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## State Water Resources Control Board

November 4, 2021

### **Public Hearing on Prosecution Team’s Draft Cease-and-Desist Order to BlueTriton Brands, Inc.: Hearing Officer’s Rulings on BlueTriton’s Motion to Dismiss and Other Parties’ Requests to Add Hearing Issues**

#### **Introduction**

This document contains my rulings on the motion to dismiss filed by BlueTriton Brands, Inc. (“BlueTriton”) on August 5, 2021 and the requests filed by various parties on September 10, 2021 to expand the hearing issues stated in the July 8, 2021 Notice of Pre-Hearing Conference and Public Hearing in this matter.

For the reasons stated in this ruling, I deny BlueTriton’s motion, without prejudice to BlueTriton’s and other parties’ rights to make the same or related arguments during the hearing process, and I deny all the requests of other parties to add hearing issues, without prejudice to their rights to make these requests in future complaints to the Division of Water Rights Enforcement Section.

#### **Background**

On April 23, 2021, an Assistant Deputy Director of the State Water Resources Control Board (“State Water Board” or “Board”) Division of Water Rights (“Division”) transmitted a draft cease-and-desist order (“Draft CDO”) to Nestlé Waters North America, Inc. (2021-04-23 Draft CDO (Nestle).)<sup>1</sup> On May 11, 2021, an attorney for BlueTriton filed a request for hearing on the Draft CDO with the State Water Board’s Administrative Hearings Office (“AHO”). That request stated that BlueTriton is the “successor by name change” to Nestlé Waters North America, Inc. (2021-05-11 BlueTriton Brands, Inc. Request for Hearing, p. 1.)

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<sup>1</sup> Citations in this document are to files in the preliminary administrative record the AHO has assembled and posted in the AHO-FTP folder for this matter. This folder is posted on the State Water Board’s FTP site. Section 8 on pages 14-15 of the AHO’s July 8, 2021 Notice of Pre-Hearing Conference and Hearing provides information about how to download files from this AHO-FTP folder.

On May 21, 2021, the AHO issued a Notice of Request for Hearing. (2021-05-21 Notice of Request for Hearing.) On July 8, 2021, the AHO issued a Notice of Pre-Hearing Conference and Public Hearing. (2021-07-08 Notice of Public Hearing and Pre-Hearing Conference.) These two documents contain detailed information about the Draft CDO and this proceeding. That information is not repeated in this document.

On August 5, 2021, BlueTriton's attorneys filed a Motion to Dismiss Draft Cease and Desist Order. (2021-08-05 BlueTriton Mtn. to Dismiss Draft CDO.)

On August 11, 2021, the AHO held its pre-hearing conference. On August 16, 2021, the AHO issued its Pre-Hearing Conference Order, Notice of Second Pre-Hearing Conference, and New Planned Hearing Schedule. (2021-08-21 Pre-Hearing Conference Order.) Among other things, that order specified filing deadlines for briefs regarding BlueTriton's motion to dismiss and other parties' requests to add hearing issues. (*Id.*, pp. 3-4.)

The parties have filed these briefs and I now issue these rulings.

### **BlueTriton's motion to dismiss and related filings**

BlueTriton's motion to dismiss alleges that, "as a matter of law, the Draft CDO does not state facts or proper legal authority to support a cease and desist order under Water Code sections 1831(d) and 1052(a)," the State Water Board should dismiss the Draft CDO and the Division's associated Final Report of Investigation and exhibits, and the Board should direct the Division's Enforcement Section "to refrain from any further enforcement action on the basis that [BlueTriton's] Strawberry Canyon collections are an unauthorized diversion of water under Water Code sections 1831(d) and 1052(a)." (2021-08-05 BlueTriton Mtn. to Dismiss Draft CDO, pp. 14-15.)

BlueTriton asserts that the "key operative facts" are: (1) BlueTriton "collects and diverts water in Strawberry Canyon from tunnels and boreholes that are completed and sealed below the ground surface" and (2) BlueTriton "does not physically divert surface water that is flowing in any natural channel." (2021-09-24 BlueTriton Reply Brief re MTD, p. 1, fn. 1.)

BlueTriton argues:

The physical occurrence of a "spring" or "spring water" has no bearing on the legal classification of water in California for water-right purposes. Spring water is subject to surface water laws when it is diverted above ground from a stream or surface water body, and it is subject to groundwater laws when it is diverted from below the ground, unless it is diverted from a subterranean stream.

