



State Water Resources Control Board

AMENDED NOTICE OF PUBLIC HEARING AND PRE-HEARING CONFERENCE

The State Water Resources Control Board
Administrative Hearings Office
will hold a Public Hearing on a proposed Cease and Desist Order against

David Collenberg

The **Public Hearing** will begin on

October 14, 2024 at 9:00 am

and will be held by Zoom teleconference.

Please access Zoom for the Public Hearing using the link:

<https://waterboards.zoom.us/j/94339799798?pwd=NlczU1d3WlpleXJsYlMxNHBrTjJuZz09> with Meeting ID: 943 3979 9798 and Passcode: 072095 or +16699009128,,94339799798#,,,,*072095# US (San Jose)

The **Pre-Hearing Conference** will be held on

September 5, 2024 at 2:00 pm

and will be held by Zoom teleconference.

Please access Zoom for the Pre-Hearing Conference using the link:

<https://waterboards.zoom.us/j/94339799798?pwd=NlczU1d3WlpleXJsYlMxNHBrTjJuZz09> with Meeting ID: 943 3979 9798 and Passcode: 072095 or +16699009128,,94339799798#,,,,*072095# US (San Jose)

If you are an interested person and do not intend to speak at the hearing, you can watch the meeting by live-stream 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/

E. JOAQUIN ESQUIVEL, CHAIR | ERIC OPPENHEIMER, EXECUTIVE DIRECTOR

PURPOSE OF HEARING; HEARING ISSUES

The purpose of this hearing is for a hearing officer in the State Water Resources Control Board's Administrative Hearings Office (AHO) to receive evidence and arguments relevant to the following hearing issues and non-exhaustive list of sub-issues below:

- 1) Is Respondent required to install and maintain a measuring device or employ a method of measurement in accordance with California Code of Regulations, title 23, section 932? If so, what are the requirements with which Respondent must comply under California Code of Regulations, title 23, sections 933 through 938?
- 2) Has Respondent complied with his obligations (if any) to measure and report his diversions under California Code of Regulations, title 23, sections 932 through 937?
- 3) If Respondent has not complied with his obligations under California Code of Regulations, title 23, sections 932 through 937, what relief should be granted?

SCHEDULE AND DEADLINES FOR HEARING PARTICIPATION

Deadline to submit pre-hearing conference statements.	August 29, 2024, 11:59 pm
Pre-hearing Conference date and time	September 5, 2024, 2:00 pm
Deadline for filing and service of any submittals of proposed testimony or exhibits before the hearing (optional)	September 13, 2024, 11:59 pm
Hearing date and time	October 14, 2024, 9:00 am
Deadline to submit closing briefs	November 1, 2024, 11:59 pm

BACKGROUND

California Code of Regulations, title 23, section 932(a)(2) requires any person who previously diverted or intends to divert greater than 10 acre-feet of water per year and is required under Water Code Part 5.1 to file a Statement of Water Diversions and Use to install and maintain a measuring device or employee a measurement method capable of measuring the rate of diversion, rate of collection to storage, the rate of withdrawal or released from storage, and the total volume of water diverted or collected to storage. Sections 933 and 934 of California Code of Regulations, title 23, set forth specific requirements for a diverter's measurement device or method of measurement, and section 935 provides an alternative compliance regime in "circumstances where strict compliance with sections 933 or 934 . . . is not feasible, would be unreasonably

expensive, would unreasonably affect public trust uses, or would result in the waste or unreasonable use of water[.]”

