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From: Petruzzelli, Kenneth@Waterboards
Sent: Monday, January 18, 2016 8:37 AM
To: Unit, Wr_Hearing@Waterboards; Glen Hansen; Diane Kindermann Henderson; bbarringer@mblaw.com; bparis@olaughlinparis.com; lwood@olaughlinparis.com; anna.brathwaite@mid.org; agodwin@MRGB.ORG; red@eslawfirm.com; jonathan.knapp@sfgov.org
Cc: Prager, John@Waterboards; Tauriainen, Andrew@Waterboards
Subject: Fahey ACL/CDO Hearing
Attachments: Prehearing Brief (clarification 1.19.16).pdf

Dear Mr. Mona,

It has come to my attention that some of the numbers cited in the Prosecution Team's pre-hearing brief require clarification.

On page 2, the maximum combined rate of authorized diversion from the two springs under Permit 21289 should be 0.089 cfs (0.045 is the maximum authorized rate for each spring). As a result, the total maximum combined rate of diversion under both permits should be 0.151 cfs.

On page 5, the number of days of diversion in 2014 should be 123 days and the acre-feet diverted in 2014 should be 9.23 cfs. The acre-feet diverted in 2015 should be 7.27 acre-feet.

On page 6, adjusting for the amount of water diverted, the price for 16.5 acre-feet of water at \$19,554 per acre-foot would be \$322,641. In footnote 4, the Fahey's price per gallon for 16.5 acre-feet would exceed \$15,000 per acre-foot.

This does not reflect the 28 loads referenced in Mr. Hansen's January 16, 2016 e-mail.

I apologize for any confusion. An updated and corrected version of the pre-hearing brief is attached.

Sincerely,

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Attorneys for the Prosecution Team

BEFORE THE STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

**In the matter of Administrative Civil
Liability Complaint issued against G. Scott
Fahey and Sugar Pine Spring Water, LP**

Prosecution Team's Prehearing Brief

I. INTRODUCTION

The Prosecution Team for the Division of Water Rights (Division) submits this brief in support of an administrative civil liability (ACL) complaint (Complaint) and a proposed cease and desist order (CDO) against G. Scott Fahey and Sugar Pine Spring Water, LP (collectively Fahey). The Complaint (Prosecution Team Exhibit WR-1.¹) recommends an ACL of \$224,875 for the unauthorized diversion and use of water during a drought period. The proposed CDO (WR-2.) would require Fahey to cease his unauthorized diversions until the State Water Resources Control Board (State Water Board) determines there is sufficient water to support beneficial use for his priority of right.

II. BACKGROUND

A. Fahey's Water Rights

Fahey diverts water from four springs in the Tuolumne River watershed. (WR-9 at ¶ 2.) He sells wholesale to spring water companies such as Arrowhead. Fahey holds two water rights to appropriate water from sources ultimately tributary to the Tuolumne River upstream of New Don Pedro Reservoir - Permit 20784 (Application A029977) and Permit 21289 (Application

¹ Further references to Prosecution Team exhibits will be "WR-[Exhibit Number]."

A031491). (WR-9 at ¶¶ 5-8.) Fahey's permits authorize him to divert and use up to 109.32 acre-feet of water annually at up to 0.151 cfs. The springs are located on US Forest Service property. (WR-9) Fahey pipes the water to his facility, a transfer station, where bulk water trucks pick up the water and deliver it to Fahey's customers. (WR-9 at ¶5) The State Water Board has no record of Fahey holding or claiming any other water rights. (WR-9 at ¶4)

Permit 20784 has a priority date of July 12, 1991, and authorizes the direct diversion and use of water from two springs up to a total combined rate of 0.062 cfs from January 1 to December 31 of each year for Industrial Use at one or more bottled water plant(s) located off the premises. (WR-9 at ¶6) Permit 20784 prohibits Fahey from diverting more than 44.82 acre-feet per year. (*Id.*)

