

## Errata Sheet

[Proposed deletions to quoted text displayed in strikethrough, proposed additions displayed in double-underline]

Page 4; first full paragraph: “Fahey’s permits allow him to pre-position replacement water for his non-FAS Period diversions in NDPR ~~and do not prohibit replacement water credit from being carried over from year to year~~, while the Water Exchange Agreement requires him to provide MID and TID’s FAS Period make-up water to NDPR during the same year that he diverts.”

Page 5; second full paragraph: “Fahey raised three affirmative defenses to unlawful diversion. First, Fahey argues that he delivered water to NDPR between 2009 and 2011 for the Interveners. ~~This argument succeeds for Fahey’s non-FAS Period diversions. Fahey’s diversions, within the scope of the hearing, appear to have been adverse to MID and TID’s pre-1914 claim of right at La Grange Dam downstream from NDPR. Evidence in the record indicates that Fahey had approximately 33.99 acre-feet of non-FAS Period replacement water available in NDPR if called for by the Interveners. Unlike the FAS Period, Fahey’s permits do not prohibit him from carrying replacement water over from year to year to compensate MID and TID for his non-FAS Period diversions. (See PT-15, pp. 6–7, ¶ 20; PT-16, pp. 9–10, ¶ 34.) Accordingly, this order finds that Fahey has complied with permit terms obligating him to provide replacement water to the Interveners for non-FAS Period diversions in 2014 and 2015 adverse to their rights and, separately, that his compliance establishes a defense to unlawful diversion during the portion of the non-FAS Period when water was not available under his priority of right in this case.~~”

**Pages 47-48:** strike second full paragraph of section 5.1.4.1 (immediately following list of bullet points) after the first sentence. Strike paragraphs 3 and 4. Add new text to revised paragraph 2, to read: Fahey, the Interveners, and the Prosecution Team submitted supplemental briefs before the April 10, 2019 deadline. On September 17, 2019, the State Water Board directed staff to resolve issues raised in the supplemental briefs on an alternative ground, consistent with public comment from the parties at a Board meeting. This mooted the issue of whether Fahey’s permits allow carryover credit for non-FAS Period replacement water.

**Pages 49-57:** Strike sections 5.1.4.2 through 5.1.4.4 in their entirety.

**Pages 57-58:** Renumber section 5.1.4.5 as section 5.1.4.2. Strike paragraph 1, paragraph 2 (block quote and citation), and paragraph 3. revise paragraph 5 as follows: ~~The State Water Board does not believe that Fahey’s non-FAS Period diversions were unlawful for the reasons stated above in section 5.1.4.4 and below in sections 5.2.3.2, 5.3.1.1, and 5.3.1.2. The State Water Board does not believe that Fahey’s non-FAS Period diversions were unlawful for the reasons stated above in section 5.1.4.4 and below in sections 5.2.3.2, 5.3.1.1, and 5.3.1.2. At the same time, t~~The Prosecution Team’s arguments in support of setting administrative civil liability that disgorges the economic benefit obtained from a violation are compelling. Good cause exists to incorporate this analysis into section 7.1.2.1.

**Pages 76-77:** ~~“Even if Fahey’s failure to fully comply with his reporting obligations did prevent the Interveners from detecting the need to call for replacement water, evidence in the record demonstrates that Fahey had sufficient replacement water credits to cover non-FAS Period diversions in 2014 and 2015, as is more fully explained below in section 5.3.1.”~~

**Pages 80 to 85:** Strike section 5.3.1.1 in its entirety. Renumber section 5.3.1.2 as section 5.3.1.1.

**Page 89-90:** Strike sentences 3 through 6 and replace with new text, to read: As noted above in section 5.2.3.2, Fahey did not receive allegations that his non-FAS Period diversions were unlawful until the Prosecution Team issued a draft CDO and an ACL Complaint on September 1, 2015. Under Permit 20784, the notification of the need for replacement water must be made by one of the Interveners, while Permit 21289 requires that CCSF must provide the notice. Having never received a qualifying call for replacement water, Fahey could not be faulted under Water Code section 1052 if he failed to provide it during the non-FAS Period in 2014 and 2015. As a consequence, consistent with section 5.1.4.1, there is insufficient information to conclude that Fahey unlawfully diverted water during this period. For the foregoing reason, the State Water Board finds that there is not sufficient evidence in the record to support a finding that Fahey diverted water during the non-FAS Period when water was not available to serve his priority of right and in violation of his permit terms in a manner that rises to a violation of section 1052 of the Water Code. Consequently, there is no need to address Fahey’s defenses that he pre-positioned water in NDPR in 2009 and 2011 sufficient to meet his non-FAS replacement water obligations since the notice required to invoke his obligation to provide replacement water never arose.

**Pages 90-91:** Re-number section 5.3.1.3 to 5.3.1.2. Revise the first sentence of paragraph 3 of renumbered section 5.3.1.2 to read: ~~Unlike non-FAS Period replacement water under Term 20 and Term 34, “m~~Make-up” water owed to MID and TID for diversions during the FAS Period cannot be carried over from year to year. (PT-19, p. 2, ¶ 4.)

**Page 114:** first full paragraph: ~~“The Board also found that about 33.99 acre-feet were still available if called upon to meet non-FAS Period replacement water requirements.”~~

**Page 124:** revise section I.G.2. of the ordering section as follows:

Describe measures sufficient to ensure that Fahey does not divert adverse to downstream legal users of water other than MID or TID during the FAS Period, when water is otherwise unavailable to serve Fahey’s priority of right, or both. These measures may include: (1) ceasing diversion; (2) operating under a valid water transfer agreement with a senior water rightholder to whom water is available at the time of Fahey’s diversions that authorizes Fahey to divert and use water under the transferor’s water right; or (3) operating under a valid exchange agreement that provides replacement water to affected senior water rightholders to whom water is available at the time of Fahey’s diversions while preventing injury to all other legal users of water downstream of Fahey’s points of diversion authorized under Permits 20784 and 21289. For the purposes of determining whether a particular water transfer agreement or exchange

agreement meets the requirements of this section, the State Water Board will consider the fully appropriated stream determinations described in Order WR 91-07 and Order WR 98-08, as they may be amended. Fahey shall provide a copy of any executed water transfer or water exchange agreement to the Division of Water Rights.

~~—These measures may include ceasing diversion, providing water from a transferor, or such other measures as Fahey and the owner of the downstream senior claim of right may mutually agree and memorialize in a written instrument that is signed by all parties. Fahey may satisfy this obligation for claims of right in the Sacramento-San Joaquin Delta (Delta) downstream of the confluence of the San Joaquin River and Middle River by identifying a cumulative estimate of lawful diversion demand in the Delta, in situations when water is not available for the most senior water right upstream of the confluence of the San Joaquin River and Middle River.~~

**Page 127:** add a new section IV. to the ordering section, to read:

The State Water Board encourages Fahey to work with MID, TID, and CCSF to address the administration of replacement water deliveries pursuant to Term 20 of Permit 20784 and Term 34 of Permit 21289.