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Attorneys at Law

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Via Email and U.S. Mail

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 24th Floor
Sacramento, CA 95814
Email: commentletters@waterboards.ca.gov

Re: *Comment Letter – Draft Order Adopting Cease and Desist Order and Imposing Administrative Civil Liability for G. Scott Fahey and Sugar Pine Spring Water, LP*

Dear Ms. Townsend:

On behalf of Modesto Irrigation District, Turlock Irrigation District (collectively, “the Districts”), and the City and County of San Francisco (“CCSF”), attached please find comments regarding the proposed draft order adopting a cease and desist order and imposing administrative civil liability against G. Scott Fahey and Sugar Pine Spring Water, LP, issued on February 8, 2019.

Should you have any questions, please do not hesitate to contact our office directly.

Respectfully submitted,

William C. Paris, III

WCP/llw

Attachment

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25 **STATE WATER RESOURCES CONTROL BOARD**

26 **DRAFT ORDER ADOPTING CEASE AND)**
27 **DESIST ORDER AND IMPOSING)**
28 **ADMINISTRATIVE CIVIL LIABILITY –)**
29 **G. SCOTT FAHEY AND SUGAR PINE)**
30 **SPRING WATER, LP – DEADWOOD)**
31 **SPRING AND THREE UNNAMED)**
32 **SPRINGS TRIBUTARY TO TUOLUMNE)**
33 **RIVER, TUOLUMNE COUNTY)**
34 _____)

1 The following comments are submitted on behalf of Modesto Irrigation District, Turlock
2 Irrigation District (collectively, “the Districts”), and the City and County of San Francisco
3 (“CCSF”). The comments address the State Water Resources Control Board’s (“SWB” or “Board”)
4 proposed draft order adopting a cease and desist order and imposing administrative civil liability
5 against G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, “Fahey”), issued on February
6 8, 2019 (the “Draft Order”).
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8 **I. Background**

9 Fahey holds two water right permits to appropriate water from sources that are tributary to
10 the Tuolumne River upstream of New Don Pedro Reservoir (“NDPR”): Permits 20784 and 21289.
11 The rights to divert and store water in NDPR are held solely by the Districts pursuant to water rights
12 that are senior to Fahey’s water rights. CCSF has Tuolumne River water rights that also are senior to
13 the water rights held by Fahey, and has an interest in the inflow to NDPR pursuant to a physical
14 solution memorialized in the Raker Act and agreements between CCSF and the Districts, which
15 provide an accounting mechanism for storage and diversion at NDPR.
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17 Term 19 in Permit 20784 explicitly requires Fahey to provide replacement water to NDPR
18 for all water he diverts under the permit from June 16 to October 31 of each year (the “fully
19 appropriated stream” or “FAS Period”), when the Tuolumne River is fully appropriated, in
20 accordance with the terms and conditions set out in a 1992 agreement with the Districts (the “1992
21 Agreement”). The 1992 Agreement specifically provides that Fahey (1) is required to provide this
22 makeup water regardless of whether he receives notice of such a request from the Districts, and (2)
23 is not permitted to carry over any replacement water for credit towards diversions in future years.
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25 In addition, Term 20 in Permit 20784 and Term 34 in Permit 21289 require Fahey to provide
26 replacement water to NDPR for diversions under these permits from November 1 to June 15 of each
27 year (the “Non-FAS Period”), if those diversions are adverse or injurious to the prior rights of the
28

1 Districts or CCSF. The Permits require Fahey to provide such replacement water within one year of
2 being notified by the Districts or CCSF of potential or actual water supply reduction caused by his
3 diversions.

4 The Districts have never agreed to allow Fahey to store any quantity of water in NDPR, nor
5 does Fahey have any agreement, existing or pending, with the Districts and CCSF authorizing him
6 to hold water in NDPR as “replacement water” under the Permits’ terms, or any type of carryover
7 “credit” in NDPR from year to year. Further, Fahey does not have an agreement with the Districts
8 and CCSF regarding the “source, amount and location” at NDPR of replacement water to be
9 discharged into NDPR, as required by Term 20 in Permit 20784 and Term 34 in Permit 21289.