Permit 20784, Term 19, requires Fahey to provide exchange water to New Don Pedro Reservoir for all water diverted under the permit during the fully appropriated stream (FAS) period from June 16 through October 31 of each year.² (WR-9 at ¶18) The State Water Board included Term 19 as a condition for accepting Application A029977, because Fahey's points of diversion are within the FAS systems identified in State Water Board Orders WR 89-25 and WR 91-07. (WR-9 at ¶9) To comply with Term 19, Fahey entered into an exchange agreement with the Turlock Irrigation District and Modesto Irrigation District (Districts) on December 12, 1992 (Exchange Agreement). (WR-9 at ¶19) An exchange agreement allows the State Water Board to issue a junior appropriator to divert otherwise unavailable water under that junior appropriator's priority of right, but it does not change priorities of any parties involved. (WR-9 at ¶20) Under the Exchange Agreement, Fahey may build a surplus supply prior to a period of unavailability, but he may not carryover that supply to subsequent years. (WR-9 at ¶19) Fahey purchases exchange water from Turlock Utilities District (TUD). (WR-9 at ¶27) Under each of his purchase agreements with TUD, he loses any water he purchases if New Don Pedro Reservoir spills. (WR-72 Exhibits, pp.25-40, WR-66, pp. 6-22)

Permit 21289 has a priority date of January 28, 1994, and authorizes the direct diversion and use of water from two springs up to a combined rate of 0.089 cfs, also from January 1 to December 31 of each year for Industrial Use at one or more bottled water plant(s) located off the premises. (WR-9 at ¶7.) Permit 21289 allows Fahey to divert up to 64.5 acre-feet per year. (*Id.*) Permit 21289 lacks the Exchange Agreement term, but Fahey cannot divert under this more junior right absent an ongoing showing there is water available under the priority of the

² In Decision 995, the State Water Board determined that the Tuolumne River from Don Pedro Reservoir upstream, including all tributaries with hydraulic continuity, lacked unappropriated water from July 1 to October 31 of each year. (WR-9 at ¶12.)

right. (WR-9 at ¶23.) Fahey therefore had to agree to require an Exchange Agreement as a condition for submitting his application. (*Id.*)

Both permits include terms (Term 20 in Permit 20784 and Term 34 in Permit 21289) requiring Fahey to provide replacement water to New Don Pedro Reservoir for water diverted adverse to the prior rights of the City and County of San Francisco (San Francisco) and the Districts during the FAS period. (WR-9 at ¶28.) Both permits also include terms subjecting them to prior rights and stating that, in some years, water will not be available for diversion during parts or all of the authorized season. (WR-9 at ¶17.)

B. The State Water Board Informed Fahey There Was Insufficient Water to Support His Priority of Right

On April 1, 2015, Governor Brown issued Executive Order B-29-15 (Executive Order), finding that on-going severe drought conditions presented urgent challenges across the state, including water shortages and additional water scarcity if drought conditions persist. (WR-7 at ¶6.) The Executive Order confirmed that the orders and provisions in the Governor's previous drought proclamations and orders, the Proclamations on January 17, 2014 and April 25, 2014, and Executive Orders B-26-14 and B-28-14, remained in full force and effect. (*Id.*)

In response to the executive orders, the State Water Board assumed responsibility for determining available water supply during the 2014 and 2015 drought years. (WR-7 at ¶7.) The Division compared current and projected available water supply with the total water right diversion demand to determine the availability of water for water rights of varying priorities. (WR-7 at ¶7.) By May 27 in 2014, and April 23 in 2015, the San Joaquin River watershed lacked available supply to meet the demands of post-1914 appropriative rights such as Fahey's. (WR-7 at ¶12.) In response, the State Water Board issued several notices of shortage and unavailability, including the "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in the Sacramento and San Joaquin River Watershed with a post-1914 Appropriative Right" on May 27, 2014 (2014 Unavailability Notice) and the "Notice of Unavailability of Water and Immediate Curtailment for Those Diverting Water in The San Joaquin River Watershed With a Post-1914 Appropriative Right" on April 23, 2015 (2015 Unavailability Notice). (WR-7 at ¶¶12, 14.) These notices notified Fahey and all other junior water right holders and holders of post-1914 appropriative water rights that there was insufficient water available to support their priority of right. (*Id.*)

