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**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**

**Opposition to G. Scott Fahey and Sugar  
Pine Spring Water, LP's Motion to Compel  
Document Disclosures**

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**I. INTRODUCTION**

The Prosecution Team opposes the Motion to Compel Document Disclosure (Motion) filed by G. Scott Fahey and Sugar Pine Spring Water, LP (collectively "Fahey"). The Motion seeks duplicative, irrelevant discovery and is overbroad, burdensome, and oppressive.<sup>1</sup> Worse, it seeks work product and documents protected by attorney-client privilege. The Prosecution Team requests that the Hearing Officers deny Fahey's request or, in the alternative, issue a protective order limiting disclosures to documents that are relevant non-privileged documents that have not already been disclosed or otherwise made available. Granting Fahey's request would impose a significant burden on the State Water Resources Control Board (State Water Board) and significantly harm its ability to effectively pursue both the present enforcement action

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<sup>1</sup> Fahey filed an opposition to the Prosecution Team's motions for protective orders and, in the alternative, motions to quash depositions. Fahey also moved to compel depositions and document disclosures from Katherine Mrowka, David LaBrie, the Person Most Knowledgeable, and the Samuel Cole. On December 21, 2015, the Hearing Officers issued a partial ruling on Fahey's motion. They denied Fahey's motion to compel depositions, but allowed the Prosecution Team to file an opposition to Fahey's motion to compel document disclosures. The Hearing Officers also granted the Prosecution Team's motion on the condition that the Prosecution Team identifies the Person Most Knowledgeable. Pursuant to the Hearing Officers' ruling, the Prosecution Team designated Ms. Mrowka as the Person Most Knowledgeable. The Prosecution Team's Person Most Knowledgeable designation is available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/fahey\\_ptdesignat ion\\_personmostknowledgeable122215.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/fahey_ptdesignat ion_personmostknowledgeable122215.pdf).

and, potentially, future enforcement actions as well.

## II. BACKGROUND

### A. Initial Disclosures

The Prosecution Team has disclosed or otherwise made available every document Fahey has requested to the extent those documents were not privileged or represented attorney work product. (Decl. of Andrew Tauriainen in Support of Prosecution Team's Motion for Protective Order or, Alternatively, Motion to Quash, pp. 1-2 (Dec. 10, 2015)<sup>2</sup>.) Those disclosures have included –

- On October 28, 2015, Andrew Tauriainen, then-lead counsel for the Prosecution Team, sent a series of emails to Sharon Buckenmeyer and Diane Kindermann, of the law firm Abbott & Kindermann, Fahey's counsel. (*Id.* at ¶ 2.) The emails included pdf attachments of the non-privileged portions of the Prosecution Team's investigative files in the Fahey matter, including inspection reports, curtailment notices, and correspondence. (*Id.*) This included all Mr. Tauriainen also provided instructions for obtaining copies of digital surveillance video files, which were too large to email. (*Id.*)
- On November 13, 2015, Mr. Tauriainen, responded to an e-mail from Mr. Glen Hansen, of the Abbott & Kindermann law firm, indicating that Mr. Hansen had obtained and reviewed copies of the Permit Files for Fahey's Permits A02997 and A031491. (*Id.* at ¶ 3.) On the same day Mr. Tauriainen responded to Mr. Hansen and included copies of three additional documents identified in the file following the October 28, 2015, voluntary disclosure. (*Id.*)
- On November 20, 2015, Mr. Tauriainen participated in and was copied on a series of emails from Dan Cucchi, of the Abbott & Kindermann law firm, regarding the process to obtain copies of the digital surveillance video footage from the State Water Board's Records Unit. (*Id.* at ¶ 4.) From those emails, Mr. Tauriainen was informed and on that basis believed that Mr. Cucchi travelled to the Records Unit and obtained copies of the digital surveillance video files on November 20, 2015. (*Id.*)

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<sup>2</sup> As much of this information has been discussed in previous discovery motions, the Prosecution Team will refer to prior motions and declarations in the interest of avoiding repetition. The Prosecution Team's Motion for Protective Order or, Alternatively, Motion to Quash and Mr. Tauriainen's supporting declaration is available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/faheaclcd0\\_pt\\_mtion2quashpo121015.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/faheaclcd0_pt_mtion2quashpo121015.pdf).

## **B. Fahey's Duplicative Written Requests for Document Disclosures**

On December 1, 2015, Fahey sent Kenneth Petruzzelli, lead counsel for the Prosecution Team, a request for production for nine categories of documents. (Decl. of Kenneth Petruzzelli in Support of Motion for Protective Order or, Alternatively, Motion to Quash, ¶ 2 (Dec. 10, 2015)<sup>3</sup>.) The categories included –

1. Any and all documents that support the Administrative Civil Liability Complaint in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP, dated September 1, 2015 ("ACL").

4. Any and all documents contained in the Permit Files for Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491), for the time period of January 1, 2012 to the present, including, but not limited to, curtailment notices and all related documents, Board staff notes and correspondence, and water use and/or diversion reports.

8. Any and all documents relating to any and all phone conversations and written communications between David LeBrie and Scott Fahey that occurred or were sent or received in the months of June, July and August 2015 regarding the following:

- (a) Water Right Permit 20784 (Application A029977);
- (b) Water Right Permit 21289 (Application A031491);
- (c) Any and all curtailment notices regarding Water Right Permit 20784 and Water Right Permit 21289 (Application A031491).