10 On February 8, 2019, the Board issued the Draft Order, in direct response to Fahey’s
11 unauthorized diversions in violation of curtailment orders in 2014 and 2015. Besides addressing the
12 matter of those specified unauthorized diversions, the Draft Order also contains rulings related to
13 storage of the replacement water in NDPR, which is the primary issue addressed by this letter.
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17 **II. Fahey Does Not Have Rights to Store Water Year Over Year in**
18 **New Don Pedro Reservoir**

19 The Draft Order misstates Fahey’s rights to regulate and store water in NDPR during the
20 Non-FAS Period, by indicating that “Fahey’s permits allow him to pre-position replacement water
21 for his Non-FAS Period diversions in NDPR and carry it over from year to year.” (Draft Order, p.
22 3.) In fact, Fahey does not have the right to regulate and store Non-FAS Period makeup water year
23 over year in NDPR, and the Draft Order errs when it inappropriately suggests that Fahey has such
24 rights. This assertion, that Fahey has some ability to store water year after year within NDPR for his
25 Non-FAS Period obligations, is outside of the scope of the Board’s authority, and must not appear in
26 the final version of this Draft Order. “It is not within the power of the legislature to vest in any other
27 body any general judicial power to establish and declare the right and title to private property.”
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1 (*Tulare Water Co. v. State Water Com.* (1921) 187 Cal. 533, 542 (conc. opn. of Shaw, C.J.)) Fahey
2 does not have the right to store carryover water in NDPR year after year, and the SWB does not
3 have the authority to grant Fahey that right, whether during the FAS Period or Non-FAS Period.

4 The Draft Order suggests that the Districts and CCSF were somehow complicit in Fahey’s
5 “genuine misunderstanding” of his obligations under the permit terms and 1992 Agreement. Fahey
6 held the mistaken belief, based on purported oral communications with a Mr. LeRoy Kennedy circa
7 1992, that he was not required to communicate with the Districts and CCSF regarding his diversions
8 and makeup water deliveries in the Non-FAS Period. This is a fundamental misinterpretation of
9 Fahey’s relationship with the Districts and CCSF. First, Mr. Kennedy’s oral statements did not
10 validly amend the 1992 Agreement, because the 1992 Agreement explicitly requires any
11 modifications to be made in writing. Second, Fahey had no reasonable basis for his belief that Mr.
12 Kennedy, a staff engineer, could bind the Districts by his oral communications. Indeed, the Districts
13 and CCSF have no obligation to “supervise” Fahey’s activities. Fahey’s permit terms and the 1992
14 Agreement require (1) that he file semi-annual reports with both TID and MID showing the amount
15 of water diverted monthly and amount discharged into NDPR, and (2) that the source, amount, and
16 location of replacement water discharged into NDPR shall be mutually agreed upon by Fahey, the
17 Districts, and CCSF. Fahey failed to comply with his permit terms, which prevented the Districts
18 and CCSF from evaluating the impact of Fahey’s Non-FAS Period diversions and the need to
19 request makeup water. In any event, this does not change the fact that Fahey has no right to regulate
20 or store Non-FAS Period makeup water in NDPR. The 1992 Agreement does not allow for year
21 over year storage in NDPR, and there is no evidence to suggest that the 1992 Agreement was ever
22 modified to allow this—in fact, the 1992 Agreement explicitly states that it may be amended only
23 by a written instrument duly executed by all the parties. (*Id.* at p. 2, para. 11.) Fahey provided no
24 such evidence of modification, and the Draft Order should therefore indicate that Fahey is *not*

1 allowed to store water year over year in NDPR.

