
State Water Resources Control Board

March 25, 2022

Public Hearing on Prosecution Team’s Draft Cease-and-Desist Order to BlueTriton Brands, Inc.: Hearing Officer’s Rulings on Pending Motions

Introduction

This document contains my rulings on the various motions the parties have filed in this matter.

Prosecution Team’s Motion for Judgment and Blue Triton’s Motion for Nonsuit and/or Judgment

On February 11, 2022, the Prosecution Team filed a motion for judgment. On March 10, 2022, Respondent BlueTriton Brands, Inc. (“BlueTriton”) filed opposition to this motion.

On February 25, 2022, Blue Triton filed a motion for nonsuit or judgment, with an accompanying Declaration of Robert E. Donlan. On February 26, 2022, Steve Loe filed opposition to this motion. On March 16, 2022, the Prosecution Team filed opposition to this motion. On March 17, 2022, the Center for Biological Diversity and the Story of Stuff Project (“Story of Stuff”) filed joinders in the Prosecution Team’s opposition.

The Code of Civil Procedure sections cited in the Prosecution Team’s and BlueTriton’s motions do not explicitly apply to this proceeding, although they may provide guidance for how an AHO hearing officer may decide to conduct a hearing. State Water Board Order WR 2016-0015, at pages 11-12, held that the Board may consider a motion for judgment during the course of an evidentiary hearing. However, that order then states that the State Water Board generally does not allow parties to file such motions, and that the Board discourages parties from attempting to do so in future proceedings. (*Id.*, p. 12.)

As discussed in my November 4, 2021 rulings in this matter and by me on the record on March 21, 2022, this hearing involves complex legal issues, many of which are issues of first impression. There also may be some disputed factual issues. The AHO’s hearing process has given and will give the parties opportunities to address these issues in detail, and this process will benefit from a complete administrative record, which will be compiled during all phases of this hearing. For these reasons, and exercising my

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

discretion regarding the conduct of this hearing, I denied the Prosecution Team's motion for judgment, and I denied BlueTriton's motion for nonsuit or judgment, during the March 21, 2022 hearing. These denials were without prejudice to the rights of the Prosecution Team, BlueTriton and other parties to make arguments in their closing briefs that are the same or similar to the arguments the Prosecution Team and BlueTriton made in their motions.

BlueTriton's Motions in Limine to Strike and/or Exclude San Bernardino Valley Municipal Water District's and Anthony Serrano's Proposed Rebuttal Testimony and Exhibits

On March 1, 2022, Blue Triton filed motions in limine to strike or exclude the proposed rebuttal testimony and exhibits of the San Bernardino Valley Municipal Water District ("San Bernardino Valley MWD") (exhibits SBVMWD-1 through SBVMWD-15) and Anthony Serrano (exhibits Serrano-8 through Serrano-11), with an accompanying Declaration of Shawnda M. Grady. On March 15, Anthony Serrano filed opposition to the motion to strike or exclude his rebuttal testimony and exhibits. On March 16, SBVMWD filed opposition to the motion to strike or exhibit its rebuttal testimony and exhibits.

San Bernardino Valley MWD argued that the written proposed testimony of Wen Huang does not assert any violations of the *Western Municipal Water District* or *Orange County Water District* judgments and instead just shows how BlueTriton's diversions affect other water users in the Santa Ana River watershed. Based on this argument, San Bernardino Valley MWD asserted that Mr. Huang's written proposed testimony and related exhibits are not excluded by the last sentence of Hearing Issue 1, as amended in my December 8, 2021 orders.

However, even if the distinction between effects on other water users and violations of the judgments is valid, this proposed testimony still is outside the scope of the first sentence of Hearing Issue 1. As I discussed in my November 4, 2021 ruling, on pages 7-8, the Prosecution Team's draft CDO does not raise issues regarding water-right priorities, impacts on other water users, or violations of either of these two judgments.

Because San Bernardino Valley MWD's and Anthony Serrano's proposed rebuttal testimony and exhibits just concerned these issues, I granted BlueTriton's motions and ruled during the March 21, 2022 hearing that I would not allow San Bernardino Valley MWD or Anthony Serrano to present their written proposed rebuttal testimony or their rebuttal exhibits. This ruling was without prejudice the rights of San Bernardino Valley Municipal Water District, Anthony Serrano and other parties to raise these arguments or similar arguments in future complaints they may file with the Division of Water Rights, Enforcement Section, or in the courts in the proceedings involving the above two judgements.

BlueTriton's Motion in Limine to Strike and/or Exclude Prosecution Team's Proposed Rebuttal Testimony and Exhibits

On March 18, 2022, BlueTriton filed a motion in limine to strike exclude or exclude the Prosecution Team's proposed rebuttal testimony and exhibits.

This motion asserted that the Prosecution Team's written proposed rebuttal testimony of Mr. Eggers and Ms. Stork does not rebut testimony presented by other parties during their cases-in chief. This assertion may or may not have been correct as to the various elements of their written proposed rebuttal testimony. However, even if some parts of their written proposed rebuttal testimony did not rebut specific testimony presented by other parties in their cases-in-chief, those parts may rebut the extensive written proposed rebuttal testimony and rebuttal exhibits that BlueTriton submitted for the rebuttal phase of this hearing.