(*Id.*, p. 4.)

The Northern California Water Association and the California Water Association submitted policy statements supporting BlueTriton's motion. (2021-09-10 NCWA Policy

Stmnt. re Respondent's Mtn. to Dismiss; 2021-09-10 CWA Policy Stmnt. re BTP Mtn. to Dismiss.)

The State Water Board's Prosecution Team ("Prosecution Team") consists of attorneys from the Board's Office of Enforcement and staff from the Division. The Prosecution Team asserts that BlueTriton "uses tunnels and boreholes constructed at or adjacent to the natural spring orifice" and that "[t]hese methods of diversion obliterated the natural spring orifices and captured the natural springs flows." (2021-09-10 PT Opp. to Mtn. to Dismiss, p.4.)

Citing State Water Board Order WR 2019-0149, the Prosecution Team argues that "California law presumes that a spring tributary to a stream is part of the stream" and therefore that the diversion of water from a spring is "subject to the Board's water right permitting and licensing authority and subject to the prohibition against unauthorized diversion or use of water under section 1052 of the Water Code." (*Id.*, p. 9.) The Prosecution Team further argues that Order WR 2019-0149 "is consistent with prior orders and decisions of the State Water Board," including numerous decisions authorizing issuance of water-right permits to appropriate water from developed springs, "including springs using tunnels and boreholes for diversion when water was available for appropriation." (*Id.*, p. 10.)

Amanda Frye and attorneys for Story of Stuff and the Center for Biological Diversity and the Sierra Club filed briefs, and Steve Loe filed a policy statement, opposing BlueTriton's motion. (2021-10-08 A. Frye Reply to BlueTriton Brief; 2021-09-10 Story of Stuff Opp. to BlueTriton Mtn. to Dismiss; 2021-09-10 CBD & Sierra Club Opp. to BlueTriton Mtn. to Dismiss.)

In its reply brief, BlueTriton argues that the State Water Board decisions cited by the Prosecution Team all involved applications by parties seeking permits from the Board to appropriate water, and none of them involved Board enforcement actions. (2021-09-24 BlueTriton Reply Brief re MTD, p. 7.) BlueTriton argues that the AHO should not rely on Order WR 2019-0149 "because that order merely relies on the same flawed legal analysis that the PT makes in the Draft CDO" and that the statements in the order cited by the Prosecution Team are dicta that "are not binding and should not be followed as precedent." (*Id.*, p. 8.)

After the deadline for filing reply briefs, Blue Triton filed a request to the AHO to take official notice of four letters prepared by State Water Board staff members during 1993-2000. (2021-10-06 BlueTriton ltr. to AHO Requesting Official Notice.)

### Discussion

BlueTriton does not cite any statute or State Water Board regulation that authorizes pre-hearing motions to dismiss water-right enforcement proceedings, and I am not aware of any such statute or regulation. BlueTriton also does not cite any State Water Board

decision or order granting such a motion, and I am not aware of any such decision or order.

In Order WR 2016-0015, the Board considered a motion for nonsuit made by two respondent irrigation districts in a water-right enforcement action after the Prosecution Team had presented its case-in-chief during the Board hearing. After considering the procedural context of the matter, the Board decided to take the matter up on its own motion as a motion for judgment. (State Water Board Order WR 2016-0015, p. 11.) The Board's order states:

We do not generally allow parties to move for judgment during the course of an evidentiary hearing. The hearing officers explicitly directed the parties not to do so in these matters. We discourage any parties to a future proceeding before the Board from attempting to do so. However, we retain the discretion to consider whether to close the evidentiary portion of an enforcement proceeding after the Prosecution Team has presented its case-in-chief. With respect to these particular matters, we have determined that additional evidence is not necessary for us to reach a final determination.

(*Id.*, p. 12.)

In *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 560-561, the court stated the following general rules regarding hearing officers' conduct of their hearings:

Moreover, even if the power to control proceedings was not specifically enunciated in the relevant statutes and Bylaws, hearing officers have "wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed. [Citations.]" Administrative agencies are "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." The pronouncements are in accord with the fundamental rule that judges have "inherent power to control litigation before them."

(Citations omitted.)