C. Investigation and Surveillance Concluded Fahey Was Still Diverting and Using Water

The Division's Enforcement Units started conducting compliance inspections of post-1914 appropriative water rights in the San Joaquin River watershed for 2015 shortly after the State Water Board issued the 2015 Unavailability Notice. (WR-11 at ¶¶6.) Based on inspections, telephone conversations and e-mail exchanges with Fahey, and subsequent surveillance of Fahey's transfer facility, Division staff concluded Fahey was continuing to divert water from the sources covered under his water rights and for the purpose authorized under his water rights during the period in which no water was available under his priority of right in 2015. (WR-13, WR-11 at ¶¶7-21, 25.) Staff subsequently reviewed Fahey's progress reports for 2014 and also concluded that Fahey diverted water from the sources covered under his water rights during the period in which no water was available under his priority of right in 2014. (WR-11 at ¶¶25-28.)

D. The State Water Board Issued the ACL Complaint and Subsequent Actions.

In response to the inspections and investigation by the Division staff, the State Water Board issued the Complaint. The State Water Board issued an order for additional information, Order WR 2015-0028-DWR (Information Order), with the Complaint. Fahey partly responded to the information order. As a result, the Prosecution Team subpoenaed the information pursuant to Water Code section 1080. Based on information developed from Fahey's responses to the Information Order and Subpoena, the Prosecution Team obtained additional relevant information about Fahey's diversions and activities.

III. ARGUMENT

A. FAHEY'S DIVERSION AND USE OF WATER VIOLATES HIS PERMIT TERMS AND CONDITIONS

Fahey's permits are subject to prior rights and state that, in some years water will not be available for diversion during parts or all of the authorized season. (WR-9 at ¶¶17.) The 2014 Unavailability Notice, the 2015 Unavailability Notice, and the related notices apply to Fahey's permits, because both permits are post-1914 appropriative rights within the covered geographic area. (WR-7 at ¶¶21-24.) The notices, particularly the 2014 Unavailability Notice and 2015 Unavailability Notice, informed Fahey there was insufficient water to fulfill his priority of right. (WR-7 at ¶¶22-23.)

B. FAHEY’S DIVERSION AND USE OF WATER IS A TRESPASS UNDER WATER CODE SECTION 1052

Diversion when there is no water available under the priority of the water right constitutes unauthorized water diversion and use. Unauthorized diversion is prohibited and is a trespass. (Water Code § 1052.) Fahey has illegally diverted and used water when water was not available under his priority of right. Fahey had ample notice there was insufficient water for his priority of right.

C. THE STATE WATER BOARD MAY ORDER FAHEY TO CEASE AND DESIST AND IMPOSE AN ADMINISTRATIVE LIABILITY UNDER WATER CODE SECTION 1052

The State Water Board may issue a CDO to “any person ... violating, or threatening to violate ... the prohibition set forth in Section 1052 against the unauthorized diversion or use of water subject to this division.” (Water Code § 1052, subd. (a), (d)(1).) Fahey illegally diverted and used water when water was not available under his priority of right. His ongoing operations demonstrate that he has continued to divert and use water.

