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Subject: Fahey Hearing Project - Schedule for Briefing and Instructions
Date: Wednesday, April 3, 2019 9:22:10 AM

Service List,

Background:

On February 8, 2019, hearing staff for the State Water Resources Control Board (State Water Board or Board) circulated a draft order in this proceeding for review and comment by the parties. G. Scott Fahey and Sugar Pine Spring Water, LP (collectively, Fahey) and Modesto Irrigation District (MID), Turlock Irrigation District (TID), and the City and County of San Francisco (CCSF) (collectively, the Interveners) submitted written comments on March 11. The Board scheduled a public hearing to consider adoption of the draft order for April 2 and posted a revised draft order and change sheet #1 at the close of business on March 28.

On March 29, 2019, the Interveners requested that the State Water Board move consideration of the revised draft order to the April 16 Board meeting “[b]ased on the substantive changes made by the Revised Draft Order, and our hope that Board Staff will consider our proposed redlines.” The Interveners’ request included a redline-strikeout version of the February 8 draft order incorporating changes requested by the Interveners. On March 30, hearing team staff sent the parties a list of questions to address in their oral comments at the April 2 Board meeting. Fahey’s counsel joined the continuance request on April 1 and requested the opportunity to file a written brief. Counsel for the staff Prosecution Team and the Interveners joined the request for continuance and written briefing. In response, consideration of the draft order was pulled from the April 2 Board meeting agenda.

Hearing team staff have prepared the following prompt and schedule for written briefing requested by the parties. The purpose of the prompt is to focus written briefs on issues raised in the March 29, 2019 continuance request and subsequent correspondence in light of the previous opportunity to submit written comments and the subsequent opportunity to submit oral comments at a future Board meeting.

Prompt:

Fahey holds water right Permits 20784 (Application 29977) and 21289 (Application 31491), with priority dates of 1991 and 2004, respectively. Permit 20784 and Permit 21289 authorize direct diversion for industrial use. (PT-15, pp. 3–4; PT-16, pp. 4–5.)

The draft order refers to the part of the year between June 16 through October 31 as the “FAS Period” and refers to the part of the year from November 1 through June 15 as the “non-FAS Period.”

Term 20 of Permit 20784 provides, at subparagraph 2, that:

Permittee shall provide replacement water within one year of the annual notification by San Francisco or the Districts of potential or actual water supply reduction caused by permittee's diversions. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. **Replacement water may be provided in advance and credited to future replacement water requirements.** Permittee shall not be obligated to provide replacement water for diversions that occur during periods when the Districts' and San Francisco's reservoirs are spilling or are being operated in anticipation of spill except that all water diverted during the period June 16 through October 31 shall be replaced pursuant to the Water Exchange Agreement executed on December 12, 1992 between permittee and the Districts. Permittee's obligations to provide replacement water under this agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement. **The source, amount and location at New Don Pedro Reservoir of replacement water discharged to the reservoir shall be reported to the State Water Resources Control Board with the annual Progress Report by Permittee.**

([PT-15](#), pp. 6–7 [emphasis added].)

Term 34 of Permit 21289 provides, at subparagraphs 2 and 3, that:

Permittee shall provide replacement water within one year of notification by San Francisco of potential or actual water supply reduction caused by permittee's diversion. Permittee shall provide replacement water in a manner that will offset the separate reductions in water supplies of San Francisco and the Districts. **Replacement water may be provided in advance and credited to future replacement water requirements.** Permittee shall not be obligated to provide replacement water for diversions that occur during periods when the Districts and San Francisco's reservoirs are spilling or are being operated in anticipation of spill.

Permittee's obligations to provide replacement water under this letter agreement shall take into consideration permittee's obligations to provide replacement water under the Water Exchange Agreement executed on December 12, 1992 between Permittee and the Districts. **The source, amount and location at NDPR of replacement water discharged into NDPR shall be mutually agreed upon by the permittee, the Districts, and San Francisco, and shall be reported to the State Water Board with the annual Progress Report by Permittee.**

([PT-16](#), p. 9 [emphasis added].)