BlueTriton's motion to dismiss Draft CDO, the Prosecution Team's opposition, and the other parties' briefs raise complex legal issues, many of which are issues of first impression that have not been decided in any State Water Board decision or order or any reported court decision. There also may be factual issues regarding the pre-development geology and hydrology of the springs and the construction of BlueTriton's facilities. The AHO's hearing process will give the parties opportunities to address these issues in detail. The hearing process will benefit from an administrative record that will have more-detailed information about the relevant geology and hydrology and BlueTriton's facilities after the AHO conducts its hearing. The hearing process also will give other parties opportunities to address the documents that BlueTriton asked the

AHO to officially notice, if BlueTriton offers these documents as exhibits during the hearing process.

For these reasons, and exercising my discretion regarding the conduct of the AHO's proceeding in this matter, I deny BlueTriton's motion to dismiss Draft CDO. This denial is without prejudice to BlueTriton's and other parties' rights to make the same or similar arguments, and to offer the same documents as exhibits, during the AHO's hearing process.

In the last sentence of its reply brief, BlueTriton argues that, even if the AHO denies BlueTriton's motion to dismiss Draft CDO, BlueTriton "strongly encourages the SWRCB to issue its ruling under Water Code [section] 1114." (2021-09-24 BlueTriton Reply Brief, p. 10.)

It is not clear exactly what BlueTriton is requesting here, because an AHO hearing officer, not the State Water Board, is issuing this ruling on BlueTriton's motion to dismiss. If BlueTriton is asking the AHO to prepare a proposed order under Water Code section 1114, subdivision (c)(1) for transmittal to the Board for its consideration, such a request is not appropriate. The statutory process established by Water Code section 1114, subdivision (c)(1) is for proposed final orders that AHO hearing officers prepare for the Board's consideration. This process does not apply to interlocutory rulings by AHO hearing officers like those in this document.

Moreover, even if I did have the discretion to prepare a proposed order denying BlueTriton's motion and to transmit it to the State Water Board for its consideration, it would not be appropriate for me to exercise that discretion here. Just as the AHO will be in a better position to prepare a proposed order on the hearing issues after the AHO has held its hearing, the Board will be in a better position to review and act on the AHO's proposed order on the hearing issues after the AHO completes its hearing process and prepares its proposed order, and there is a complete administrative record.

### **Other parties' requests for additional hearing issues**

Before the AHO's August 11, 2021 pre-hearing conference, several parties submitted pre-hearing conference statements. The statement filed by Story of Stuff raised potential additional hearing issues. (2021-08-05 SOS Pre-Hrg. Conf. Stmt., pp. 3-6.) The AHO's August 16, 2021 order invited parties to file briefs on the threshold issue of whether the AHO has the authority to include in the proposed order the AHO will be transmitting to the Board any analyses, conclusions or orders regarding hearing issues in addition to the hearing issues stated in the AHO's July 8, 2021 Notice of Pre-Hearing Conference and Public Hearing. (2021-08-16 Pre-Hearing Conference Order, pp. 3-4.)

In the briefs they filed on September 10, 2021, several parties urged the AHO to add additional hearing issues to the hearing issues stated in the AHO's July 8, 2021 Notice of Pre-Hearing Conference and Public Hearing.

The Prosecution Team states that, “[s]hould information become available indicating that the Respondent’s diversions are injuring public trust resources and will not be mitigated, the Division would further investigate the possible injury under its public trust authority and determine if other appropriate remedies are necessary.” (2021-09-10 PT Brief re Consideration of Other Issues, p. 2.) The Prosecution Team concedes that the State Water Board would have to assign issues regarding misuse of water or injury to public trust resources to the AHO before the AHO would be authorized to hold a hearing or issue a proposed order on such issues. (*Id.*, p. 4.)

In its reply brief, the Prosecution Team argues that, “[r]egardless of whether the public trust impacts are considered as part of this hearing, an order issued by the AHO should at least ensure that the Respondent submit information necessary for the Division to determine, at a later time, whether the Respondent’s diversions are causing unmitigated injury to public trust resources.” (2021-09-24 PT Reply Brief on Other Threshold Issues, p. 2.) The Prosecution Team does not cite any legal authority for this argument.

