



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

John Long

The **Public Hearing** will commence on

January 10, 2023, at 9:00 am

and will be held by Zoom teleconference.

Please access Zoom by using the link:

https://waterboards.zoom.us/j/91681760213?pwd=b2E4cGh1RWVUaVFMVzVyMktzdG xvdz09 with Meeting ID: 916 8176 0213 and Passcode: 126214 or by calling in at: +16699009128,,91681760213#,,,,*126214# 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 July 12, 2022, Jule Rizzardo, Assistant Deputy Director for the State Water Resources Control Board's (State Water Board or Board) Division of Water Rights (Division) Enforcement Section, issued an administrative civil liability complaint (ACL Complaint) and draft cease and desist order (Draft CDO) against John Long (Respondent), based on an inspection of the property identified as Trinity County APN 018-230-24-00. The Division sent copies of the ACL Complaint and Draft CDO to Mr.

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

Long by letter dated July 12, 2022. The letter notified Mr. Long of his right to request a hearing to contest the allegations in the ACL Complaint and Draft CDO.

Cannabis Cultivation Policy

On October 17, 2017, the State Water Board adopted the Cannabis Cultivation Policy. (Resolution No. 2017-0063). The Board updated the Cannabis Cultivation Policy on February 5, 2019, and the updates went into effect on April 16, 2019. The Cannabis Cultivation Policy contains "principles and guidelines for diversion and use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flows." (Wat. Code, § 13149, subd. (a).) The purpose of the Cannabis Cultivation Policy is to ensure that the diversion of water and discharge of waste associated with cannabis cultivation does not have a negative impact on water quality, aquatic habitat, riparian habitat, wetlands, and springs. (Cannabis Cultivation Policy, April 16, 2019, p. 7.) Attachment A to the Cannabis Cultivation Policy contains diversion and discharge requirements for cannabis cultivation activities.

Draft Cease and Desist Order

Water Code section 1831 authorizes the State Water Board to issue a cease and desist order when the Board determines that any person is violating, or threatening to violate, any of the requirements listed in subdivision (d) of section 1831. The violations or threatened violations for which the Board can issue a cease and desist order include violation of the requirement to comply with any term or condition of a water right permit, license, certification, or registration (Wat. Code, § 1831, subd. (d)(2)), and diversion or use of water for cannabis cultivation when a license is required but has not been obtained under Chapter 6 (commencing with section 26060) or Chapter 7 (commencing with section 26070) of Division 10 of the Business and Professions Code (*Id.*, subd. (d)(6)(A)).

The Draft CDO states that on September 7, 2021, staff of the Division of Water Rights, California Department of Fish and Wildlife, Trinity County Sherriff's Office, and Trinity County Code Enforcement conducted an inspection of Trinity County APN 018-230-024-00 (Property), for which Mr. Long is the owner of record. The Property is located in the Olsen Creek watershed, which is tributary to the Mad River. The Draft CDO states that staff observed cannabis cultivation on the property and diversion of water from an unnamed stream or spring to irrigate cannabis plants.

Records maintained by the Division of Water Rights indicate that Mr. Long has three statements of diversion and use of water on file: S025124, S025125, and S025129. Mr. Long also has a Small Irrigation Use Registration (SIUR H500552) on file for diversion and use of water on the Property.

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¹ More information about the Board's Cannabis Cultivation Policy is available at https://www.waterboards.ca.gov/water issues/programs/cannabis/cannabis policy.html

The Draft CDO against Mr. Long alleges that he violated or threatened to violate requirements in Water Code section 1831 subdivisions (d)(2) and (d)(6)(A). The Draft CDO alleges that Mr. Long is (1) violating or threatening to violate the terms and conditions of SIUR H500552 by diverting and using water in violation of the Board's Cannabis Cultivation Policy, and (2) diverting and using water for commercial cannabis cultivation without a required license from the Department of Cannabis Control under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code. The Draft CDO would order Mr. Long to cease and desist any diversion and use of water from the unnamed creek or spring for commercial cannabis cultivation until Mr. Long obtains a commercial cannabis license from the Department of Cannabis Control. The Draft CDO would also require Mr. Long to install adequate water storage to avoid diversions during the forbearance period as defined in the Cannabis Cultivation Policy (April 1 through October 31) if Mr. Long intends to continue to divert water from the unnamed creek or spring for commercial cannabis cultivation.