9. Any and all documents relating to any and all correspondence and communications between Sam Cole and David LeBrie, between June 1, 2015, and September 30, 2015, regarding the following:<sup>4</sup>

- (a) Water Right Permit 20784 (Application A029977);
- (b) Water Right Permit 21289 (Application A031491);
- (c) Any and all curtailment notices regarding Water Right Permit 20784 and Water Right Permit 21289 (Application A031491);
- (d) Cease and Desist Order in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP;
- (e) Order for Additional Information, Order WR 2015-0028-DWR, in the matter of Unauthorized Diversion by G. Scott Fahey and Sugar Pine Spring Water LP; and/or
- (f) The ACL.

(*Id.*)

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<sup>3</sup> The Prosecution Team's Motion for Protective Order or, Alternatively, Motion to Quash, Mr. Petruzzelli's supporting declaration, and the attachments to Mr. Petruzzelli's supporting declaration are available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/faheaclcd0\\_pt\\_mtion2quashpo121015.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/faheaclcd0_pt_mtion2quashpo121015.pdf).

<sup>4</sup> Fahey's counsel subsequently amended this request to also include correspondence between Mr. LaBrie, Mr. Cole, and third persons.

Mr. Petruzzelli responded to Fahey's December 1, 2015 letter on December 8, 2015. (*Id.* at ¶ 4, Attachment 3.) Of the four categories, everything that was not privileged or work product had already been disclosed, had otherwise been made available, or would be made available on December 16, 2015. (*Id.*) Of the other five categories, the Prosecution Team provided a website link and explanation for one and concluded the remaining four categories were not relevant to the Fahey proceeding and, consequently, more appropriately addressed through a request for public records.<sup>5</sup> (*Id.*)

With regard to the e-mails, Mr. Petruzzelli sent every e-mail David LaBrie and Sam Cole had that responded to Fahey's request that were not privileged. (*Id.*) Since the Division's record retention policy only requires e-mail retention for 90 days few remained. (*Id.*) Since Fahey also asked for e-mails sent from Mr. LaBrie and Mr. Cole to third parties, Mr. Petruzzelli inquired with the managerial staff since they retain e-mail longer. (*Id.*) If Mr. Petruzzelli found anything that was not privileged he sent it to Fahey. (*Id.*) Mr. Petruzzelli also included the Division's record retention policy in his response (Declaration of Kenneth Petruzzelli in Support of Motion for Protective Order or, Alternatively, Motion to Quash, at ¶3, see *also* Attachment 3 (Dec. 10, 2015).)

Under the Division's record retention policy, Division staff retains "transitory" e-mail communications for 90 days after that e-mail has served its purpose. (Declaration of Kenneth Petruzzelli in Support of Opposition to G. Scott Fahey and Sugar Pine Spring Water, LP's Motion to Compel Document Disclosures, Att. 1 at p. 6 (Dec. 31, 2015).) "Transitory e-mail" consists of e-mail messages "created primarily communication of informal information as opposed to the perpetuation or formalization of knowledge." (*Id.*) E-mail communications that have "official record status" are retained for the same period as the subject matter they most closely match. (*Id.*) For water right investigations, the Division retains investigation files for 50 years after they are no longer active (*Id.* at p. 4.) If an e-mail communication was not a transitory e-mail constituted an "official record" and went in the investigation file, the Division retained it, and the Division did not delete it. Fahey received these e-mail communications with the rest of the investigation file.

Fahey submitted a request for public records for the same documents on December 7, 2015. Declaration of Kenneth Petruzzelli in Support of Motion for Protective Order or,

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<sup>5</sup> Specifically, the Prosecution Team provided a website link for the State Water Board's water availability analysis for category 7. The Prosecution Team treated categories 2, 3, 5, and 6 and requests for public records and addressed these matters in its December 9, 2015 response to Fahey's December 7, 2015 request for public records. (*Id.* at ¶¶ 2-5, Attachments 3-4.) Categories 2 and 3 sought documents related to the curtailment certifications. With regard to the curtailment certifications, Fahey's Motion sought orally depose the Person Most Knowledgeable, but did not seek to compel disclosure of any related documents.

Alternatively, Motion to Quash, at ¶3, see *also* Attachment 3 (Dec. 10, 2015).) Mr. Petruzzelli responded to the request on December 9, 2015. (*Id.* at ¶ 5, Attachment 4.)

**C. Fahey Notices Deposition and Demands Production of Privileged Documents**

On December 9, 2015, Fahey served notices of deposition and requested the production of documents from David LaBrie and Katherine Mrowka. The Prosecution Team's Notice of Intent to Appear has Mr. LaBrie and Ms. Mrowka listed as expert witnesses for its case in chief.<sup>6</sup> The deposition notices were identical, with each requesting -

1. All DOCUMENTS utilized or relied on to create, formulate or prepare your written testimony, conclusions, reports and/or opinions in this matter.
2. All DOCUMENTS constituting or relating to correspondence between YOU and Fahey and/or between YOU and Fahey's agents, employees or representatives.
3. All DOCUMENTS constituting or relating to correspondence (including, but not limited to, letters and emails) from YOU, and to YOU, relating to Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491).

(Fahey Notice of Deposition of David LaBrie and Request for Production of Documents, p. 2 (Dec. 9, 2015) (*emphasis added*); Fahey Notice of Deposition of Katherine Mrowka and Request for Production of Documents, p. 2 (Dec. 9, 2015).)

