

State Water Resources Control Board

December 14, 2015

VIA ELECTRONIC MAIL

TO: ENCLOSED SERVICE LIST OF PARTICIPANTS

PROCEDURAL RULING: REQUEST TO SUBMIT REVISED NOTICE OF INTENT TO APPEAR BY G. SCOTT FAHEY SUGAR PINE SPRING WATER, LP IN ADMINISTRATIVE CIVIL LIABILITY COMPLAINT AND CEASE AND DESIST ORDER HEARING

This letter addresses the December 7, 2015 [Revised Notice of Intent to Appear \(Revised NOI\)](#) filed by G. Scott Fahey Sugar Pine Spring Water, LP (Fahey), and the December 8, 2015 [Opposition to Fahey's Revised Notice of Intent to Appear](#) (Opposition to Revised NOI) submitted by the Division of Water Rights Prosecution Team (Prosecution Team).

BACKGROUND

On October 16, 2015, the State Water Resources Control Board (State Water Board) issued a [Notice of Public Hearing](#) for the above referenced Fahey enforcement hearing. The notice set the date of Monday, November 9, 2015, as the deadline for receipt of Notices of Intent to Appear (NOIs). On November 9, 2015, Fahey timely submitted a [NOI](#) listing four potential witnesses: G. Scott Fahey, Kathy Mrowka, David LaBrie, Samuel Cole and "Others to be determined from pending Discovery". Fahey's NOI also included the following footnoted reservation: "We retain the right to amend this Notice because Board records from 2012 to the present are missing and subject to subpoena."

On December 7, 2015, Fahey submitted a Revised NOI listing six witnesses: G. Scott Fahey, Kathy Mrowka, David LaBrie, Samuel Cole, Ross Grunwald, and Gary Player. The Revised NOI described newly identified witnesses Ross Grunwald, and Gary Player as expert witnesses to provide testimony on Hydrology. Fahey's Revised NOI also included the following footnoted reservation: "We continue to retain the right to amend this Notice any time prior to the hearing based upon relevant information discovered or developed subsequent to the submittal of this draft witness list."

On December 8, 2015, the Prosecution Team submitted its Opposition to Revised NOI that argues that: (1) the Hearing Notice recognizes no right to submit subsequent, revised NOI's after the November 9, 2015 deadline, (2) the Revised NOI comes extremely late and without explanation or justification; and (3) Fahey's Revised NOI is extremely prejudicial to the Prosecution Team, as well as other parties appearing. The Prosecution Team requests that the Hearing Officers deny Fahey's Revised NOI. The Prosecution Team was the only party to submit comment on the Revised NOI.

On December 10, 2015, Fahey submitted a [Response to Opposition to Revised Notice of Intent to Appear](#). Fahey's response: (1) provided additional clarification regarding the extent of

proposed testimony to be presented by newly identified witnesses Ross Grunwald and Gary Player and explained that this testimony could not be sufficiently obtained and developed within the time frame for submission of NOIs; (2) reconfirmed its expressed footnoted reservations to amend its NOI; (3) argued that the Prosecution Team provided “absolutely no explanation” to support its contention of extreme prejudice; and (4) confirms that “Fahey will comply with that 1-hour requirement for all its direct testimony (supplemented by written testimony).” Fahey requests that the Hearing Officers deny and reject the Prosecution Team’s Opposition to the Revised NOI.

ADDITIONAL WITNESSES

We will allow the inclusion of Fahey’s proposed witnesses Ross Grunwald and Gary Player. While the Prosecution Team correctly asserts that neither the October 16 Notice nor the Board’s regulations expressly provide Fahey the right to submit a subsequently revised NOI, the hearing officers retain discretion to issue further rulings clarifying or limiting the rights of any party where authorized under applicable statutes and regulations. Here, Fahey has demonstrated good cause for the change.

