



State Water Resources Control Board

NOTICE OF PUBLIC HEARING

The State Water Resources Control Board
Administrative Hearings Office
will hold a public hearing
on a proposed Cease and Desist Order
and an Administrative Civil Liability Complaint against

Lance Batistich

The **Public Hearing** will commence on

February 14, 2023 at 9:00 a.m.

and will be held by Zoom teleconference.

Please access Zoom by using the link:

<https://waterboards.zoom.us/j/92011631831?pwd=YUtZVkprRUy82SGFhRHZiekllVt2QT09>
with Meeting ID: 920 1163 1831 and Passcode: 984176
or by calling in at:
+16699009128,,92011631831#,,,,*984176# 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

On September 30, 2022, the Division of Water Rights (Division) Enforcement Section of the State Water Resources Control Board (State Water Board or Board) issued a draft cease and desist order (Draft CDO) against Lance Batistich (Respondent). On October 13, 2022, the Administrative Hearings Office (AHO) received a request for a hearing on the Draft CDO from the Respondent. On December 9, 2022, the Division Enforcement Section issued an administrative civil liability complaint (ACL Complaint) against Respondent. On December 12, 2022, the AHO received a request for a hearing on the ACL Complaint from the Respondent.

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

The Draft CDO and ACL Complaint state that the Respondent is the primary owner for the water rights identified as Statements of Water Diversion and Use, ID Nos. S025829 (Foster 603C), S025819 (Foster 614-B34), S025820 (Foster 616-B34), S025830 (Foster 617C), and S0288076 (Foster 446-7-B25), for diversions from Oro Fino Creek and Kidder Creek. The water rights associated with these statements of diversion and use were adjudicated in the Scott River Decree, No. 30662 (January 30, 1980).

2021 and 2022 Scott-Shasta Emergency Regulations

On August 17, 2021, the State Water Board adopted California Code of Regulations, title 23, sections 875 through 875.9 (2021 Scott-Shasta Emergency Regulations), which became effective on August 30, 2021.¹ On June 21, 2022, the State Water Board readopted sections 875 through 875.9 with some amendments (2022 Scott-Shasta Emergency Regulations), which went into effect on July 29, 2022. The 2021 and 2022 Scott-Shasta Emergency Regulations (collectively, Scott-Shasta Emergency Regulations) authorize the Deputy Director of the Division of Water Rights (Deputy Director) to issue curtailment orders to water right holders and claimants in the Scott and Shasta Rivers when flows are insufficient to support all diverters.

The Scott-Shasta Emergency Regulations prohibit diversion of surface water and groundwater at a diversion point or for use at a place of use that is subject to a curtailment order. (Cal. Code Regs., tit. 23, § 875, subd. (a).) The regulations authorize the Deputy Director to issue a curtailment order upon a determination that without curtailment of diversions, flows are likely to be reduced below drought emergency minimum flows for the Scott and Shasta Rivers specified in the regulations. (*Id.* at subd. (b).)

On September 10, 2021, the Deputy Director issued two curtailment orders pursuant to the Scott-Shasta Emergency Regulations: Order Imposing Water Right Curtailment, Increased Coordination, and Reporting Requirements for Adjudicated Groundwater Rights in the Scott River Watershed (Order WR 2021-0083-DWR) and Order Imposing Water Right Curtailment and Reporting Requirements in the Scott River Watershed for Water Right(s) Associated with the Parcel(s) Listed in Attachment A and not Otherwise Curtailed (Order WR 2021-0084-DWR) (collectively, Curtailment Orders). The Curtailment Orders prohibit the diversion of water from the Scott River watershed under the water rights identified in the orders or on lands identified in the orders unless an exception under the Scott-Shasta Emergency Regulations apply to the diversion and use. The Draft CDO and ACL Complaint allege that Respondent received both orders on September 14, 2021.

The Deputy Director issued numerous addenda to the Curtailment Orders starting on October 25, 2021, that partially suspended and then reinstated the Curtailment Orders. As of July 14, 2022, the Curtailment Orders applied to all rights to divert surface water

¹ Unless otherwise specified, references to section numbers in this notice refer to sections of title 23 of the California Code of Regulations.

and groundwater from the Scott River watershed that were listed in the Curtailment Orders.

On August 23, 2022, Division staff inspected the Respondent's property. Division staff observed a reservoir on the property. The Draft CDO and ACL Complaint allege that the Respondent informed Division staff that Respondent diverted water from the reservoir once per week to irrigate 47 acres of crops starting in the spring of 2022.

On September 30, 2022, the Deputy Director issued an Information Order for Water Use in the Scott River Watershed (Information Order) (Order WR 2022-0171-DWR). The Information Order required each recipient of the order to submit information about water used on the identified parcels on a Scott River Watershed Water Use Information Order Form (Information Order Form) by October 14, 2022.

Proposed Cease and Desist Order

Water Code section 1831 authorizes the State Water Board to issue a cease and desist order when the Board determines any person is violating, or threatening to violate, a regulation adopted under Water Code section 1058.5. (Wat. Code, § 1831, subd. (d)(4).)

The Draft CDO alleges that Respondent is violating or threatening to violate the Scott-Shasta Emergency Regulations by diverting and threatening to divert water when the Curtailment Orders apply to Respondent's water rights and place of use to prohibit diversions of surface water and hydraulically connected groundwater from the Scott River watershed.

