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BEFORE THE STATE WATER RESOURCES CONTROL BOARD
 STATE OF CALIFORNIA

In the Matter of:

RICHARD JENNINGS

)
) DECLARATION OF
) KYLE OCHENDUSZKO, P.E.
) IN SUPPORT OF
) ADMINISTRATIVE CIVIL LIABILITY
) FOR VIOLATION OF STATE WATER
) RESOURCES CONTROL BOARD
) ANNUAL DIVERSION REPORTING
) REGULATIONS
)

I, Kyle Ochenduszkowski, declare as follows:

1. My testimony, herein provided, identifies my personal knowledge of the evidence, actions, and rationale for the State Water Resources Control Board ("State Water Board") Division of Water Rights' ("Division") recommendation to issue an Administrative Civil Liability (ACL) order against Richard Jennings ("Diverter"). The ACL Complaints are offered into evidence as **Prosecution Team Exhibits WR-1a – WR-1t**.¹ A true and correct copy of the Diverter's Hearing Request is offered into evidence as **Exhibit WR-2**.
2. I have been an employee of the State Water Board for over 10 years. I am currently employed as the Chief of Water Rights Enforcement (position specification: Supervising Water Resource Control Engineer [Supervisory]). My statement of qualifications is offered into evidence as **Exhibit WR-5**.

¹ Further references to Prosecution Team exhibits will be "WR-[Exhibit Number]."

- 1 3. My role in this enforcement action is to provide testimony regarding the Division
2 Enforcement Section's efforts to increase compliance with State Water Board diversion
3 reporting regulations through the use of outreach, education, and progressive enforcement.

4 **Purpose of the Division Enforcement Section**

- 5
6 4. The Division Enforcement Section's vision is for water users to comply with all applicable
7 water right statutes and regulations. The Enforcement Section understands that water rights
8 can be confusing at times, so we take specific actions in each investigation to provide
9 education and pathways to compliance for water diverters. We give diverters the benefit of
10 the doubt during our investigation and when making enforcement decisions. Often after
11 outreach and education many potential water right issues are resolved and no punitive
12 enforcement action is taken. Some water diverters choose to ignore our efforts or willfully
13 violate water rights laws and regulations. In these cases, it is my job to consistently apply
14 penalties for violations and provide incentives for compliance.

15 **The Failure to File (FTF) Enforcement Project**

- 16 5. The FTF Enforcement Project applies a "progressive enforcement" framework for finding
17 and penalizing violators. Progressive enforcement is consistent with the Division
18 Enforcement Section's goal of compliance by providing reminders and notices to potential
19 water rights violators before assessing monetary liabilities and revoking water rights. Each
20 communicate we send becomes progressively more directive as the violation continues, and
21 the number of violators decreases as potential violators return to compliance. At the end of
22 progressive enforcement, the Enforcement Section brings formal enforcement against only
23 a few non-compliant diverters. Progressive enforcement is an effective way to sort out
24 recalcitrant diverters from those that were unaware of their responsibilities as water right
25 holders, or those that simply forgot to file annual diversion reports. Progressive
26 enforcement is very resource intensive in the early outreach stages but results in less
27 formal enforcement actions, which can be much more resource heavy, and has a
28 demonstrated history of achieving greater compliance in FTF enforcement efforts.

- 1 6. The objective of the FTF Enforcement Project is to obtain timely water use data through
2 annually filed statements and reports so that the public has transparency in the system and
3 the State Water Board can make accurate planning decisions. Riparian and Pre-1914 water
4 right holders must file a Supplemental Statements of Diversion and Use (Statements) by
5 July 1 of each year (Cal. Code Regs. Tit. 23, § 920). Diverters holding Appropriative water
6 rights (applications, permits, and licenses) must file their Annual Diversion and Use
7 Reports (Reports) by April 1 of each year (Cal. Code Regs. Tit. 23, § 925, § 929).