The notices used an expansive definition of "documents," which included "all written, recorded, or graphic materials, however produced or reproduced, *whether or not privileged*, pertaining in any way to the subject matter of this action..." (*Id.*, *emphasis added*) Each notice provided that "If any requested DOCUMENT or thing cannot be produced in full, it shall be produced to the extent possible, indicating what DOCUMENT or portion of DOCUMENTS are being withheld and the reason such DOCUMENTS are being withheld." (*Id.*) The Prosecution Team, finding these notices duplicative, oppressive, and burdensome, responded with a Motion for Protective Order or, Alternatively, Motion to Quash on December 10, 2015.<sup>7</sup>

Then, on December 10, 2015, Fahey served a notice of deposition and request for production of documents from Samuel Cole, requesting

"All DOCUMENTS constituting or relating to correspondence (including, but not limited to, letters and emails) from YOU, and to YOU, relating to

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<sup>6</sup> The Prosecution Team's Notice of Intent to Appear, submitted November 5, 2015, is available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/faheyaclcd0\\_noi\\_ptrevised110515.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/faheyaclcd0_noi_ptrevised110515.pdf).

<sup>7</sup> The Prosecution Team's Motion for Protective Order or, Alternatively, Motion to Quash is available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/faheaclcd0\\_pt\\_mtion2quashpo121015.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/faheaclcd0_pt_mtion2quashpo121015.pdf).

Water Right Permit 20784 (Application A029977) and Water Right Permit 21289 (Application A031491 ).<sup>8</sup>

(Fahey Notice of Deposition of Samuel Cole and Request for Production of Documents, p. 3 (Dec. 10, 2015).)

Mr. Cole's deposition notice did not request any privileged documents, but similarly stated that if the Prosecution Team does not produce any document in whole or in part that the Prosecution Team must indicate the document or portion of the document it is withholding and the reason for withholding that document or portion of that document. (*Id.* at pp. 2-3.) The Prosecution Team responded to the deposition notice for Mr. Cole and the Person Most Knowledgeable with a request to broaden its motion for a protective order on December 11, 2015.<sup>9</sup>

#### **D. The Prosecution Team Submits Evidence for Its Case in Chief**

On December 16, 2015, the Prosecution Team submitted witness testimony and other evidence supporting its case in chief. The witness testimony includes statements from Ms. Mrowka, Mr. LaBrie, and Mr. Cole. (Declaration of Kenneth Petruzzelli in Support of Opposition to G. Scott Fahey and Sugar Pine Spring Water, LP's Motion to Compel Document Disclosures, at ¶ 2 (Dec. 31, 2015).) Their statements include citations to exhibits that were included with the evidence the Prosecution Team submitted. (*Id.*) They also include e-mail correspondence and contact reports.<sup>10</sup> (*Id.*) Other than materials such as maps and summary tables that were prepared specifically for the hearing, all of the Prosecution Team's exhibits have previously been disclosed to Fahey, previously made available to Fahey, or disclosed by Fahey. (*Id.*) Fahey has all of the evidence the Prosecution Team will use to support its case in chief, in addition to all of the evidence Ms. Mrowka, Mr. LaBrie, and Mr. Cole used to develop their testimony. (*Id.*)

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<sup>8</sup> Fahey also served a Notice of Deposition for the Person Most Knowledgeable with regard to various matters involving the curtailment forms, but unlike the others this deposition notice did not request the production of any documents. (Fahey Notice of Deposition of Person Most Knowledgeable, p. 2 (December 10, 2015).)

<sup>9</sup> The Prosecution Team's request to broaden its motion for protective order is available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/docs/faheyacldo\\_pt\\_moroprotectquash120915.pdf](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/docs/faheyacldo_pt_moroprotectquash120915.pdf).

<sup>10</sup> Such exhibits include the Exhibit WR-48, "LaBrie email to Fahey June 12, 2015 re Fahey Water Rights," Exhibit WR-51, "Email exchange between Sam Cole and CDPH re Fahey diversion operations, Dated July 29, 2015," Exhibit WR-52, "Contact report following telephone conversation on August 12, 2015."

### III. ARGUMENT

#### A. Rules of Evidence in State Water Board Adjudicative Proceedings

State Water Board adjudicative proceedings incorporate certain elements of the Code of Civil Procedure, Evidence Code, and Administrative Procedures Act, but differ in important respects. For the State Water Board, an “adjudicative proceeding” means “an evidentiary hearing for determination of facts pursuant to which the State Board or a Regional Board formulates and issues a decision.” (23 Cal. Code Regs., tit. 23, § 648, subd. (a).) Except as otherwise provided, all adjudicative proceedings before the State Water Board shall be governed by regulations in title 23, chapter 1.5 of the Code of Regulations, chapter 4.5 of the Administrative Procedure Act (commencing with section 11400 of the Government Code), sections 801-805 of the Evidence Code, and section 11513 of the Government Code. (Cal. Code Regs., tit. 23, § 648, subd. (b).) Each party has the broad right to cross-examine any opposing witness on any relevant matter, including any relevant matter not covered by direct examination. (Govt. Code, § 11513 subd. (b).)

The State Water Board is not required to conduct adjudicative hearings according to technical rules relating to evidence and witnesses. (Govt. Code, § 11513 subd. (c).) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely on in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions. (*Id.*) The rules of privilege shall also be effective to the extent that they are otherwise required by statute to be recognized at the hearing. (Govt. Code, § 11513 subd. (e).) Regardless, the presiding officer has discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time. (Govt. Code, § 11513 subd. (f).)

#### B. The Discovery Sought is Duplicative, Has Already Been Provided, and Fahey May Obtain the Additional Discovery Sought Through Less Burdensome Means

State Water Board adjudicative proceedings incorporate certain sections of the Civil Discovery Act, particularly with respect to issuing subpoenas and noticing and conducting depositions (Title 4 [commencing with Section 2016.010] of Part 4 of the Code of Civil Procedure). (See generally Wat. Code § 1100; Gov. Code § 11400 et seq.; Cal. Code Regs., tit.23, §§ 648, 648.4.) However, the scope of discovery shall be limited if the burden, expense, and intrusiveness of that discovery outweighs the likelihood of discovering admissible evidence.

