participate.

Please do not attempt to communicate by telephone with any AHO hearing officer or any AHO staff member regarding this hearing, because other parties would not be able to participate in such communications. If any party wishes to communicate with the AHO at any time regarding any issue related to this proceeding, including any issue regarding hearing procedures or filing of documents, please communicate by e-mail to adminhrгоffice@waterboards.ca.gov or by letter to the AHO and serve all other parties

with copies of the communication.⁴ The party shall include a proof of service through a formal proof of service or by other verification.⁵

The Prosecution Team is separated from the AHO hearing team. Like all other parties, members of the Prosecution Team are prohibited from having any *ex parte* communications about this proceeding with members of the AHO hearing team. (See Wat. Code, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.)⁶ These rules regarding *ex parte* communications apply to all members of the AHO hearing team.

AHO WEBPAGE AND NOTICES

Subject to legal limitations, including the requirements for Internet website accessibility in Government Code section 11546.7, the AHO will post all of its notices and other AHO documents regarding these proceedings on the AHO's Internet webpage:

https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

More information about this proceeding may be accessed on the AHO's Internet webpage by clicking on "Water-Right Enforcement–Cannabis" and then on the folder with the name of the Respondent.

The AHO webpage has information about accessing the AHO's YouTube channel to watch live broadcasts or past recordings of hearings and pre-hearing conferences.

For general information about AHO proceedings, an AHO Frequently Asked Questions (FAQs) page is posted at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/procedures.html.

The AHO maintains a list of attorneys who may agree to provide pro bono legal assistance to parties without counsel. This list is available at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/pro_bono_aho.pdf.

⁴ The AHO's mailing addresses are provided in Item 6 below.

⁵ All references to "proof of service" in this document refer to either a formal proof of service or a list of the parties and the addresses of them or their representatives in an e-mail "cc" (carbon copy) list or the cc portion of a letter.

⁶ For a discussion of *ex parte* communications regarding State Water Board members, see "Ex Parte Questions and Answers," available on the State Water Board's website at: http://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf.

DEADLINES FOR HEARING PARTICIPATION

Deadline to request unique log-in to upload exhibits to Water Board's FTP site	April 8, 2022, 12:00 pm
Deadline for filing and service of any submittals of proposed testimony or exhibits before the hearing (optional)	April 12, 2022, 12:00 pm
Hearing date and time	May 11, 2022, 9:00 am

PROCEDURES FOR THIS WATER-RIGHT HEARING

The following procedures apply to this hearing. The hearing officer may amend these procedures before, during or after the hearing as she deems appropriate.

- 1. HEARING PROCEDURES:** The AHO will conduct this hearing according to the procedures for hearings set forth in California Code of Regulations, title 23, sections 648-648.8, 649.6 and 760. If there is any conflict between any provision of this notice and any provision of these regulations or any applicable statute, then the provision of the regulation or statute shall apply to this proceeding.
- 2. SETTLEMENTS:** The Prosecution Team and the Respondent may engage in private settlement discussions, and may, or may not, include any other persons in those discussions. No representative of the AHO will participate in such settlement discussions. If the parties sign a written settlement agreement, the Respondent shall notify the AHO in writing that the parties have signed a written settlement agreement and that the Respondent withdraws her request for a hearing.
- 3. POLICY STATEMENTS BY INTERESTED PERSONS:** As provided in California Code of Regulations, title 23, section 648.1, subdivision (d), the hearing officer normally will allow interested persons who are not designated as parties to present non-evidentiary policy statements during the hearing.
- 4. TESTIMONY AND OTHER EXHIBITS:** Exhibits include all written proposed testimony and other documents to be submitted as evidence. There is no requirement for any party to submit any written proposed testimony or exhibits before the hearing, but a party may do so. Any party that wants to submit written proposed testimony or exhibits before the exhibit filing deadline listed above may do so by following the procedures described in Item 6 below. Any party submitting written proposed testimony before the hearing still must produce the actual witness or witnesses to verify the written proposed testimony, provide a summary of it, and be available for cross-examination, during the hearing.
- 5. EXHIBIT FORMATTING AND ORGANIZATION:** A party deciding to submit exhibits before the hearing must file with the AHO both the exhibits and an Exhibit Identification

Index, which is a list of exhibits in Excel format. A sample is attached to the end of this document.

Each party should label exhibits with a short version of the party's name and sequential numbers. For example, the Prosecution Team's exhibits should be numbered PT-1, PT-2, etc. Respondent's exhibits should be numbered Respondent-1, Respondent-2, etc.