8 **The 2016/2017 FTF Enforcement Project**

- 9 7. Building on past FTF Enforcement Projects, I added more outreach and education activities
10 to the 2016/2017 FTF Enforcement Project including social media posts and postcards to
11 encourage diverters to submit Statements and Reports on time. I felt it was important to
12 reach the community through multiple media channels to spread the message that 2016 and
13 2017 Statements and Reports needed to be filed immediately as broadly as possible.
- 14 8. Division staff from the Enforcement Section and the Data Management Unit collaborated to
15 remind water right holders to file annual Statements and Reports through the electronic
16 Water Rights Information Management System (eWRIMS). These reminders included the
17 eWRIMS login information for every water right holder, as the Division ceased accepting
18 paper Statements and Reports in 2009. In February 2018, the Data Management Unit
19 mailed every water right holder a reminder to file their Statements and Reports on July 1
20 and April 1, 2018 respectively. Any returned mail was logged, and ownership changes
21 were processed.
- 22 9. On June 8, 2018, at my direction, the Division Enforcement Section and Data Management
23 Unit staff mailed postcards to all parties who are required to submit a Statement or Report
24 reminding them to file their Statements and Reports. For diverters who hold permits and
25 licensees this was outreach conducted after the April 1 deadline to file. For Statement filers
26 this postcard was their final reminder to file before the upcoming July 1 deadline. Specific
27 copies of postcards sent to the Diverter are not available, however a true and correct copy
28 of an example of the reminder postcard is offered into evidence as **Exhibit WR-30**.

- 1 10. After the deadline to submit Statements and Reports I directed Division Enforcement
2 Section staff to monitor compliance rates and begin the process of sending out Notices of
3 Deficiency to water rights holders that have not filed Statements and Reports.
- 4 11. On July 27, 2018, I directed Division Enforcement Section staff to mail 14,557 Notice of
5 Deficiency letters to 6,591 unique owner names that failed to file Statements or Reports for
6 2016 and/or 2017. In response, the Division received, recorded, and tracked over 1,600
7 calls between July 27 and September 17, 2018 from Notice of Deficiency recipients
8 requesting assistance. Approximately 14 Division Enforcement Section staff returned
9 every phone call received and provided direct assistance to diverters filing Statements and
10 Reports. These staff are in addition to the 11 Data Management Unit staff which assist
11 diverters throughout the year with water rights questions and eWRIMS assistance.
- 12 12. On September 17, 2018, I directed Division Enforcement Section staff to send 2,851 Final
13 Notice of Deficiency letters to 2,166 unique owner names that did not file the 2016 and/or
14 2017 Statements or Reports. In response, the Division received over 500 calls from
15 deficiency letter recipients requesting assistance. Again, 14 Division Enforcement Section
16 staff and 11 Data Management Staff returned phone calls and provided direct assistance to
17 diverters filing Statements and Reports.
- 18 13. In a final attempt to reach water right holders not responding to previous paper
19 correspondence before taking formal enforcement action the Division Enforcement Section
20 staff, at my direction, posted four tweets to the State Water Board's Twitter account on
21 September 17, 20, 2018 and October 2, 17, 2018. True and correct copies of the social
22 media posts on September 17, 20, 2018 and October 2, 17, 2018 are offered into evidence
23 as **Exhibit WR-31**.
- 24 14. After reviewing compliance rates and speaking with my staff I decided to send ACL
25 Complaints to statement filers that diverted, on average, more than 10 acre-feet per year
26 who had failed to submit their Statements for 2016 and/or 2017. I also decided to send
27 ACL Complaints to water right holders with permits and license that have a "face-value" of
28 more than 10 acre-feet per year that had failed to submit their Reports. I decided to send

ACL Complaints to water right holders likely diverting more than 10 acre-feet per year to remind them of their basic responsibility to submit annual statements and reports. There is also a regulatory synergistic effect: water right holders and statement filers who divert more than 10 acre-feet of water per year are also required to install and use measuring devices on their diversion. (Cal. Code Regs. Tit. 23, § 931 - § 938). Diversion data collected by these devices must be included in Statements and Reports submitted to the State Water Board. It is my understanding that there is significant confusion and/or noncompliance with this regulation. I determined it was appropriate to identify this group of diverters as needing more enforcement attention now because of this group's increased diversion monitoring and reporting responsibilities.