Administrative Civil Liability Complaint

Water Code section 1846 authorizes the State Water Board to impose administrative civil liability on any person or entity that violates a term or condition of a permit, license, certificate, or registration issued by the Board. (Wat. Code, § 1846, subd. (a).) The Board may impose administrative civil liability in an amount up to \$500 for each day in which the violation occurs. (*Ibid.*)

Water Code section 1055, subdivision (a), provides that the Executive Director for the Board may issue a complaint to any person or entity on which administrative civil liability may be imposed under Water Code section 1846. This authority has been redelegated to the Assistant Deputy Director for the Permitting and Enforcement Branch.

The ACL Complaint alleges that Mr. Long violated Water Code section 1846, subdivision (a)(1) by violating the terms of the Small Irrigation Use Registration (SIUR H500552) for diversion and use of water on the Property. Term 5 of SIUR H500552 states that no water shall be diverted under the right unless the right holder is in compliance with all applicable conditions of the current version of the State Water Board's Cannabis Policy. Term 10 of SIUR H500552 states that no water shall be diverted under the right unless the right holder complies with all applicable laws, regulations, ordinances, permits, and license requirements including those for cannabis cultivation.

The ACL Complaint alleges that Mr. Long diverted and used water in violation of the State Water Board's Cannabis Cultivation Policy by (1) diverting water during the surface water forbearance period (from April 1 through October 31) (Cannabis Cultivation Policy, Attachment A, Section 2, Term 66); (2) failing to plug, block, disconnect, or otherwise make the diversion intake inoperable during the surface water forbearance period (*Id.*, Term 77); (3) failing to install and maintain a measuring device for surface water diversions (*Id.*, Term 82); (4) failing to use water storage tanks equipped with a float valve or equivalent device to shut off diversion when the storage

system is full (*Id.*, Term 92); and (5) failing to maintain daily records of water used for irrigation of cannabis (*Id.*, Term 98). The ACL Complaint also alleges that Mr. Long diverted and used water for commercial cannabis cultivation without a required license from the Department of Cannabis Control under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code.

The ACL Complaint states that the maximum potential liability for the alleged violations is \$4,000. The ACL Complaint recommends the imposition of administrative civil liability in the amount of \$4,000.²

Administrative Hearings Office Proceedings

On August 4, 2022, Mr. Long requested a hearing in this matter by e-mail to the AHO. Water Code section 1112, subdivision (a)(1) and (a)(2), provides that an AHO hearing officer shall preside over hearings on ACL Complaints issued under Water Code section 1055 and any notice of proposed cease and desist order issued under Water Code section 1834. After the hearing, the AHO hearing officer will prepare a proposed order and transmit it to the Clerk of the Board under Water Code section 1114, subdivision (c)(1).³

PURPOSE OF HEARING; HEARING ISSUES

The AHO will hold a public hearing to receive evidence and arguments relevant to the following hearing issues:

Draft CDO Hearing Issues:

- Is the State Water Board authorized to issue a cease and desist order against the Respondent under Water Code section 1831, subdivisions (d)(2) and (d)(6)(A)?
 - a. Did the Respondent violate or threaten to violate the terms and conditions of SIUR H500552 by diverting or using water in violation of the Board's Cannabis Cultivation Policy?

² The ACL Complaint appears to mistakenly state that the recommended penalty is \$7,000, while stating in the same paragraph that the total proposed liability is \$4,000.

³ Water Code section 1114, subdivision (b), provides for the AHO hearing officer to adopt a final order in proceedings for administrative civil liability under Water Code section 1847 or 5107. While this proceeding is about an administrative civil liability complaint under these statutes, it also is for a proposed cease and desist order under Water Code section 1831. Because this proceeding is not solely under sections 1847 and 5107, the AHO is conducting this proceeding under Water Code section 1114, subdivision (c)(1).

- b. Did the Respondent divert or use, or threaten to divert or use, water for commercial cannabis cultivation when a license is required but has not been obtained under Chapter 6 (commencing with section 26060) or Chapter 7 (commencing with section 26070) of Division 10 of the Business and Professions Code?
- 2. If so, should the State Water Board issue a cease and desist order against the Respondent and what terms and conditions should be included in the order?

