ABBOTT &
KINDERMANN, INC.
ATTORNEYS AT LAW

March 11, 2019

Via U.S. Mail and
Email to: commentletters@waterboards.ca.gov

Jeanine Townsend
Clerk of the Board
State Water Resources Control Board
P.O. Box 100
Sacramento, CA 95812-0100

RE: COMMENT LETTER - 4/2/19 BOARD MEETING: FAHEY CDO & ACL HEARING

Dear Ms. Townsend:

Attached please find G. Scott Fahey and Sugar Pine Spring Water, LP's Response and Comments to the Draft Order Adopting a Cease and Desist Order and Imposing Administrative Liability.

Thank you for your attention to this matter.

Sincerely,

Glen C. Hansen

GCH/lh
Enclosure
cc: Client

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BEFORE THE STATE OF CALIFORNIA

STATE WATER RESOURCES CONTROL BOARD

IN THE MATTER OF ADMINISTRATIVE CIVIL LIABILITY COMPLAINT ISSUED AGAINST G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP	**RESPONSE AND COMMENTS TO DRAFT ORDER ADOPTING A CEASE AND DESIST ORDER AND IMPOSING ADMINISTRATIVE LIABILITY**

The State Water Resources Control Board proposes a Draft Order Adopting a Cease and Desist Order and Imposing Administrative Liability on February 8, 2019 ("Draft Order"). G. SCOTT FAHEY AND SUGAR PINE SPRING WATER, LP (collectively, "Fahey") hereby submit their response and comments to the Draft Order as follows:

1. As to the Draft Order, page 56, fifth line from the bottom of the page: Please state the authority or statute that authorizes the Board to "set[] aside the requirement to provide all FAS make-up water during the same year it is diverted?"

2. As to the Draft Order, page 60, second paragraph: Please explain (a) if the 2014 Curtailment period was from May 27 through October 31, inclusive, and November 4 through November 18, inclusive; and (b) if the 2015 Curtailment period was from April 1 through November 1, inclusive.

3. As to the Draft Order, page 61, second paragraph: Please state whether, during the 2014 and 2015 Curtailment periods there were any rights or claims between Fahey's points of diversion and the Delta, in addition to Modesto Irrigation District (MID"), Tuolumne Irrigation

District ("TID"), the City and County of San Francisco ("CCSF"), or others "downstream of both NDPR and Fahey and senior both to Fahey's and to MID and TID's post-1914 at NDPR" that were authorize to divert?

4. As to Draft Order, page 64, end of first partial paragraph: Since the Mrowka testimony at R.T., Jan. 26, 2015, p. 29:2-15, conflicts with the Mrowka testimony at R.T., Jan. 25, 2015, p.98:1-11, please explain why one part of her testimony is more credible than the other part of her testimony?

5. As to Draft Order, page 65, last paragraph: Does the Board find that Fahey is not diverting any developed percolating ground water, or does the Board find that the factual determination of that matter cannot be made without further field investigation by a Certified Hydrogeologist, Registered as Professional Geologist in California, such as Ross Grunwald (R.T., Jan. 25, 2015, p.176:23-25)?

6. As to Draft Order, page 66, end of first partial paragraph: Is Mrowka a Registered Professional Geologist in the State of California and Certified Hydrogeologist, and is she testifying as an expert witness (R.T., Jan. 26, 2015, p. 29:2-15)?

7. As to Draft Order, page 67, paragraph 6.0, second to last sentence ("Fahey....threatens to continue") and paragraph 6.1, second sentence (Fahey "continued and threatened unauthorized diversion"): Please identify where is there evidence in the 2016, 2017 and 2018 Progress Report by Permittee, or anywhere else, that Fahey "threatens to continue" or "continued and threatened unauthorized diversion...."

8. As to Draft Order, page 68, section 7.1.1, first paragraph, last sentence: Please explain whether the Board is making the finding that during the 2014 and 2015 Curtailment periods there were many others with a senior basis of right allowed to divert in addition to MID/TID & CCSF?