15. On October 19, 2018, I directed the Division Enforcement Section staff to mail 552 ACL Complaints to 438 unique owner names that had not filed 2016 and/or 2017 Statements or Reports.
16. Significant resources were allocated to the 2016/2017 FTF Enforcement Project that would otherwise have been available for investigating claims of water theft, illegal diversions, and permit/license compliance surveillance and enforcement. So far, and not including time preparing for a hearing, the 2016/2017 FTF Enforcement Project has lasted 10 months, required the involvement of at least the following resources:

Resource	Number	Hours	PY
Technical staff	14	3,360	1.6
Non-technical staff	11	4,400	2.1
Managers	3	480	0.2
<i>Total</i>	<i>30</i>	<i>8,560</i>	<i>4.1</i>

17. Under Water Code section 1846 the maximum penalty that the State Water Board may apply for not filing timely and accurate Statements and Reports is \$500 per day per violation. Potential penalties can accrue quickly and grow to large sums. In some 2016/2017 FTF Enforcement Project cases the State Water Board can impose liabilities of over \$200,000 for failure to file Statements and Reports. However, rather than proposing

these large monetary penalties for failing to file Statements and Reports, the Prosecution Team proposed in each ACL Complaint a modest penalty of \$1,500 per violation.

18. With every 2016/2017 FTF Enforcement ACL Complaint, I proposed a three-part settlement offer to diverters still refusing to file their Statements or Reports. The settlement offer was a last and final chance for diverters to come into compliance before an ACL order was issued. To accept the three-part settlement offer, diverters would be required to pay a reduced liability (\$500 per reporting violation), file any outstanding Statements or Reports, and submit a signed Waiver of Right to Hearing. This settlement amount represents one day of violation and a 99% discount of the potential maximum liability a diverter may incur for non-compliance. In contrast, the Prosecution Team's proposed penalty represents three days of violation.

Harm Caused by Not Filing Statements and Reports

19. I considered many factors when proposing a uniform liability across all parties including, but not limited to, the amount of harm caused by the failure to file statements and reports. The harm caused by this type of violation can be categorized generally as "harm to the regulatory program" but in a very real way failing to submit diversion data does harm to other water right diverters, the environment, and the public at large.

20. Water's importance to the State of California is so prominent, it is described as Article X of our Constitution. Put another way, the California State Constitution discusses water as a public trust resource before it describes other important topics, such as local governance (Article XI), taxation (Article XII), and public finance (Article XVI). We, the Division of Water Rights and the public, need to understand when, where, how, and why water is used to ensure water is being put to full beneficial use. Information provided by Statements and Reports provides valuable insight into how water is used in California and supports Article X, Section 2 of the California Constitution:

"...It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the

conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.”

21. The State Water Board is the state agency responsible for water quality and water rights.

The State Water Boards’ mission statement is:

“to preserve, enhance, and restore the quality of California's water resources and drinking water for the protection of the environment, public health, and all beneficial uses, and to ensure proper water resource allocation and efficient use, for the benefit of present and future generations.”²

The State Water Board’s Division of Water Rights is responsible for administering the water rights system.

22. Failure to submit timely and accurate diversion data harms the Division’s ability to issue permits and licenses. Without a clear understanding of who is using water, how much water is being diverted, and when water is diverted, the Division cannot issue accurate permits or grant petitions. Timely and accurate Statements and Reports inform permitting and petition staff on water availability and the likelihood of causing harm from additional diversions. As part of the permitting process, potential diverters need to submit evidence showing water is available for diversion. If there are no Statements or Reports, it could appear that there is more water available for diversion than is actually available in the subject watershed.

23. Failure to submit timely and accurate diversion data harms the Division’s ability to determine which waters are fully appropriated. Water rights are issued if water is available for diversion. Once the Division determines that no more water is available for diversion, a waterbody may be deemed “fully appropriated.” A “fully appropriated” determination is

² <https://www.waterboards.ca.gov/>

1 based, in part, on the information contained in Statements and Reports supplied by
2 diverters. Inaccurate and untimely Statements and Reports can give the impression that
3 more water is available for diversion, leading Division staff to inappropriately issuing more
4 water rights than water is available. If this happens, a waterbody is termed “over
5 appropriated” and unnecessary competition for water between diverters could occur.
6 Timely and accurate Statements and Reports help Division staff make appropriate
7 assessments about water availability and assists Division staff in their goal to protect all
8 water rights in a given watershed.

