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# State Water Resources Control Board

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Arnold Schwarzenegger  
Governor

March 16, 2010

## VIA EMAIL ONLY

To: Attached Service Lists:

WATER RIGHT HEARINGS REGARDING ADOPTION OF DRAFT CEASE AND DESIST ORDERS AGAINST GALLO VINEYARDS, INC.; MARK AND VALLA DUNKEL; MUSSI ET AL.; AND YONG PAK AND SUN YOUNG

This letter responds to issues raised in a letter dated March 10, 2010, from Kenneth Petruzzelli, who represents Modesto Irrigation District (MID) in the four hearings identified above, and a response dated March 12, 2010, from John Herrick, who represents three of the four parties against whom draft cease and desist orders have been issued. In his letter, Mr. Petruzzelli requested a response to the joint requests for intervention in the four hearings identified above that were filed by MID, San Luis & Delta-Mendota Water Authority (SLDMWA), and the State Water Contractors (SWC). Mr. Petruzzelli also requested a response to MID, SLDMWA, and SWC's requests to intervene in other prospective enforcement hearings. (Our records indicate that MID, SLDMWA, and SWC's requests to intervene in the four hearings identified above were made by letters dated January 26, 2010. Subsequent intervention requests were made by letters dated February 9, 2010.) In his letter, Mr. Petruzzelli explained that MID, SLDMWA, and SWC sought to intervene in order to participate in a meaningful manner before hearing notices were issued.

Sometime during the week of February 22, 2010 (after the hearing notice had been issued), Valerie Kincaid, who represents SLDMWA, called me to ask about the status of MID, SLDMWA, and SWC's requests to intervene in the four hearings identified above. Ms. Kincaid agreed that responding to the requests to intervene at that point in time would be of limited utility in light of the fact that notices of intent to appear were due the following week, on March 3, 2010. Ms. Kincaid confirmed that responding to the intervention requests was not necessary, and MID, SLDMWA, and SWC would seek to participate in the four hearings by filing notices of intent to appear. I assumed that it was not necessary to inform Mr. Petruzzelli or Cliff Schulz, who represents SWC, of my conversation with Ms. Kincaid because the intervention requests were filed jointly by MID, SLDMWA, and SWC, but my assumption appears to have been mistaken. I apologize for the confusion. As for the other prospective enforcement hearings, as I informed Ms. Kincaid, I have not been assigned to those hearings. My understanding is that the State Water Resources Control Board (State Water Board) will respond to Mr. Petruzzelli's requests to intervene in those hearings separately.

In his March 10, 2010 letter, Mr. Petruzzelli stated that MID had communicated its interest in the hearings identified above with Members of the State Water Board, and was assured that MID would be allowed to participate in a meaningful manner. In response, Mr. Herrick expressed concern that the State Water Board Members may have had inappropriate communications with some of the parties concerning the merits of these hearings. Mr. Herrick requested that the State Water Board Members disclose any such communications, and that the hearings be continued to allow Mr. Herrick's clients to investigate whether to file motions to recuse some or all of the Board Members.

The Hearing Team has discussed this issue with Board Chairman Charles R. Hoppin and Board member Arthur G. Baggett, Jr., who are presiding as co-hearing officers in the four hearings identified above. Board Chairman Hoppin and Board Member Baggett both confirmed that they

have not had any communications with any parties concerning the alleged unauthorized diversions that are the subject of these hearings, either before or after the hearing notice was issued. There have been meetings that included Board Members and an attorney from Mr. Petruzzelli's law firm concerning general policies that may relate to diversions in the Delta, but these meetings did not have reference to any specific diversion, and occurred many months before the current proceedings were initiated. Accordingly, postponement of the hearings due to alleged inappropriate communications does not appear to be warranted. (As the parties have been notified previously, the hearing on the draft cease and desist order against Gallo Vineyards, Inc. has been postponed indefinitely due to the fact that the Prosecution Team and Gallo Vineyards, Inc. have reached a settlement agreement in principle.) The Hearing Team has not yet had the opportunity to discuss this issue with the other Board Members. We will determine whether any inappropriate ex parte communications with any of the other Board Members concerning any of these hearings have taken place. Any such communications will be disclosed and made part of the appropriate hearing record.

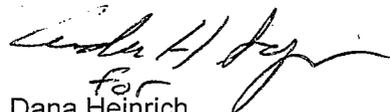
In his March 10, 2010 letter, Mr. Petruzzelli also indicated that MID is interested in learning more about investigations conducted by the compliance unit and settlement negotiations between compliance unit staff and other parties. Accordingly, Mr. Petruzzelli has filed a request for public records related to specified investigations and enforcement actions pursuant to the California Public Records Act. In his response to Mr. Petruzzelli's letter, Mr. Herrick requested that he also receive a copy of all materials that the State Water Board intends to provide to Mr. Petruzzelli. Mr. Petruzzelli's Public Records Act request will be addressed separately. The matter has been assigned to David Rose, Staff Counsel, who informs me that he will respond to Mr. Herrick's request as well.

Finally, Mr. Petruzzelli requested a two-week extension of the April 1, 2010 deadline to submit written testimony and other exhibits in the four hearings identified above. Mr. Petruzzelli stated that he did not believe that such an extension would necessitate a postponement of the May 5, 2010 hearing date. In his response to Mr. Petruzzelli, however, Mr. Herrick asserted that if the extension were granted, his clients would not have adequate time to review MID's written testimony and exhibits, as well as any documents provided pursuant to Mr. Petruzzelli's Public Records Act Request, prior to the hearings. Accordingly, Mr. Herrick requested that the hearings be postponed indefinitely.

I have conferred with Hearing Officer Baggett regarding Mr. Petruzzelli's request for an extension, and he has directed me to advise the parties that the request for an extension is denied. The April 1, 2010 deadline is necessary to allow the parties sufficient time to prepare for the three hearings that are still scheduled for May 5, 2010.

If you have any questions regarding this letter, you may contact me at (916) 341-5188 or [dheinrich@waterboards.ca.gov](mailto:dheinrich@waterboards.ca.gov).

Sincerely,



<sup>for</sup>  
Dana Heinrich  
Senior Staff Counsel

cc: Continued Next Page

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