6. SUBMISSIONS OF DOCUMENTS: The AHO prefers that participants that decide to submit exhibits before the hearing do so by uploading the exhibits in electronic form to the State Water Board's FTP site. A party that submits documents electronically also shall file a paper copy of each exhibit with the AHO and mail a paper copy of each exhibit to the other party. This procedure will remain in place unless the hearing officer authorizes submission of exhibits in different formats.

The State Water Board's FTP site may be accessed at <https://ftp.waterboards.ca.gov/>. All parties may use the shared account on this site to access and download documents in the administrative record for this hearing. This shared account is referred to in this notice as the "AHO-FTP Download Folders".

Upon request by the deadline specified above, the AHO will provide each party a unique account to upload the party's documents for this hearing. These accounts are referred to in this hearing notice as the "Parties' Upload Folders".

If a party wants to request a unique account to upload documents to the Upload Folder in preparation for hearing, the party must e-mail the request to the AHO at adminhrгоffice@waterboards.ca.gov by the deadline specified in "Deadlines for Hearing Participation". A party that already has a unique account for the Upload Folder with the AHO does not need to request this log-in information again.

a. AHO-FTP Download Folders:

The AHO will create a folder for this proceeding on the State Water Board's FTP site. The folder for this proceeding will contain all administrative record documents related to this proceeding and may contain various subfolders, including subfolders for background documents and hearing documents. Only AHO personnel may upload files to this folder. The AHO will post each party's hearing exhibits, exhibit identification indices and legal briefs, if applicable, to this folder promptly after each filing deadline. The AHO may add other administrative record documents to this folder during this proceeding (including recordings of hearings, correspondence and the AHO's order). The documents in this folder will be the AHO's administrative record for this proceeding. Anyone may download documents from the AHO-FTP Download Folder for any proceeding, including this proceeding, at any time.

If any party believes that the AHO should add documents to, or remove any documents from, this folder for this proceeding, then the party may file a request to the hearing officer for such action (by e-mailing the request to the AHO e-mail inbox), and shall transmit copies of the request to all other parties on the service list. The hearing officer will issue rulings or take other actions on such requests as the hearing officer deems appropriate.

b. Parties' Upload Folders:

Upon request by the deadline specified in "Deadlines for Hearing Participation," the AHO will create a separate upload account for each party that requests such an account. The separate upload account will be for the party to upload the party's exhibits and other documents to the folder for that account. In most cases, these accounts will be specific for each party and each hearing, and the AHO will close the accounts for each hearing after the hearing and related proceedings have been completed.

Any party to this proceeding may upload documents for this proceeding (primarily exhibits and exhibit identification indices and any closing briefs) using the party's upload account. Only the party may upload files to the party's folder, and only the AHO may view, transfer, and download files from this folder. After the applicable filing deadline, AHO staff will move documents uploaded by each party to the administrative record in the AHO-FTP Download Folder for the proceeding, so all other parties may view and download the documents.

Each party shall upload its exhibits and Exhibit Identification Index to the party's folder on the State Water Board's FTP site before the exhibit filing deadline specified in this notice. A party that uploads hearing documents to the FTP site also shall serve paper copies of all such documents on the other party and shall file a proof of this service with the AHO. **When a party has uploaded all of the party's exhibits to the Board's FTP site, the party or party's representative shall send an email the AHO at AdminHrgOffice@Waterboards.ca.gov, with copies to the other parties on the service list, notifying the AHO that the party has uploaded the documents.**

Each party also shall mail or hand-deliver one paper copy of each of the party's exhibits that is less than 100 pages long and the party's Exhibit Identification Index to one of the AHO's two addresses listed below, with a proof of service of these paper copies. A party may provide this proof of service of these paper copies by sending an e-mail or letter to the AHO, with the transmittal of copies of the e-mail or letter to the other parties shown in the e-mail "cc" (carbon copy) list or the cc portion of the letter. The party shall make this mailing of the paper copies of the party's exhibits by the exhibit filing deadline, but the AHO does not need to receive the mailed paper copies of the exhibits by this deadline. Parties do not need to submit any paper copies of any exhibits that are over 100 pages

long. Any party that elects not to submit paper copies of such exhibits shall state this election in the party's proof of service.