On April 26, 2024, the State Water Resources Control Board, Division of Water Rights, (Division) issued a Draft Cease and Desist Order (Draft CDO) against Respondent David Collenberg. The Draft CDO alleges that Respondent is the owner of water right statements S000774 and S019640, which claim riparian and pre-1914 water rights to divert water for irrigation and stockwatering uses from Oro Fino Creek and Kidder Creek, both of which are tributary to the Scott River. According to the Draft CDO, statements S000774 and S019640 reported a combined direct diversion and use of over 1000 AF in 2021. Thus, the Draft CDO contends that Respondent must install and maintain an appropriate measuring device or employ a measurement method that complies with California Code of Regulations, title 23, sections 932 through 937. The Draft CDO alleges that Respondent has failed to do so, and seeks an order under Water Code sections 1831 through 1836 directing Respondent to:

1. Cease all diversions until Respondent installs a measurement device(s) to ensure compliance with measurement and reporting regulations required in Title 23, Chapter 2.7, Article 2, Section 932 through 938 of the California Code of Regulations;
2. Submit a report of water measuring device pursuant to California Code of Regulations, title 23, section 937 to the State Water Board with the first water use report submitted after installation of the device; and
3. Maintain, and provide to the Division upon request, records of all water diversions from Oro Fino and Kidder Creek.

Respondent requested a hearing in this matter in an email dated May 16, 2024. Water Code section 1112, subdivision (a)(2), provides that an AHO hearing officer shall preside over hearings on a notice of a proposed cease and desist order issued under Water Code section 1834. The AHO hearing officer’s proposed order in this matter will be issued under Water Code section 1114, subdivision (c).

On May 28, 2024, the AHO issued an initial Notice of Public Hearing and Pre-Hearing Status Conference (Hearing Notice) for this matter. The Hearing Notice directed the parties to file a joint status conference statement no later than June 18, 2024. After the parties failed to submit any status conference statement by that deadline, the AHO vacated all previously scheduled hearing dates. On June 26, 2024, the State Water Board Prosecution Team submitted a pre-hearing conference statement indicating that the parties were engaged in settlement discussions, and that a hearing date in mid-September would provide sufficient time to either finalize a settlement agreement or agree to resolve this matter in a hearing.

PRE-HEARING STATUS CONFERENCE

The AHO will hold a pre-hearing status conference on September 5, 2024, at 2:00 pm. The Prosecution Team shall file a pre-hearing conference statement no later than August 29, 2024, at 11:59 pm that addresses the following issues:

1. Whether the schedule and deadlines for hearing participation set forth above should be adjusted in any way;
2. Prospects for settlement;
3. Any changes in the information provided by the Prosecution Team in its June 26 pre-hearing conference statement;
4. Any other topics the Prosecution Team wishes to address.

Respondent may also file a pre-hearing conference statement no later than August 29, 2024.

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 any exhibits the parties submit, to the administrative record. The following documents currently are in the AHO administrative record for this matter: (1) the Division's April 26, 2024, Draft CDO; and (2) Respondent's May 16, 2024, request for hearing. The parties may submit additional evidence and make arguments based on the evidence during the hearing concerning the hearing issues outlined above.

HEARING OFFICER AND HEARING TEAM

Hearing Officer Sam Bivins will be the hearing officer for this proceeding and will prepare a written proposed order. The hearing officer will transmit the written proposed order to the Clerk of the State Water Board (for the Board's consideration) 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 parties and members of the AHO hearing team are prohibited. *Ex parte* communications are any type of communication 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 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.¹ The party shall include a proof of service through a formal proof of service or by other verification.²

The Prosecution Team is separated from the AHO hearing team. Like all other parties, the Prosecution Team is prohibited from having any *ex parte* communications with any members of the AHO hearing team. (See Wat. Code, § 11110, subd. (c); Gov. Code, §§ 11430.10-11430.80.)³ 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 notices and other documents regarding these proceedings on the AHO's Internet webpage: https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/

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

For general information about AHO proceedings, an AHO Procedures and Frequently Asked Questions (FAQs) page is available, with links to an Attorney List for Pro Bono Representation, a guide to Preparing for Your Hearing, and FAQs at https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/procedures.html.

¹ The AHO's mailing addresses are provided in Item 6, below.

² 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.

³ 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.

LIVE-STREAM AND RECORDINGS

The hearing will be live streamed through the Administrative Hearings Office YouTube channel, accessible by clicking on the link provided below.