(Cal. Code Civ. Proc., § 2017.020, subd. (a).) To that end, a Hearing Officer may issue a protective order prohibiting or limiting depositions in order to protect a party or deponent from undue burden and expense. (*Id.*, § 2025.420, subd. (b).) A Hearing Officer may also issue a protective order if the discovery sought would be “unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive.” (*Id.*, § 2019.030, subds. (a) & (b).) Finally, a Hearing Officer may issue a protective order to protect a person served with a subpoena or subpoena *duces tecum* from unreasonable or oppressive demands. (Gov. Code § 11450.30.)

Responding to Fahey’s document requests, particularly the duplicative requests and those lacking relevance, has already proved burdensome and time consuming for the Prosecution Team and for the Division. The Prosecution Team has provided all of the non-privileged documents Fahey has requested. The Prosecution Team has also provided Fahey with the non-privileged portions of the investigative file, which includes all e-mail records relevant to the investigation.

The Prosecution Team has also submitted all of the evidence it intends to rely on to support its case in chief. This includes documents subject to disclosure that Mr. LaBrie, Ms. Mrowka, and Mr. Cole relied on and considered in developing their testimony. These exhibits include relevant e-mail, contact reports, and other correspondence that Division staff retained in the investigation file for potential future enforcement action. (See Prosecution Team Exhibit Identification Index and Exhibits WR-48, 51, 52<sup>11</sup>.) The State Water Board’s regulations give Fahey broad scope in cross-examination and allow him to cross-examine Mr. LaBrie, Ms. Mrowka, and Mr. Cole about any other relevant matter, including any relevant matter not covered by direct examination. Aside from anything covered by attorney-client privilege, attorney work product privilege, or other privileges, this includes all of the e-mail communication and every other document and piece of information Fahey seeks. Fahey therefore has less burdensome means available to obtain the discovery he seeks and, on that basis, the hearing officer should deny Fahey’s motion.

**C. The Motion Seeks Documents Protected By Attorney-Client Privilege and Attorney Work Product Privilege**

State Water Board adjudicative proceedings are not criminal or civil proceedings and, consequently, do not operate pursuant to the strict rules of evidence and witnesses. (Govt.

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<sup>11</sup> The Prosecution Team’s Exhibit List and exhibits are available at the Hearing website at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/exhibits.shtml](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/exhibits.shtml).



Code, § 11513 subd. (e). Still, privileges are effective to the extent that they are otherwise required by statute to be recognized at the hearing. (Govt. Code, § 11513 subd. (e).) Attorney-client privilege and attorney work product privilege, which include work produced by an attorney's agents and consultants, as well as the attorney's own work product, are both recognized by statute and protected. (Evid. Code § 950 *et seq.*; Code. Civ. Proc. § 2018.030; *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911.) A party is not entitled to discovery of privileged matters. (Code Civ. Proc., § 2017.010.) Rather, the party seeking discovery has the burden to provide evidence, set forth specific facts, and show a matter is relevant and not privileged. (*Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 223-224 (as modified (Mar. 7, 1997).))

Fahey asserts that, that, because the Prosecution Team's Notice of Intent to Appear designates Mr. LaBrie, Mr. Cole, and Ms. Mrowka as "experts," that it now much disclose privileged material. Fahey argues disclosing otherwise privileged material is necessary, because the only potentially relevant e-mails that have not been deleted are privileged. However, since Fahey uses a very broad definition of "document," the request encompasses much more than just staff e-mail. As support, Fahey cites Evidence Code section 721, subd. (b)(1). However, Evidence Code section 721, subd. (b)(1) does not apply in State Water Board adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (b).)

Fahey also relies on *People v. Combs*, (1974) 34 Cal. 4th 821, 862. However, the holding in *Combs* relied on sections of the Evidence Code that do not apply in adjudicative proceedings conducted under the Administrative Procedures Act or even by the State Water Board. The facts were also different. In *Combs*, the prosecutor sought to cross-examine the defense expert about a report that the defense counsel had previously disclosed to the prosecutor without asserting any privilege. The prosecutor could cross-examine the defense expert about the report not just because the expert considered the report in forming his expert opinion, but also because the defense counsel waived the report's confidentiality by failing to assert the report was privileged when he disclosed it. (Evid. Code §912.) Fahey, by comparison, demands the Prosecution Team produce material the Prosecution Team has never disclosed and has refused to do so because those materials are privileged.

Agency staff qualify as experts where the type of analysis at issue is their business. (*Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 413.) State Water Board staff who appear as witnesses in adjudicative proceedings, appear in the course of their duties and as a consequence of the expertise they have through their personal knowledge, training, experience, and skills. In this role, they provide both percipient and expert testimony that the

State Water Board may rely on in reaching decisions. (*Center for Biological Diversity v. California Department of Forestry and Fire Protection* (2014) 232 Cal.App.4th 931, 948; *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 900.) This is necessary to help the Hearing Officers understand complex issues and provide testimony to support findings based on substantial evidence. (*Phelps v. State Water Resources Control Bd.* (2007) 157 Cal.App.4th 89, 99; *Browning-Ferris Industries v. City Council* (1986) 181 Cal.App.3d 852, 866; *Coastal Southwest Dev. Corp. v. California Coastal Zone Conservation Com.* (1976) 55 Cal.App.3d 525, 535-536; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1417 [43 Cal.Rptr.2d 170, 210], *as modified* on denial of reh'g (Aug. 17, 1995); Cal. Code Civ. Proc. §1094.5, subd. (c).)