After the exhibit filing deadline, the AHO will move all filed exhibits and Exhibit Identification Indices from the parties' Upload Folders to the administrative record folder and advise the parties that these documents are available for downloading from that folder. The AHO may rename or renumber exhibits that do not have proper exhibit names or numbers. If the AHO does this, then the AHO may create an electronic folder of documents that the party has submitted and a separate electronic folder of any documents the AHO has renamed or renumbered, in the administrative record folder.

If a party cannot upload exhibits to the FTP site, then the party may mail two paper copies of all its exhibits to the AHO at:

State Water Resources Control Board
Administrative Hearings Office
P. O. Box 100
Sacramento, CA 95812-0100

Alternatively, a party may send paper copies of its exhibits to the AHO by overnight delivery to:

Joe Serna Jr. CalEPA Building
State Water Resources Control Board
Administrative Hearings Office
1001 I Street
Sacramento, CA 95814

If a party uses either of these alternative means of filing paper copies of its exhibits with the AHO in lieu of electronically filing the exhibits, then the party shall complete the filing of the paper copies by the exhibit filing deadline specified in this notice.

7. ORDER OF PROCEEDING: The hearing officer will follow the order of proceedings specified in California Code of Regulations, title 23, section 648.5, unless the hearing officer decides to modify the order of proceeding before or during the hearing.

- a. Policy Statements:** The hearing officer will allow interested persons to present policy statements at the start of the hearing before the presentations of cases-in-chief. **Oral policy statements and oral summaries of written policy statements will be limited to 5 minutes.**
- b. Presentation of Cases-In-Chief:** Each party may present a case-in-chief addressing the key issues in this hearing notice. The hearing will proceed in the following order:

- Party's opening statement (**5 minutes per party**)
- Summaries of the party's witnesses' written proposed testimony or presentation of the party's oral testimony (**no more than 30 minutes total for all witnesses for each party**).
- Cross-examination of the party's witnesses (**30 minutes total for all the other party's witnesses**).
- Re-direct examination and re-cross examination of the party's witnesses if the hearing officer allows.
- Questions from the hearing officer. (These questions may occur at any time, but normally will be after all other parties have completed their cross-examinations of a party's witnesses.)
- Submitting exhibits into evidence, including the AHO's own exhibits, with opportunities for objections by other parties.

c. Presentations of parties' rebuttal evidence: After all parties have presented their cases-in-chief, the hearing officer may allow parties to submit rebuttal exhibits and testimony.

d. Closing statements (5 minutes per party): The hearing officer may instead order the parties to file closing briefs.

8. HEARING LOGISTICS: The hearing officer prefers that parties participate in the hearing by both audio and video through the Zoom meeting link listed on the first page of this notice. If this is not possible, then the hearing officer will accept audio-only participations. **If a party intends to participate via audio-only, then that party shall notify the AHO by e-mail at least a week before the hearing date. The party's e-mail shall state whether the party has received copies of the other party's exhibits.**

The AHO will not order a court reporter for this hearing. Any interested party may order a court reporter at the party's own expense. The AHO will record the hearing and post audio-plus-video files of the hearing on the Water Board's FTP site as part of the administrative record for this matter. Parties should test their devices' video and audio functions before the start of the hearing.

Each party should call into the hearing at least 10 minutes before the scheduled hearing time so the party can resolve any technical issues before the hearing begins. Parties initially will be in a virtual waiting room and will be admitted to the hearing by a member of the AHO at the time scheduled for the hearing to begin. When speaking, please turn the video on and unmute the microphone by clicking on the symbols in the lower left-hand side of the Zoom window.

During the hearing, please be respectful and patient. Parties should raise a hand on-screen to get the hearing officer's attention. To reduce acoustic background noise, please remain on mute unless speaking. If other devices are tuned into the meeting, please turn off the speaker of each of those devices. Other participants will be able to see each party's name, depending on the party's Zoom account settings. Other participants may also see the last three digits of a party's phone number unless the party has called in anonymously. During the hearing, AHO staff may add designations of participants' names to the Zoom display.

If a party's device freezes, please notify staff at adminhrгоffice@waterboards.ca.gov or by calling (916) 341-6940 and leaving a voicemail message and then restart the device. AHO staff will be monitoring the e-mail inbox and voicemail and will notify the hearing officer.

If restarting the device does not work, try calling into the hearing using the phone number provided with the Zoom meeting information on the first page.

February 9, 2022
Date

SIGNATURE ON FILE
Megan S. Knize
Hearing Officer

Enclosures:

- Exhibit Identification Index
- Service List

SERVICE LIST

Stella Vivanco, Respondent
P.O. Box 3123
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