The Prosecution Team also asserted that Fahey’s Revised NOI is “extremely prejudicial” to the Prosecution Team and other parties. We agree with the Prosecution Team that the request comes very late in the process and weigh the potential prejudice to the other parties. However, the Prosecution Team was the only party to claim that injury would result from granting the request and failed to provide any substantiation for this claim. Additionally, the Prosecution Team and all other parties will have the opportunity to cross-examine and rebut any testimony presented by Fahey’s expert witnesses on Hydrology, as specified by the Notice Attachment (Sections 9b)(iii), Cross-Examination; 9(c), Rebuttal).

Therefore, for the above stated reasons, we will allow the two new witnesses identified in Fahey’s Revised NOI to participate.

TIME LIMITS

Fahey’s Revised NOI lists six witnesses with a total proposed estimated length of direct testimony of six and one-half (6.5) hours. We remind the parties that we plan to strictly adhere to the times limits specified in our November 13, 2015 [Service List of Participants](#) letter. Oral summaries by the witnesses of direct testimony submitted by parties presenting a case-in-chief will be limited to twenty (20) minutes per witness and up to one (1) hour total to present all of the party’s direct testimony. As a reminder, as specified by the Notice Attachment, written testimony shall not be read into the record. Written testimony affirmed by the witness is direct testimony. (Section 9b)(ii); see also Cal. Code Regs., § 648.4, subd. (d).) Cross-examination will be limited to one (1) hour per witness or panel of witnesses.

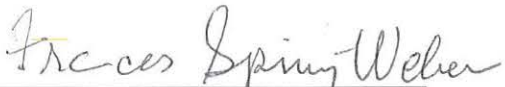
EX PARTE COMMUNICATIONS

We would like to remind the parties that *ex parte* communications concerning substantive or controversial procedural issues relevant to this hearing are prohibited. Please be sure to copy the service list on any correspondence to me, the other Board Members, and the hearing team related to this matter.

Thank you for your continued cooperation. Questions regarding non-controversial procedural matters should be directed to Staff Counsel Nathan Weaver at (916) 341-5184 or by email to

Nathan.Weaver@waterboards.ca.gov, or to Ernie Mona at (916) 341-5359 or by email to Ernie.Mona@waterboards.ca.gov. (Gov. Code, § 11430.20, subd. (b).)

Sincerely,



Frances Spivy-Weber, Vice-Chair



Dorene D'Adamo, Board Member

Enclosure: Service List

SERVICE LIST OF PARTICIPANTS
G. Scott Fahey and Sugar Pine Spring Water, LP
Administrative Civil Liability Complaint and Cease and Desist Order
(November 13, 2015; Revised 11/30/15)

| Parties | |
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| THE FOLLOWING <u>MUST BE SERVED</u> WITH WRITTEN TESTIMONY, EXHIBITS AND OTHER DOCUMENTS. (All have AGREED TO ACCEPT electronic service, pursuant to the rules specified in the hearing notice.) | |
| <p>DIVISION OF WATER RIGHTS SWRCB Office of Enforcement Prosecution Team Kenneth P. Petruzzelli 1001 I Street, 16th Floor Sacramento, CA 95814 kenneth.petruzzelli@waterboards.ca.gov</p> <p>Andrew Tauriainen, Attorney III 1001 I Street, 16th Floor Sacramento, CA 95814 Andrew.Tauriainen@waterboards.ca.gov</p> <p>(revised: 11/30/15)</p> | <p>G.SCOTT FAHEY AND SUGAR PINE SPRING WATER , LP Abbott & Kindermann, LLP Diane G. Kindermann Glen C. Hansen 2100 21ST Street Sacramento, CA 95818 dkindermann@aklandlaw.com ghansen@aklandlaw.com</p> <p>Bart Barringer Law Offices of Mayol & Barringer P.O. Box 3049 Modesto, CA 95353 bbarringer@mblaw.com</p> <p>(revised 11/30/15)</p> |
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