Evidence Code requirements for an expert witness to disclose materials considered in forming an opinion have nothing to do with whether a party designates that person as an expert. (Evid. Code § 721, subd. (b).) Rather, the focus is whether that witness qualifies as an expert and presents an expert opinion. (*Id.*) In civil and criminal proceedings, a witness can qualify as an expert in the course of a hearing under direct examination and on cross-examination regardless of whether a party designates that witness as an expert prior to the hearing. (Evid. Code §720, subd. (b).) Given the latitude permitted in cross-examining witnesses in State Water Board adjudicative proceedings and the expertise State Water Board staff bring as an inherent part of their roles, it is too easy for opposing parties to qualify a State Water Board witness as an expert on cross-examination. Under Fahey's reasoning, the State Water Board would then lose any right to attorney-client privilege. Even if the State Water Board ceased listing staff as experts it would still effectively lose its right to attorney-client privilege, because opposing parties would simply use the tactic of qualifying State Water Board witness as experts through cross-examination and then continue with questioning about otherwise privileged material. The State Water Board would not only lose its right to attorney client privilege, it would also lose its right to effective legal counsel. The line, if one exists, is too fine. Adopting Fahey's reasoning, especially given the potential for parties in future adjudicative proceeding to rely on it, would eviscerate the ability of the Office of Enforcement to provide effective assistance of counsel and destroy the State Water Board's ability to conduct any enforcement. The Prosecution Team therefore urges great caution on the Hearing Officers' part in entertaining this argument from Fahey.

State Water Board adjudicative proceedings are not civil or criminal proceedings. They use difference procedures and different rules of evidence and witnesses. A witness offering an expert opinion does not then waive privileges and is not required to subsequently divulge

otherwise privileged material, including privileged communications with counsel and attorney work product, upon cross-examination, at deposition, or in response to a subpoena. Imposing this requirement on the Prosecution Team and its witnesses would prove devastating, not just for the Prosecution Team's case against Fahey, but for all future enforcement actions by the State Water Board. The Prosecution Team therefore urges the Hearing Officers to deny Fahey's demand for the Prosecution Team to disclose privileged documents.

#### **IV. CONCLUSION**

The Hearing Officers should deny Fahey's motion to compel document disclosures. Fahey's request is repetitive, duplicative, and burdensome. Fahey demands that the Prosecution Team disclose privileged material, but the laws and regulations governing State Water Board adjudicative proceedings do not require such disclosures from expert witnesses. Fahey's demand for privileged material would be so prejudicial it would destroy the State Water Board's ability to prosecute the case against Fahey. It would also set a precedent destroying State Water Board's ability to prosecute any future cases. Fahey already has the investigation file and the permit file. The Prosecution Team has submitted all of the evidence it plans to use to support its case in chief, including everything Mr. LaBrie, Ms. Mrowka, and Mr. Cole considered in developing their testimony. Fahey has more than enough opportunity for discovery through cross-examination at the hearing.

Respectfully submitted,



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Attorney for the Prosecution Team

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**(Revised 11/30/15)**

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**Declaration of Kenneth Petruzzelli in  
Support of Opposition to G. Scott Fahey  
and Sugar Pine Spring Water, LP's Motion  
to Compel Document Disclosures**

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I, Kenneth Petruzzelli, declare as follows:

1. I am an Attorney III (Specialist) with the State Water Resources Control Board's Office of Enforcement. I have been a practicing attorney since 2003, California Bar No. 227192. I joined the Office of Enforcement in 2015. I have represented the Prosecution Team as lead counsel in the matter of the Administrative Civil Liability Complaint and Draft Cease and Desist Order issued against G. Scott Fahey and Sugar Pine Spring Water, LP (Fahey or Defendant) since about November 17, 2015, when I replaced Andrew Tauriainen. Mr. Tauriainen still serves as co-counsel in the matter.
2. On December 16, 2015, I submitted the Prosecution Team's pre-hearing brief and all of the evidence it intends to rely on to support its case in chief. The Prosecution Team's exhibits are available at [http://www.waterboards.ca.gov/waterrights/water\\_issues/programs/hearings/fahey/exhibits.shtml#prosecution](http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/fahey/exhibits.shtml#prosecution).
3. To the best of my knowledge and recollection, everything included in the Prosecution Team's exhibits has already been disclosed, otherwise made available to Fahey's attorneys, or disclosed to the Prosecution Team by Fahey in response to Information Order WR 2015-0028-DWR or in response to the Prosecution Team's subpoena. See Prosecution Team Exhibit WR-3 for a true and correct copy of Information Order WR 2015-0028-DWR and exhibits WR-65 through WR-69. See Prosecution Team Exhibit WR-70 for a true and correct copy of the subpoena and WR-72 for a true and correct copy of Fahey's response to the subpoena.

Declaration of Kenneth Petruzzelli  
G. Scott Fahey and Sugar Pine Spring Water, LP  
ACLIC and Draft CDO

4. To the best of my knowledge and recollection, the only exhibits not previously disclosed, otherwise made available, or disclosed by the Prosecution Team to Fahey are items that were still incomplete at the time of Fahey's requests, such as David LaBrie's Report of Investigation (Exhibit WR-61), and items prepared specifically for the hearing to summarize and assist in understanding evidence. These latter items include annotated maps (Exhibit WR-45) and tables used to summarize, compare, and compile data (Exhibits WR-55, 60, 63).
5. To the best of my knowledge and recollection, the only material the Prosecution Team has not disclosed or already made available consists of privileged attorney-client communications and attorney work product.
6. A true and correct copy of the Division of Water Right's current record retention policy is marked as Attachment 1 to this declaration.