The Draft CDO would order Respondent to (1) immediately cease and desist all diversions from Oro Fino Creek and groundwater that is hydraulically connected to Oro Fino Creek while the Curtailment Orders apply to prohibit diversions; (2) maintain records of all surface water diversions from the Scott River watershed; (3) maintain a working flow meter for all future diversions from the Scott River watershed.

Administrative Civil Liability Complaint

Water Code section 1846 authorizes the State Water Board to impose administrative civil liability, pursuant to Water Code section 1055, on any person or entity that violates a regulation or order adopted by the Board. Under these statutes, the Board may impose administrative civil liability in an amount not to exceed \$500 per day for each day in which the violation occurs.

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.

The ACL Complaint alleges that Respondent did not submit the Information Order Form by October 14, 2022, as required by the Information Order (Order WR 2022-0171-DWR), and had not submitted the form as of the date the Division issued the ACL Complaint.

The ACL complaint alleges that Respondent violated the Scott-Shasta Emergency Regulations, section 875.9, subdivision (b), for 55 days by failing to submit the Information Order Form pursuant to the Information Order. The ACL Complaint calculates that the maximum potential liability for the alleged violations is \$27,500 (55 days x \$500 per day of violation) and recommends the imposition of administrative civil liability in the amount of \$5,000.

PURPOSE OF HEARING AND HEARING ISSUES

The Administrative Hearings Office (AHO) of the State Water Board will hold a public hearing to receive evidence and arguments relevant to the ACL Complaint and Draft CDO. During the hearing, the hearing officer will receive evidence and arguments relevant to the following questions:

- 1) Did Respondent violate the Scott-Shasta Emergency Regulations and the Information Order for Water Use in the Scott River Watershed (Information Order) (Order WR 2022-0171-DWR) by failing to submit a Scott Watershed Information Order Form about water use on parcels identified in the Information Order, by October 14, 2022?
- 2) If Respondent violated the Scott-Shasta Emergency Regulations and the Information Order, should the Board impose administrative civil liability? If so, what is the appropriate amount for such administrative civil liability?
- 3) Is Respondent violating or is Respondent threatening to violate the Curtailment Orders (Order WR 2021-0083-DWR or Order WR 2021-0084-DWR)?
 - a. Did Respondent divert surface water or groundwater from the Scott River watershed while the Curtailment Orders applied to Respondent's water rights or property?
 - b. Is Respondent threatening to divert surface water or groundwater from the Scott River watershed while the Curtailment Orders apply to Respondent's water rights or property?
- 4) If Respondent is violating or threatening to violate the Curtailment Orders, should the State Water Board issue a cease and desist order under Water Code section 1831? If so, what provisions should be in the order?

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 uses the State Water Board's File Transfer Protocol (FTP) site to make AHO administrative record files available to interested parties and the public. 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 Folder."

To access the AHO-FTP download folder, please submit an e-mail request to the AHO at AdminHrgOffice@Waterboards.ca.gov with "Request for AHO ftp password" in the subject line. After receiving the e-mail request, the AHO will send a reply e-mail with a password to access the download account. It is not necessary to include any other parties in the cc line for such an e-mail request.

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.

HEARING OFFICER AND HEARING TEAM

Nicole Kuenzi, 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 AND 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 adminhrgoffice@waterboards.ca.gov or by letter to the AHO and serve all other parties with copies of the communication.² The party shall include a proof of service through a formal proof of service or by other verification.³

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, § 1110, subd. (c); Gov. Code, §§ 11430.10-11430.80.)⁴

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/

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.

² The AHO's mailing addresses are provided in Item 6, below.

³ 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.

⁴ 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.

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.

DEADLINES FOR HEARING PARTICIPATION

Deadline for filing and service of any submittals of proposed testimony or exhibits before the hearing (optional)	February 7, 2023, 12:00 pm
Hearing date and time	February 14, 2023, 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. PARTY STATUS AND POLICY STATEMENTS BY INTERESTED PERSONS: Respondent 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).) A person or entity that has not been identified as a party in this notice that wants to participate as a party in this hearing must file a request with the AHO no later than **February 7, 2023**. The person or entity shall include information demonstrating good cause as to why the hearing officer should allow the person or entity to participate in the hearing as a party rather than as an interested person presenting a policy statement.

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 EXHIBITS: Submission of exhibits and written testimony before the hearing is optional. 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. The AHO will provide each party a unique account to upload the party's documents for this hearing approximately one week before the deadline to file exhibits. These accounts are referred to in this hearing notice as the "Parties' Upload Folders." 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 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 the Download 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 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 serve its exhibits on the other parties by mail by the optional exhibit filing deadline specified in this notice.

The party may mail 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

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 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 60 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.
- d. **Closing statements (5 minutes per party)**

8. HEARING LOGISTICS: Parties should participate in the hearing by both audio and video through the Zoom meeting link if possible. If this is not possible, then the hearing officer will accept audio-only participations.

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 a file of the recording 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.

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 on 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 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.

January 5, 2023
Date

/s/ Nicole L. Kuenzi
Nicole L. Kuenzi
Hearing Officer

Enclosures:

- Exhibit Identification Index
- Service List

SERVICE LIST

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