ACL Complaint Hearing Issues:

- 3. Did the Respondent violate Water Code section 1846, subdivision (a)(1), which authorizes the State Water Board to impose administrative civil liability against a person or entity who violates a term or condition of a water right permit, license, certificate, or registration?
 - a. Did the Respondent violate a term or condition of SIUR H500552 by diverting or using water in violation of the Board's Cannabis Cultivation Policy?
 - Did the Respondent violate Attachment A, Section 2, Term 66 of the Cannabis Cultivation Policy by diverting water during the surface water forbearance period (from April 1 through October 31)?
 - ii. Did the Respondent violate Attachment A, Section 2, Term 77 of the Cannabis Cultivation Policy by failing to plug, block, disconnect, or otherwise make the diversion intake inoperable during the surface water forbearance period?
 - iii. Did the Respondent violate Attachment A, Section 2, Term 82 of the Cannabis Cultivation Policy by failing to install and maintain a measuring device for surface water diversions?
 - iv. Did the Respondent violate Attachment A, Section 2, Term 92 of the Cannabis Cultivation Policy by failing to use water storage tanks equipped with a float valve or equivalent device to shut off diversion when the storage system is full?
 - v. Did the Respondent violate Attachment A, Section 2, Term 98 of the Cannabis Cultivation Policy by failing to maintain daily records of water used for irrigation of cannabis?
 - b. Did the Respondent violate a term or condition of SIUR H500552 by diverting or using water for commercial cannabis cultivation when a license is required but has not been obtained under Chapter 6

(commencing with section 26060) or Chapter 7 (commencing with section 26070) of Division 10 of the Business and Professions Code?

4. If so, should the State Water Board impose administrative civil liability, and what is the appropriate amount of any administrative civil liability?

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 may add documents, in addition to the parties' exhibits, to the administrative record. Documents that are currently in the AHO administrative record for this matter include: (1) July 12, 2022 cover letter, ACL Complaint, and Draft CDO; (2) the Cannabis Cultivation Policy with Attachment A, approved April 16, 2019; and (3) October 22, 2018 Small Irrigation Use Registration (SIUR) H500552. The hearing officer will consider whether to move these and other documents in the administrative record into the evidentiary record during the hearing. Parties may submit additional evidence and make arguments based on the evidence during the hearing concerning the hearing issues listed above.

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 proposed order and transmit it to the Clerk of the State Water Board for the Board's consideration 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; 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.⁴ The party shall include a proof of service through a formal proof of service or by other verification.⁵

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.)⁶

⁴ The AHO's mailing addresses are provided in Item 6, below.

⁵ 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 email "cc" (carbon copy) list or the cc portion of a letter.

⁶ 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.

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/.

More information about this proceeding may be accessed on the AHO's Internet webpage by clicking on "Water-Right Enforcement Matters - Cannabis" and then on the folder with the name of the Respondent.

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.

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)	January 3, 2023, 12:00 pm
Hearing date and time	January 10, 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. POLICY STATEMENTS BY INTERESTED PERSONS:** 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: 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.

Each party shall upload its exhibits and Exhibit Identification Index to the party's folder on the State Water Board's FTP site before the exhibit filing deadline specified in this notice.

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 a y 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 onscreen 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 adminhrgoffice@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.

November 16, 2022	/s/ Nicole L. Kuenzi		
Date	Nicole L. Kuenzi		
	Hearing Officer		

Enclosures:

- Exhibit Identification Index
- Service List

Exhibit Identification Index

Exhibit Identification Number	Exhibit Description	Status of Evidence (for AHO use only)		
		Introduced	Accepted	By Official Notice

SERVICE LIST

Respondent

John Long madriverfarms@gmail.com

State Water Resources Control Board

Andrew.Tauranien

Andrew.Tauranien@waterboards.ca.gov

Jule Rizzardo

Jule.Rizzardo@waterboards.ca.gov

Taro Murano

Taro.Murano@waterboards.ca.gov

Stormer Feiler

Stormer.Feiler@waterboards.ca.gov

Chris Baimas

Chris.Baimas@waterboards.ca.gov

North Coast Regional Water Quality Control Board

Kason Grady

Kason.Grady@waterboards.ca.gov

Department of Fish and Wildlife

Mathew Jones

Matthew.Jones@wildlife.ca.gov

Lt. Douglas Willson

Douglas.Willson@wildlife.ca.gov

Scott Bauer

Scott.Bauer@wildlife.ca.gov

Ryan Borque

Ryan.Borque@wildlife.ca.gov

Trinity County District Attorney

James Gandy

JGandy@trinitycounty.org

Trinity County Code Enforcement

Kristalynn Anderson

KAnderson@trinitycounty.org

Trinity County Cannabis Program

Kim Hunter

KHunter@trinitycounty.org

Trinity County Sheriff's Office

Sergeant Nate Trujillo

NTrujillo@trinitycounty.org

Sergeant Joshua Ford

JFord@trinitycounty.org

Deputy Justin Hayslett

JHayslett@trinitycounty.org

Department of Cannabis Control

Tabatha Chavez

Tabatha.Chavez@cannabis.ca.gov

Lindsay Rains

Lindsay.Rains@cannabis.ca.gov

Erin Wonder

Erin.Wonder@cannabis.ca.gov