I declare under penalty of perjury to the laws of the State of California that the foregoing is true and correct. Executed this 30th day of December, 2015, at Sacramento, California.



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Kenneth Petruzzelli

Submit three copies to: Department of General Services, California Records and Information Management, 707 Third St. 2<sup>nd</sup> Fl., W. Sacramento, CA 95605.

A CalRIM Consultant may be reached by phone at (916) 375-4404, by fax at (916) 375-4408 or by email at CalRIM@dgs.ca.gov

(1) DEPARTMENT, BOARD OR COMMISSION STATE WATER RESOURCES CONTROL BOARD.	(2) AGENCY BILLING CODE 79300	(3) PAGE 1 OF 6 PAGES
(4) DIVISION/ BRANCH/ SECTION DIVISION OF WATER RIGHTS	(5) ADDRESS 1001 I STREET, SACRAMENTO CA 95814	

CHECK THE APPROPRIATE BOX

- New schedule of records that have never been scheduled. [Complete boxes (9) - (12)]
- Revising a previous schedule. [Complete boxes (9) - (16)] (A new approval number will be assigned.)
- Amending some pages of a previous schedule. [Complete boxes (13) - (16)] (The original approval number will remain in effect.)

NEW SCHEDULE INFORMATION (If applicable) 10-300-001	(9) SCHEDULE NUMBER	(10) SCHEDULE DATE 4/18/11	(11) NUMBER OF PAGES 5	(12) CUBIC FEET (Total Schedule) 3106
PREVIOUS SCHEDULE INFORMATION (If applicable) SWRCB 04-05	(13) SCHEDULE NUMBER	(14) APPROVAL NUMBER 04-056	(15) APPROVAL DATE (S) 04/08/04	(16) PAGE NUMBER(S) REVISED - 5

(17) MISSION/FUNCTIONAL STATEMENT : TO ESTABLISH AND MAINTAIN A STABLE SYSTEM OF WATER RIGHTS, TO DEVELOP, CONSERVE AND UTILIZE IN THE PUBLIC INTEREST, THE WATER RESOURCES OF THE STATE WHILE PROTECTING VESTED RIGHTS, WATER QUALITY AND THE ENVIRONMENT.

PART I - AGENCY STATEMENTS

As the program manager (or person authorized to sign for the program manager) directly responsible for the records listed on this records retention schedule, I certify that all records listed are necessary and that each retention period is correct. For revisions, all items on the previous schedule are included or accounted for on the recapitulation. Vital records identified by this schedule are protected. If protection is not currently provided but plans are underway, the details of such plans are shown in Column 45, Remarks.

(18) SIGNATURE - MANAGER RESPONSIBLE FOR THE RECORDS <i>Erica Garcia</i>	(19) TITLE SSM, Administrative Officer	(20) PHONE NUMBER 341-5325	(21) DATE SIGNED 4/7/11
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In accordance with Government Code 14755, approval of this Records Retention Schedule by the Department of General Services is hereby requested. Retention periods shown have been established in accordance with the criteria set forth by Section 1667 of the State Administrative Manual.

(22) SIGNATURE - RECORDS MGMT. ANALYST <i>[Signature]</i>	(23) CLASSIFICATION APA	(24) NAME (Printed or Typed) WENDY KATAYANASI	(25) PHONE NUMBER (916) 341-5331	(26) DATE SIGNED 04/08/11
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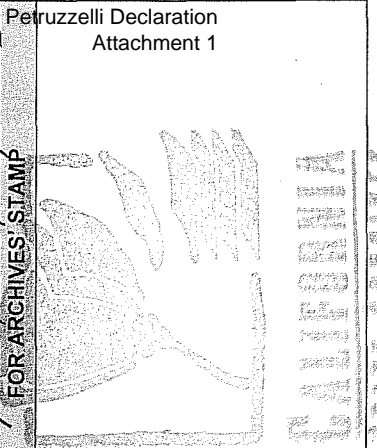
(27) SIGNATURE - CALRIM CONSULTANT <i>[Signature]</i>	(28) APPROVAL NUMBER 11-043	(29) DATE SIGNED 5/04/2011	(30) EXPIRATION DATE 5/04/2016
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PART III - ARCHIVAL SELECTION (Per Government Code Section 14755)

THE ATTACHED RECORDS RETENTION SCHEDULE:

- Contains no material subject to further review by the California State Archives
- Contains material subject to archival review. Items stamped "NOTIFY ARCHIVES" may not be destroyed without clearance by the California State Archives. (Per Section 1671 of the State Administrative Manual.)