9 24. Failure to submit timely and accurate diversion data harms the Division’s ability to conduct
10 efficient, fair, and accurate drought management. The California water rights priority
11 system is a mix of English common law and an appropriative permitting system (i.e.
12 permits are issued to diverters allowing them to divert water). In general terms, during
13 times of water unavailability, the Division must understand how much water is currently in
14 the watershed, determine all the diverters in the watershed, prioritize diverters based on
15 type and date of appropriation date, identify how much water is needed for environmental
16 purposes, then, if water is unavailable, inform the most junior water right holders that water
17 is not available for them to divert.³ Without a clear understanding of water demand
18 throughout the year, the Division is hampered in its ability to protect senior water rights
19 during times of shortage.

20 25. Failure to submit timely and accurate diversion data harms the Division’s ability to protect
21 public trust resources by limiting the Division’s ability to determine and set instream flow
22 requirements. Developing instream flow requirements relies on timely and correct
23 information about diverters within the watershed. Once staff understand how water is
24 currently used, and its permitted maxima, analysis can begin on how much water is needed
25 for public trust resources. With the human and public trust needs clearly understood, staff
26 can then make determinations on how much water should be used by humans and the
27 environment. This balancing of water use is impossible without accurate and timely
28 Statements and Reports.

³ This is a general discussion of water unavailability analysis and should not be construed as requisite steps in every case. This discussion is provided to illustrate the importance of data in this decision making process.

- 1 26. Failure to submit timely and accurate diversion data harms the Division's ability to
2 determine compliance with the State Water Boards permits and regulations. Many
3 enforcement cases rely heavily on Statements and Reports to determine if a party is
4 diverting without basis of right, out of season, or exceeding the amount permitted.
5 Accurate and timely Statements and Reports, coupled with stream gages and direct
6 observations, inform Division Enforcement Section staff investigations.
- 7 27. Failure to submit timely and accurate diversion data harms the Division's ability to build
8 and calibrate water resource planning models. Annual Statements and Reports submitted by
9 water rights holders provide the backbone for the Division's data analysis. These planning
10 models are then used by decision makers to inform their water resource decisions. Without
11 accurate and timely Statements and Reports, decision makers may not have enough
12 information regarding the placement of a point of diversion, long term availability of water,
13 or may not have a clear understanding of whether enough water is available to grow a
14 particular crop along a surface waterbody.
- 15 28. Failure to submit timely and accurate diversion data harms the Division's ability to evaluate
16 and respond to complaints. Statements and Reports are a critical source of information
17 when the Division Enforcement Section receives complaints of "low flow" or "no flow" in
18 a given surface waterbody. A preliminary step to investigate complaints is for Division
19 Enforcement Section staff to research statement and water right holders both upstream and
20 downstream of the complainant. Searching through historical water use provided in the
21 Statements and Reports provides insight into how a specific waterbody is used and if
22 further investigation of potential illegal diversion is warranted. Without accurate
23 information in the Statements and Reports Division Enforcement Section staff would have
24 to resort to time-intensive surveillance and numerous field inspections, thus allowing
25 potential violations to persist, undermining the water rights regulatory framework.
- 26 29. Failure to submit timely and accurate diversion data harms the Division's ability to quickly
27 respond to emergency situations or changes in the major diversion operations. The
28 information contained within Statements and Reports can be used when changes in the
environment potentially pose human health and safety risks. For example, Sacramento
Regional County Sanitation District's wastewater treatment plant discharges treated

1 effluent into the Sacramento River downstream of a drinking water intake for the East Bay
2 Municipal Utility District. At times, the Sacramento River reverses flow and East Bay
3 Municipal Utility District must coordinate with Sacramento Regional County Sanitation
4 District so that the East Bay Municipal Utility District does not inadvertently divert treated
5 wastewater effluent into its drinking water system. The clarity provided by the information
6 contained within these agencies' Statements and Reports allows both agencies to effectively
7 coordinate their water needs to avert potential negative impacts to humans.

- 8 30. Consistent with the above listed use cases, the State Water Board adopted regulations
9 mandating annual water use reporting. But the data is only as good as what is submitted by
10 the diverters. Filing timely and accurate Statements and Reports may seem trivial to an
11 individual statement or water right holder, but on an aggregate basis these types of
12 violations undermine the validity and transparency of our water rights system.

13 I declare under penalty of perjury to the laws of the State of California that the foregoing is true
14 and correct. Executed March 18, 2019, at Sacramento, California.

15 
16 KYLE OCHENDUSZKO, P.E.