The 1992 exchange agreement between Fahey, Modesto Irrigation District (MID), and Turlock Irrigation District (TID) provides, at paragraphs 1 through 4 and 9, that:

1. Fahey shall be entitled to appropriate up to 20,000 gallons per day (22.41 acre-feet per year) from Deadwood Spring and up to 20,000 gallons per day (22.41 acre-feet per year)

from Cottonwood Spring according to the terms and conditions in SWRCB Application No. 29977.

2. Between the period June 15 and October 31 of any year, Fahey is limited to 17 acre-feet (40,000 gallons per day x 138 days).

3. To provide sufficient make-up water during the period of unavailability, Fahey shall pump an equivalent amount of ground water from his well located in the SW ¼ of the NE ¼ of the NE ¼ of Section 8, T3S, R15E, MDB&M. The water shall be discharged into an unnamed tributary thence into the Roger Creek arm of Lake Don Pedro.

4. Fahey may provide make-up water at any time of the year between January 1 and December 31. **Fahey may pump more water than is required under this Agreement and build a surplus prior to the period of unavailability; however, no carryover will be allowed to subsequent years.**

...

9. Water Rights. Fahey shall not accrue any interest in the Districts' water rights by virtue of this Agreement. **Nothing contained herein shall be construed as a grant of water rights or an interest in the Districts' water rights.**

([PT-19](#), pp. 1–2 [emphasis added].)

The draft order discusses these issues in sections 1.0, 5.1, 5.2.3.2, 5.3.1, and 7.1.2 and in some subdivisions of those sections.

In light of the foregoing, please respond to the following questions:

- Under Permit 20784, may Fahey provide replacement water in advance and credit it to future replacement water requirements for non-FAS Period diversions in a future year to comply with the terms of the permit? If so, then under what conditions may Fahey do so?
- Under Permit 21289, may Fahey provide replacement water in advance and credit it to future replacement water requirements for non-FAS Period diversions in a future year to comply with the terms of the permit? If so, then under what conditions may Fahey do so?
- Does Fahey have the right to store water in New Don Pedro Reservoir (NDPR)?
- Is it possible to provide replacement water in advance and credit it towards future replacement water requirements without pre-positioning water into NDPR?
- Is it possible to distinguish a property interest in water stored in NDPR from credit for Fahey's non-FAS Period replacement water deliveries to NDPR towards compliance with Fahey's permit terms?

Instructions:

- Parties may file briefs responding to the prompt. **Briefs are due Wednesday, April 10 at noon**

(12:00 PM). Briefs are limited to five (5) pages (not including the service list).

- The State Water Board reserves the right to strike briefs or portions of briefs that address issues that are not relevant to the prompt.
- Parties may propose changes to following sections (including subdivisions thereof) of the March 28, 2019 draft order: 1.0, 5.1, 5.2.3.2, 5.3.1, 7.1.2, and the ordering section. Proposed changes may be submitted in the form of a change sheet or a redline-strikeout of the March 28 draft order. **Any proposed changes to the March 28 draft order shall be filed concurrently with a brief no later than Wednesday, April 10 at noon (12:00 PM).**
 - Any proposed changes to a portion of the draft order not identified above shall be accompanied by a written statement demonstrating the existence of good cause, not to exceed one (1) page. The Board reserves the right to strike proposed changes to sections not identified above where good cause is not demonstrated.
 - The Board reserves the right to strike briefing and other argument submitted in the guise of proposed changes to the draft order.
- No reply briefs will be accepted. However, parties may address arguments raised by other parties during oral comments at a future Board meeting.

Citation Rules:

- Citations to the record should follow the format specified in footnote 1 of the March 28, 2019 draft order.
- Citations to documents within exhibit SWRCB-1 (permitting files) should identify the exhibit, the application number, the file category and volume number, and the title, author, recipient (if any) and date of the specific document cited. For example: SWRCB-1, A031491, Correspondence File, Cat. 1, Vol. 1, Contact Report, Yoko Mooring, State Water Board (Oct. 10, 2003).
- Citations to other materials should follow the fourth edition of the California Style Manual.

Please contact me if you have any questions.

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State Water Resources Control Board
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