(33) SIGNATURE - CHIEF OF ARCHIVES OR DESIGNATED REPRESENTATIVE <i>[Signature]</i>	(34) DATE SIGNED May, 9, 2011
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ITEM # (37)	CUBIC FEET* (38)	CA. STATE ARCHIVES USE ONLY (39)	TITLE AND DESCRIPTION OF RECORDS (40) <i>(Double spaces between items)</i>	MEDIA (41)	VITAL (42)	RETENTION			PRA (Exempt) & IPA (47)	REMARKS (48)
						OFFICE (43)	DEPT. (44)	SRC (45)		
1	288	<b>NOTIFY ARCHIVES</b>	<b>ADMINISTRATIVE AND GENERAL FILES</b> All documentation <u>not</u> directly related to actual water right applications, stockpounds, livestock stockpounds, small domestic users, statements and groundwater	P	Perm	Perm	Perm	Perm	Authority: SAM §1600 Reference files Destruction: Non-confidential	
2	1		Timesheets	P	Active +3	Active +3	Active +3	Active +3	Authority: SAM §1600 Active until superceded. Destruction: Confidential	
3	2	<b>NOTIFY ARCHIVES</b>	Legislative Bill Information (624)	P	Active +2	Active +2	Active +2	Active +2	Authority: SAM §1600 Active until bill is adopted, used for management and special studies/budget impact/fee increases Destruction: Non confidential	
4	3		Fiscal and budgetary Information (626)	P	Active +5	Active +5	Active +5	Active +5	Authority: SAM §1600 Active until posted as historical data for budget purposes. Destruction: Non-confidential	
5	6	<b>NOTIFY ARCHIVES</b>	Administrative reports and Memos (626)	P	Active +4	Active +4	Active +4	Active +4	Authority: SAM §1600 Active until superceded or posted. Periodically purged. Destruction : Non-confidential	
6	2		Informal Personnel records i.e., RPA, duty statements, EAR's	P	Active +1	Active +1	Active +1	Active +1	Authority: SAM §1600 Used for Management and supervision EAR's statement. Destruction: Confidential	
7	2	<b>NOTIFY ARCHIVES</b>	Subject files re policy and management	P	Active	Active	Active	Active	Authority: SAM §1600 Active until superceded or becomes obsolete. Destruction: Non confidential	
8	4	<b>NOTIFY ARCHIVES</b>	Records of Board meeting Agenda	P	Current	Current	Current	Current	Authority SAM §1600 Active for current fiscal year Destruction: Non-confidential	
9	8	<b>NOTIFY ARCHIVES</b>	Colorado River Board	P	Active	Active	Active	Active	Authority: SAM §1600 Active until superceded or becomes obsolete Destruction: Non Confidential	
10	42	<b>NOTIFY ARCHIVES</b>	05.00 Various Special Studies including American river and Central Lahontan River Basin <b>WATER USAGE FILES</b>	P	Active +1	Active +1	Active +1	Active +1	Authority: SAM §1600 Active until superceded. Destruction: Non-confidential	
11	36	<b>NOTIFY ARCHIVES</b>	267.0 Recordation of Water Extraction <b>WATER USAGE FILES</b>	P	Active +5	Active +5	Active +5	Active +5	Authority SAM §1600 Used for reporting of groundwater Active until file closed Electronic reporting on-line 2011 Destruction: non confidential	
12	5.5	<b>NOTIFY ARCHIVES</b>	Microfiche working copy of Recordation of water extractions and diversion material	D	PERM	PERM	PERM	PERM	Authority: Statutory Water Rights Law §5300 Retain for Reference Purposes. Destruction Non-confidential	

Petruzzelli Declaration Attachment 1



ITEM #	CUBIC FEET *	CA. STATE ARCHIVES USE ONLY	TITLE AND DESCRIPTION OF RECORDS (Double spaces between items)	MEDIA	VITAL	RETENTION			PRA (Exempt) & IPA (47)	REMARKS
						OFFICE	DEPT.	SRC		
(37)	(38)	(39)	(40)	(41)	(42)	(43)	(44)	(45)	(46)	(48)
13	25	NOTIFY ARCHIVES	270.0 Statements of Water Diversion	P		+1		+	+4	Auth:Statutory Water Rights Law§1053 All Statements are now electronically scanned for public viewing. In 2011, all reporting will be on-line. Destruction Non Confidential
14	5.5	NOTIFY ARCHIVES	270.0 Microfiche Working Copy of State Water Diversion and use	D		Perm			Perm	Authority: Statutory Water Rights Law§1053 Retained. For Reference. Destruction Non-confidential
15	15	NOTIFY ARCHIVES	266.8 Groundwater Extraction	P		Active +1		+1	Active +2	Auth: Statutory Water Rights Law§1053 Reporting of Groundwater. Online from 2011. Destruction non confidential
16	91	NOTIFY ARCHIVES	266.1 Revoked /canceled water right apps and Small Domestic Users	P		+1		+5	+6	Auth:Statutory Water Rights law§1053 Orders of Revocation on line. Destruction Non-Confidential
17	7	NOTIFY ARCHIVES	Exhibits too large for Application folder. Active until revoked	P		Active +1		+5	Active +6	Auth:Statutory Water Rights Law §1053 Active until application is canceled, then scanned Destruction non-confidential.
18	60		Reference Quads (Maps)	P		Perm			Perm	Statutory Water Rights law§1053 Retained as permanent Destruction: Non-confidential
19	2	NOTIFY ARCHIVES	Admin of alternative flow/salinity scenarios analysis	P		Active +10			Active +10	Auth:Statutory Water Rights§1053 Active until project completed. Destruction Non Confidential
20	2	NOTIFY ARCHIVES	Aquatic habitat Program	P		Active +10			Active +10	Auth:Statutory Water rights §1053 Active until project complete Destruction Non Confidential.
21	2	NOTIFY ARCHIVES	Consultants for Litigation (Decision 1485)	P		Active +10			Active +10	Auth:Statutory Water Rights law§1053 Active, treat as permanent Destruction Non-confidential
22	1	NOTIFY ARCHIVES	Water Right Permits (originals)	P		Active+			Active	Auth:Statutory Water Rights law§1053 Now incorporated into Application files. All permits on-line for public viewing. Destruction: Non-confidential
23	16	NOTIFY ARCHIVES	Water Right Licenses (Originals)	P	X	Perm			Perm	Auth:Statutory Water Rights law§1053 Kept in safe and also electronic version on-line for public viewing Destruction Non-Confidential
24	3	NOTIFY ARCHIVES	264.0 Stockpond Waterrights and certs	P	X	Perm			Perm	Authority:Statutory Water Rights law§1053 Permanent until revoked or canceled. Available on-line Destruction: Non-confidential