Rather than spending the considerable effort that would be needed to sort out exactly what parts of Mr. Eggers's and Ms. Stock's written proposed rebuttal testimony rebut what other testimony, I ruled during the March 21, 2022 hearing that I would allow them to submit and summarize their written proposed rebuttal testimony. I made this ruling exercising my hearing officer's discretion in the conduct of this hearing. As stated on page 11 of the November 17, 2021 Notice of Second Pre-Hearing Conference and Public Hearing, the AHO hearing officer may amend the procedures stated in the notice before, during or after the hearing, as he or she deems appropriate.

Story of Stuff Motion in Limine No. 2 to Exclude Expert Testimony of Mark Nicholls and Refer Ruling on Admissibility of BTB-6, BTB-7, and BTB-9 Until Conclusion of Sur-Rebuttal; Center for Biological Diversity Objections to BlueTriton Rebuttal Testimony

On March 22, 2022, Story of Stuff filed its Motion in Limine No. 2, which asked me to exclude portions of the written proposed testimony of BlueTriton witness Mark Nicholls in exhibit BTB-6. Story of Stuff argued that these portions of this exhibit should be excluded because: (a) the contain unsupported statements of fact that are not based on personal knowledge or any supporting foundations; (b) they contain misstatements of prior testimony; (c) they contain improper legal conclusions; and (d) they rely on unproduced data.

Story of Stuff objected to parts of exhibit BTB-7, a technical report prepared by Mr. Nicholls, on the grounds that it contains discussions of the adaptive management plan BlueTriton has prepared for the Forest Service in connection with BlueTriton's special use permit from the Forest Service and a paired basin study required by the Forest Service, but does not contain significant portions of the technical data on which the conclusions in this plan and this study rely. Story of Stuff also asked me to defer ruling on the admissibility of these exhibits until after the conclusion of the sur-rebuttal phase of this hearing. Story of Stuff filed a Declaration of Rachel S. Doughty, with a detailed Exhibit A, in support of its motion.

On March 22, 2022, the Center for Biological Diversity and the Sierra Club filed their initial objections to exhibits BTB-6 and BTB-7. Their general objection was that there is not sufficient information in these exhibits for an independent expert to reproduce the results of the studies and to support the conclusions in these exhibits. They also stated various specific objections.

Near the end of the hearing day on March 22, I advised the parties that I was considering not admitting into evidence the parts of exhibit BTB-7 that discussed the paired watershed study and the coupled groundwater/surface water model, because the discussions of this study and this model did not appear to be relevant to the hearing issues, and because considering them, the underlying data (much of which had not been produced), and evidence rebutting them, would consume substantial amounts of time. I asked the attorneys to review this issue and to be prepared to discuss it on March 23.

On March 23, I told the attorneys that my proposed ruling was to not allow into evidence these parts of these exhibit BTB-7, and the parts of exhibit BTB-6 that refer to them, and I asked the attorneys for their comments. No one objected to my proposed ruling and all the attorneys who spoke supported it. I then ruled that I would not accept into evidence the following parts of exhibits BTB-6 and BTB-7:

Exhibit BTB-6: page 3:4-7 (¶ 9, 2nd sentence); p. 25:25-26 (the word “and” on line 25 and the rest of the sentence on line 26); p. 35:11-17 (¶ 114).

Exhibit BTB-7: section 6.3, part 7 (including sections 7.1, 7.1.1, 7.1.2, 7.2, 7.2.1 and 7.2.2), sections 8.5, 8.6 and 9.6; figures 28-45.

I also stated that I would consider excluding other parts of these exhibits, if any party advises me that such other parts of these exhibits include references to the paired watershed study or the coupled groundwater/surface water model. If any party wants to raise this point regarding such other parts of these exhibits, then he, she or it may do so by e-mail to me (sent to the AHO e-mail address), with the e-mail addresses of everyone else on the service list in the e-mail’s cc line.

After making this ruling, I denied the remainders of Story of Stuff’s motion in limine and the Center for Biological Diversity and Sierra Club’s objections, for the reasons I stated during the hearing.

BlueTriton’s Motion to Quash Story of Story Project’s Subpoena Duces Tecum

On February 17, 2022, BlueTriton filed a motion to quash the subpoena duces tecum that Story of Stuff served on BlueTriton on February 7, 2022. During the March 24, 2022 hearing, Story of Stuff’s attorney withdrew Story of Stuff’s February 7 subpoena. I therefore dismissed BlueTriton’s motion as moot.

AHO Staff Exhibits AHO-1 through AHO-4

During the March 24, 2022 hearing, I admitted into evidence exhibits AHO-1 through AHO-4.

After I admitted these exhibits, BlueTriton expressed the concern that audio-recording portions of exhibit AHO-3 may contain statements by Mr. Lawrence or Mr. Nicholls that went beyond descriptions of the facilities and features the parties were observing during the site visit when these recordings were made, and that it would not be appropriate to allow such statements into evidence because they were made outside of the normal hearing process where all parties, all attorneys and the court reporter are present.

I ruled that I would not change my ruling admitting exhibit AHO-3 into evidence, but that, if any party believes that the draft proposed order that I will be preparing in this matter and circulating to the parties for review and comments contains findings that are based on such statements, then the party may object to such findings in their comments on the draft proposed order, and I will consider those objections when I prepare the final proposed order that I will be transmitting to the Clerk of the State Water Board.

March 25, 2022

/s/ ALAN B. LILLY

Alan B. Lilly

Presiding Hearing Officer

Administrative Hearings Office

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