YouTube live-stream sessions will be available on the Administrative Hearings Office YouTube channel. These recordings will include automatic captions for accessibility.

The live-stream and recordings may be accessed at the following

link: <https://www.youtube.com/channel/UCM-gmipRyd7Nw-g8l-C7Nig/videos?view=57>

PROCEDURES FOR THIS ENFORCEMENT 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 to 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 his request for a hearing.

3. PARTY STATUS AND POLICY STATEMENTS BY INTERESTED PERSONS: Respondent David Collenberg and the Division of Water Rights Prosecution Team are parties to this proceeding. The hearing officer may allow other persons or entities to participate in the hearing as a party. (See Cal. Code Regs., tit. 23, § 648.1, subd. (a)-(b).) The deadline for additional persons or entities to request party status in this hearing was June 25, 2024.

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. The deadline for interested persons to notify the AHO of their intention to present a policy statement was July 26, 2024.

4. TESTIMONY AND OTHER EXHIBITS: Exhibits include all written testimony and other documents to be submitted as evidence. There is no requirement for any party to submit any proposed testimony or exhibits before the hearing, but a party may do so. Any party that wants to submit proposed testimony or exhibits before the exhibit filing deadline listed above may do so by following the procedures described in Item 6. 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 submitting evidence must file with the AHO both the exhibits and an Exhibit Identification Index, which is a list of exhibits in Word or 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: If a party chooses to submit exhibits before the hearing, that party shall upload those exhibits to the State Water Board's FTP site in electronic form 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". 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".

a. AHO-FTP Download Folders:

The AHO has created a folder for this proceeding on the State Water Board's FTP site. The folder for this proceeding contains all administrative record documents related to this proceeding and may contain various subfolders, including subfolders for background documents and hearing documents. This folder is referred to in this notice as the "AHO-FTP folder for this proceeding." Only AHO personnel may upload files to this folder. The AHO will post each party's hearing exhibits, exhibit identification indices and any closing briefs (as required by the hearing officer) to this folder promptly after each applicable 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 proposed 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:

The AHO will create a separate upload account for each party for this hearing, so that the party may 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 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 does not need to serve copies of the documents on the other parties, except that, if another party has not agreed to accept electronic service of documents, then the party uploading hearing documents to the Board's FTP site also shall serve paper copies of all such documents on that 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 and the other parties that the party has uploaded the documents.

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 clear exhibit names or are not identified by 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 issues in the 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 (**60 minutes total for all of the other party's witnesses**).
 - Re-direct examination and re-cross examination of the party's witnesses, if allowed by the hearing officer.
 - 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, 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. Rebuttal evidence is new evidence used to rebut evidence another party has presented in its case-in-chief.

d. **Closing Briefs (no more than 15 pages per party, due November 1, 2024, at 11:59 pm)**

8. HEARING LOGISTICS: The hearing officer prefers that parties participate in the hearing by both audio and video through the Zoom meeting link. If this is not possible, then the hearing officer will accept audio-only participations. New users of Zoom may want to review Zoom's support guide: <https://support.zoom.us/hc/en-us/categories/200101697>.

The AHO will not order a court reporter for the 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 AHO-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 or pre-hearing conference.

Parties should plan to call into the hearing at least 10 minutes before the scheduled hearing time to ensure the party can resolve any technical issues before the hearing begins. Parties will initially be in a virtual waiting room and will be admitted to the hearing by a member of the AHO office. 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 volume 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 adminhrgoffice@waterboards.ca.gov or by calling (916) 341-6940 and leaving a voicemail message and 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.

July 12, 2024
Date

/s/Sam Bivins
Sam Bivins
Hearing Officer

Enclosures:

- Exhibit Identification Index
- Service List

State Water Resources Control Board

Exhibit Identification Index

Exhibit Identification Number	Exhibit Description	Status of Evidence (for hearing team use only)		
		<i>Introduced</i>	<i>Accepted</i>	<i>By Official Notice</i>

SERVICE LIST

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