D. THE PROPOSED ACL AMOUNT IS JUSTIFIED BY THE WATER CODE RELEVANT CIRCUMSTANCES

In 2014, the Legislature amended section 1052 to increase administrative civil liabilities during drought conditions, including periods when the Governor has issued a proclamation of a state of drought emergency. Water Code section 1052 now provides that the maximum civil liability that can be imposed by the State Water Board in this matter for the unauthorized diversion and use of the water during a drought period is \$1,000 for each day of trespass plus \$2,500 for each acre-foot of water diverted or used in excess of that diverter's water rights. Evidence demonstrates that Fahey's unauthorized diversions in 2014 began on May 27, 2014, and continued, with a four-day interruption, until November 18, 2014, for a total of 123 days of unauthorized diversion under each permit. (WR-11 at ¶¶34.) During that period, Fahey diverted 9.23 acre-feet of water in excess of that available to serve his permitted water. (*Id.*) Additional evidence demonstrates that Fahey diverted and used water for at least 90 days in 2015 under each permit and that, during that period, he diverted and used approximately 7.27 acre-feet of water. (WR-11 at ¶¶35, 37, 47.) As a result, the maximum ACL under Water Code section 1052

is \$467,250.³ (WR-11 at ¶¶43-47.) The Complaint recommends an ACL of \$224,875, but this additional evidence would support a higher ACL.

In determining the amount of civil liability, California Water Code section 1055.3 requires that the State Water Board consider all relevant circumstances, including, but not limited to, the extent of harm caused by the violation, the nature and persistence of the violation, the length of time over which the violation occurs, and any corrective action taken by the violator.

Fahey illegally diverted and used water during extreme drought, when there was insufficient water for rights as senior as 1903. (WR-9 at ¶32.) Fahey reduced the amount of water available for every senior water right holder downstream, including the Districts and San Francisco. He also reduced water available instream beneficial uses such as riparian habitat. (*Id.*)

Fahey derives substantial economic benefit from illegally diverting and using water. Fahey extracts spring water, a food-grade product, and sells it to commercial water bottling operations. (WR-9 at ¶¶6-7, WR-11 at ¶¶8, 39.) The spring water nearly bacteria free and requires no pumping. (WR-46) His replacement water from TUD costs only \$60 per acre-foot. (WR-72 Exhibits, pp. 38.) According to Fahey's response to the Subpoena, he made \$255,646.36 during the period the Complaint alleges he was illegally diverting and using water.⁴ (WR-72 Exhibits, p.4.) However, given advertised market rates for purchasing bulk spring water, Fahey potentially made as much as \$19,554 per acre-foot, for a potential total economic benefit of \$322,641. (WR-11 at ¶42)

The Division estimates that its staff cost to investigate the unauthorized diversion issues and develop the enforcement documents to be \$15,624. (WR-9 at ¶35.) Should the matter go to hearing, the State Water Board may consider a different liability based on the evidence received, including additional staff costs incurred, up to the maximum amount provided by law. (WR-9 at ¶36.) At the time of the Complaint, the Division estimated that additional staff costs to go to hearing at approximately \$10,000. (*Id.*) However, Fahey has inundated the Division and Prosecution Team with redundant, repetitive deposition notices and documents requests. Responding to Fahey's requests has required substantial staff time in addition to that initially contemplated at the time of the Complaint.

³ Information available at the time of the Complaint supported a maximum ACL of \$394,866, but the Prosecution Team refined the calculation based on information developed subsequently through Fahey's responses to the Information Order and Subpoena.

⁴ Based on information provided by Fahey, this would equate to over \$15,000 per acre-foot.

E. THE CEASE AND DESIST ORDER IS NECESSARY

All evidence indicates that Fahey continues to illegally divert and use water. A CDO is necessary to stop him from doing so. A strong ACL penalty is necessary to deter Fahey from illegally diverting and using water in the future and to deter other from doing so, particularly during severe drought, and particularly those who, like Fahey, profit so significantly from the amount of water they use.

IV. CONCLUSION

The Prosecution Team respectfully requests that the Board issue an ACL Order imposing liability of \$224,875, and issue a CDO as proposed.

Respectfully submitted,



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Service List

(Revised January 5, 2016)

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