Petruzzelli Declaration Attachment 1

ITEM # (37)	CUBIC FEET* (38)	CA. STATE ARCHIVES USE ONLY (39)	TITLE AND DESCRIPTION OF RECORDS (Double spaces between items) (40)	MEDIA (41)	VITAL (42)	RETENTION			REMARKS (48)	
						OFFICE (43)	DEPT. (44)	SRC (45)		
						TOTAL (46)	PRA (Exempt) & IPA (47)			
25	90	NOTIFY ARCHIVES	261.0 Adjudication Files	P	X	Perm			Perm	Auth:Statutory Water Rights law§ 1053 Used for reference Retained as permanent Destruction: Non-confidential
26	42	NOTIFY ARCHIVES	262.0 Court reference files	P	X	Perm			Perm	Auth:Statutory Water Rights law§ 1053 Used for reference, retain as permanent Destruction: Non-confidential
27	1848	NOTIFY ARCHIVES	266.1 Water Right Applications	P		Activ +1	Activ +5		Activ +6	Auth:Statutory Water Rights law§ 1053 Retain as permanent until canceled or revoked then scan. Destruction Non-confidential
28	120	NOTIFY ARCHIVES	263.0 Complaints and Investigations	P		Activ +50	+5		Activ +55	Auth:Statutory Water Rights law§ 1053 Keep in office for 50 years in process of being scanned. Reference retain as permanent for 50 yrs Destruction: Non-confidential
29	14	NOTIFY ARCHIVES	50.10 Sap/General State Assistance programs including Bay Delta, Oso Creek Diversion Structure	P		Active +50	+1		Active +51	Auth: SAM§ 1600 Keep in office for 50 yrs Destruction Non confidential
30	228		Field Files for engineer investigation	P		Activ +1	Activ +5		Activ +6	Auth: SAM§ 1600 Active until Application revoked or canceled. Destruction Non Confidential
31	3	NOTIFY ARCHIVES	Reservation Survey files- aerial	P		Perm			Perm	Auth:Statutory Water Rights law § 1053 Retain for comparison purposes. Treat as permanent Destruction Non-confidential
32	6	NOTIFY ARCHIVES	General Correspondence	P		Activ +5			Activ +5	Auth: SAM§ 1600 Purged annually after 5 year retention Destruction Non confidential
33	10	NOTIFY ARCHIVES	AB2121	P CD		Perm			Perm	Auth:Statutory Water Rights law § 1053 Original copy lodged with State Legislature. Destruction Non-confidential

\* Provide total of office and departmental

ITEM #	CUBIC FEET *	CA. STATE ARCHIVES USE ONLY	TITLE AND DESCRIPTION OF RECORDS (Double spaces between items)	MEDIA (41)	VITAL (42)	RETENTION			PRA (Exempt) & IPA (47)	REMARKS
						OFFICE (43)	DEPT. (44)	SRC (45)		
(37)	(38)	(39)	(40)	(41)	(42)	(43)	(44)	(45)	(46)	(48)

1		Consolidation	<p><b>EXPLANATION OF CONSOLIDATION</b></p> <p>Entire Item now under Administrative and Office Files due to enormous volume of individual files which would be more than 70 pages in length. All files are numbered and we have an index in house Increase of 78 to 288</p> <p><b>EXPLANATION FOR DELETION FROM PREVIOUS SCHEDULE</b></p> <p>Purging and consolidation Files scanned, file covers removed and boxed- on-line. Consolidation and Purging Scanned to Internet, consolidated in cartons Purged, redundant due to on-line templates This item consolidated into Application files Purged due to out of date data</p>							
2	1									
13	27.5									
21	1									
24	3									
30	2									
32	1									
33	4									
<b>Total</b>	<b>39</b>		<b>TOTAL 3106</b>							

\* Provide total of office and departmental

ITEM #	CUBIC FEET *	CA. STATE ARCHIVES USE ONLY	TITLE AND DESCRIPTION OF RECORDS (Double spaces between items)	MEDIA	VITAL	RETENTION				PRA (Exempt) & IPA	REMARKS
						OFFICE	DEPT.	SRC	TOTAL		
(37)	(38)	(39)	(40)	(41)	(42)	(43)	(44)	(45)	(46)	(47)	(48)

34.			<u>Records Management</u> STD Form 70, Records Inventory Worksheet	P		Current			Current		Retain as current until next inventory, or when no longer needed for reference or analysis, whichever is later.
35.			STD Form 71, Records Transfer List	P		Current			Current		Retain as current until all records have been either destroyed, retired permanently, transferred to the State Archives, or when no longer needed whichever is later.
36.	1		STD Form 73, Records Retention Schedule	P		Current			Current		Retain as current until revised. NOTE: Although revision is required every five years from date approved by CalRIM, records retention schedules that are not revised remain in effect but are considered non-current.
37.			Authorization for Records Destruction (Computer Printouts)			4			4		Retain for two years from date destruction is authorized. Then retain two additional years or until audited, whichever occurs first (maximum of four years).
38.			<u>Electronic Mail</u> A. E-mail that are categorized as official records are subject to department records retention schedule and must be retained for the same period of time as the records series that most closely matches the subject matter contained within the new e-message. If there is no entry that resembles or matches the subject matter of the e-message, the "record" should be added to the schedule as a separate series (separate item number). B. Transitory e-Mail consists of electronic messages that are created primarily for the communication of informal information as opposed to the perpetuation or formalization of knowledge.	M		*	*	*	*		*E-mail communications that have "official records status" are subject to department records retention schedule and must be retained for the same period of time as the records series that most closely matches the subject matter of the e-communication in question.
				M		90 days			90 days		Destroy transitory e-communications when they have served their purpose.