9. As to Draft Order, page 69, section 7.1.2, first paragraph: Please insert the following highlighted text (in red) in order to present an accurate context of the Board's findings:

> Fahey unlawfully diverted 25.33 acre-feet over 178 days during the FAS Period in 2014 and 2015 without providing make-up water to MID and TID as would have been required by his permits and the

> Water Exchange Agreement for the diversion to be authorized. Evidence in the record shows that Fahey did not provide make-up water for his FAS Period diversions on a consistent basis in prior years. However in 2009, upon receipt of the Board's letter, dated Feb. 28, 2009, warning of "a very serious dilemma" if surplus water was not impounded for use during a future curtailment, Fahey "immediately did" (R.T., Jan. 26, 2016, p.78:10-11.), cause the impoundment of 88.31 AF of foreign-water in NDPR for its use as replacement water during a future curtailment. As discussed in section 5.3.1.1, Fahey failed to meet his obligation to provide make-up water for his full FAS Period diversions in 2011. (See Table 4 [demonstrating that Fahey did not provide sufficient make-up water for FAS Period diversions in 2011]; Prosecution Team's Closing Brief, June 17, 2016, p. 15:15–25.) In addition, during the FAS Periods in 2012 and 2013, Fahey diverted at least 28.3 acre-feet and at least 10.4 acre-feet, respectively,23 without providing any FAS Period make-up water in those years. (Fahey-57, p. 1265 [Permit 20784 reported 2012 diversions]; Fahey-58, p. 1269 [Permit 20784 reported 2013 diversions]; SWRCB-1, Permit 21289 Report of Permittee for 2012 and 2013; R.T., Jan. 25, 2016, pp. 195:24 to 196:3 [Fahey did not buy water from TUD in 2012 or 2013 because it was unavailable].) In 2009 through 2012, Fahey's FAS Period diversions also violated Term 2 of the Water Exchange Agreement, which requires that Fahey divert no more than 17 acre-feet during the FAS Period in any year. (Fahey-51, p. 929 [Permit 20784 reported 2009 diversions]; Fahey-52, p. 1016 [Permit 20784 reported 2010 diversions]; Fahey-56, p. 1243 [Permit 20784 reported 2011 diversions]; Fahey-57, p. 1265 [Permit 20784 reported 2012 diversions]; PT-19, p. 1, ¶ 2 [Term 2].)

10. As to Draft Order, page 70, section 7.1.2, last paragraph: Please insert the following highlighted text (in red) in order to present an accurate context of the Board's findings:

> The record suggests that Fahey would have continued violating his permit terms and obligations under the Water Exchange Agreement indefinitely but for the Prosecution Team's intervention. Additional relevant circumstances related to the nature and persistence of the violation are discussed below. But in Fahey's defense, the record is clear, Fahey complied with each years' reporting requirements, was never given notice of any existing Permit violation by either the Interveners or the SWRCB prior to Permit 21289 being issued, and no timely notice of violation was provided to Fahey when he reported the amount of water diverted during the 2014 Curtailment; that being said, how would Fahey have known he was in continual violation of his Permits?

11. As to Draft Order, page 73, first full paragraph, last sentence: Please explain whether Fahey's full and complete compliance of Term 24 Permit 21289 was considered to mitigate the Prosecution Team's allegation that bypass flow requirements were not met.

12. As to Draft Order, page 74, section 7.1.2.3: Please explain whether the applicable Water Code compliance is a matter of strict liability that does not require a guilty mind upon its

violation, or not?

13. As to Draft Order, page 79, section 7.1.2.3, last paragraph, second sentence: Please insert the following highlighted text (in red) in order to present an accurate context of the Board's findings:

> The better explanation for the unlawful diversion is that Fahey genuinely believed he had already met his obligations to downstream senior diverters. Fahey's mistake, his apparent reliance on long-ago representations by the Interveners, his apparent reliance on the Interveners' failure to timely inform him of his error, and his experience working with the Interveners, and his reliance upon the SWRCB issuance of Permit 21289, which by statute cannot occur without absolute compliance of his existing Permit, does not justify or excuse an unlawful diversion. All of these considerations, however, are relevant to setting an appropriate civil penalty for unlawful diversions that deprived the very same senior diverters of water and violated permit terms specifically crafted to protect their interests.

14. As to Draft Order, page 80, section 7.1.4, first paragraph, first sentence: Please correct the findings to demonstrate, based on the documents and information belatedly produced by the Prosecution Team after the hearing, that the "340, claimed, like Fahey" is actually just four (4) Curtailment Certification forms, including Fahey's, that only had the "OTHER" box checked and attached a letter of explanation.

Respectfully submitted,

Dated: March 11, 2019

ABBOTT & KINDERMANN, INC.

By: _____

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