2 The Draft Order assumes that the Districts and CCSF had sufficient ability to request Non-
3 FAS Period makeup water, because they could notify Fahey of potential injury then have the water
4 delivered within a year under the permit terms. However, this premise raises two issues of concern.
5 First, this notion incorrectly presupposes that Fahey is in fact providing the Districts and CCSF with
6 the requisite notice, so that the Districts and CCSF are appropriately warned whether or not they
7 stand to be injured. If Fahey does not provide that notice (as he has not in the past), the Districts and
8 CCSF cannot know whether to request replacement water. Second, the Draft Order interprets this
9 term in Fahey’s permits to serve as the basis for allowing him to preposition water for Non-FAS
10 Period diversions, and carry it over year to year. However, nothing in this term permits storage in
11 NDPR. In two distinct places, the Draft Order states: “Fahey’s permits allow him to pre-position
12 replacement water for his Non-FAS Period diversions in NDPR and carry it over from year to year,”
13 then states “[u]nlike the FAS Period, Fahey’s permits do not prohibit him from carrying replacement
14 water over from year to year to compensate MID and TID for his non-FAS Period diversions.”
15 (Draft Order, pp. 3, 4 (emphasis added).) The Draft Order mischaracterizes Fahey’s permit terms
16 and his contractual rights with the District; Fahey simply does not have a right to carryover storage
17 in NDPR.
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21 Fahey should not be permitted to rely on his clearly incorrect belief that he did not need to
22 provide the Districts and CCSF with regular accounting of his diversions, as that interpretation
23 directly contradicts the terms of the 1992 Agreement, which is expressly incorporated into Fahey’s
24 water right permits. The Districts and CCSF are not, and should not be, responsible for prodding
25 Fahey to provide timely notification of his diversions and makeup water amounts. The obligation to
26 notify the Districts and CCSF is primarily Fahey’s; secondarily, the SWB should ensure that Fahey
27 is complying with the clear and explicit terms of his permits.
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1 **III. The Proposed Curtailment Operations Plan is Unnecessarily Broad in Scope**

2 As discussed above, the Districts and CCSF are seeking only Fahey’s adherence to and
3 compliance with his existing permit terms and the 1992 Agreement, and to confirm that Fahey has
4 no right to carryover storage in NDPR. Nothing in the permits or the 1992 Agreement give Fahey
5 the right to store any amount of water year over year in NDPR, and the Districts and CCSF request
6 that the Curtailment Operations Plan be modified to reflect simply that Fahey comply with his
7 existing permit terms and obtain necessary agreements with the Districts and CCSF for delivery of
8 makeup water. The Curtailment Operations Plan should not assume that Fahey has any rights to
9 regulate or store Non-FAS Period makeup water in NDPR, but should direct Fahey to explain how
10 he intends to satisfy his Non-FAS Period makeup obligations to the Districts and CCSF, which may
11 require appropriate additional agreements with the Districts and CCSF to carry out the Curtailment
12 Operations Plan. The Districts and CCSF will consider proposals to amend the 1992 Agreement
13 and/or to enter into new agreements, but cannot agree to makeup water terms that call for carryover
14 storage in NDPR.
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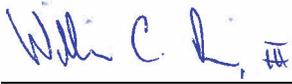
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17 **IV. The Order Should be Issued as Non-Precedential**

18 The Districts and CCSF respectfully request that the Final Order in this matter be expressly
19 deemed “non-precedential.” This matter is highly factual in nature and limited in scope and parties,
20 and therefore is not a good case for establishing precedent related to SWB enforcement policy.
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22 **V. Conclusion**

23 The Districts and CCSF request that the Draft Order be modified to clarify that Fahey has no
24 right to place water into NDPR and store it there year over year to meet his obligation as to Non-
25 FAS Period diversions. The 1992 Agreement and Fahey’s permit terms make it clear that no storage
26 rights are granted as to the FAS Period makeup water, and while such terms are not explicitly set out
27 for the Non-FAS Period, Fahey has no affirmative storage right for Non-FAS Period makeup water,
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1 and the SWB may not grant him that storage right through an ACL/CDO Order or otherwise. The
2 Districts and CCSF further request that Fahey be directed to obtain an appropriate agreement with
3 the Districts and CCSF regarding Fahey's Non-FAS Period makeup obligations, and that the Final
4 Order in this matter be designated as non-precedential.
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7 Dated: March 11, 2019 **O'LAUGHLIN & PARIS LLP**
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