The California Department of Fish and Wildlife (“CDFW”) notes that the Prosecution Team’s Report of Investigation concluded that “there is insufficient information to determine if [BlueTriton’s] authorized diversions cause injuries to public resources that outweigh the beneficial use.” (2021-09-10 CDFW Brief, p. 5.) CDFW argues that “the AHO, in its draft Order should require BlueTriton to do the necessary studies to better inform the AHO and the Water Board regarding 1) the nature of the public trust resources in the affected area; 2) the extent to which those public trust resources are injured by current diversions, or such diversion as may be determined to be authorized, and; 3) what remedies would be necessary to lessen the impact of those diversions on public trust resources.” (*Id.*) CDFW does not cite any specific authorities for this argument, but argues generally that the AHO and the Water Board “have an independent obligation to take the public trust into account in the allocation of water resources”, citing *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419. (2021-09-10 CDFW Brief, p. 6.)

Story of Stuff’s brief describes the State Water Board’s obligations to prevent waste and unreasonable use of water, citing article X, section 2 of the California Constitution, and “to protect the interests of the public in trust resources,” citing *National Audubon Society v. Superior Court, supra*. (2021-09-10 Story of Stuff Brief re Public Trust, pp. 1-2.) Story of Stuff argues that these Board duties “by extension” apply to the AHO. (*Id.*, p. 2.) Story of Stuff argues “[i]f trust and reasonable use evidence is ignored in any proposed order sent to the Board following administrative hearing, this omitted evidence would fatally compromise the Board’s ability to fulfill its cornerstone duties to protect against injury to other legal users of water, protect public trust resources, and enforce the prohibition of waste and unreasonable use of water in article x, section 2 of the California Constitution.” (*Id.*, p. 3.)

Steve Loe makes similar arguments in his brief. (2021-09-10 S. Loe Brief.)

San Bernardino Valley Municipal Water District (“San Bernardino Valley MWD”) argues that BlueTriton may divert surface water only up to the amounts of its predecessors’ average annual diversions between 1959 and 1963, and that any diversions above these amounts “will injure previously adjudicated rights to municipal water supplies” under two judgments involving waters of the Santa Ana River watershed. (2021-09-10 SBVMWD Brief re AHO Authority to Consider Mun. Water Supplies, p. 3.) San Bernardino Valley MWD argues that the AHO “has broad discretion” to consider any evidence that is “relevant to whether BlueTriton is engaged in unauthorized diversions that should be subject to a CDO” and that is admissible under Government Code section 11513, subdivision (c). (SBVMWD Brief, pp. 4-5.) San Bernardino Valley MWD notes that one of the hearing issues stated in the AHO hearing notice is whether BlueTriton is engaged in unauthorized diversions, and argues that, as part of the AHO’s proceedings on this issue, the AHO is authorized to consider whether BlueTriton’s diversions exceed adjudicated amounts. (*Id.*, p. 6.)

BlueTriton opposes these requests to expand the AHO hearing issues. BlueTriton argues that Water Code section 1112, subdivision (a)(2), authorizes the AHO to hold a hearing only on the issues raised by the Draft CDO, and that any other issues, like issues involving the public trust, unreasonable use or municipal priorities, are outside the scope of the Draft CDO and may be addressed by the AHO only if the State Water Board assigns such issues to the AHO. (2021-09-24 BlueTriton Brands Brief Opp. Exp. Hrg., pp. 3-5.)

### Discussion

The present proceeding is before the AHO under Water Code section 1112, subdivision (a)(2), for a hearing on the Draft CDO. The Board has not assigned any hearing regarding BlueTriton’s diversions to the AHO under Water Code section 1112, subdivision (c)(2), and the Board has not made any requests regarding BlueTriton’s diversions to the AHO under Water Code section 1112, subdivision (c)(3). Under this statutory framework and procedural history, the issues the AHO may consider during this proceeding and address in the proposed order it will transmit to the Board are limited to the issues raised by the Draft CDO.

Because the Draft CDO does not allege injury to public trust resources (2021-09-10 PT Brief re Consideration of Other Issues, pp. 1-2), the AHO is not authorized to consider such issues during its hearing process in this matter. The AHO also may not consider issues regarding unreasonable use or misuse of water during its hearing process in this matter, because the Board has not assigned such issues to the AHO (see *id.*, p. 4). Even though the Board has certain obligations regarding protection of public trust resources and prevention of waste or unreasonable use of water, such obligations do not require or authorize the AHO to expand its hearing process beyond of the scope of the AHO’s specific statutory framework.

For similar reasons, the AHO is not authorized to consider the water-right priority issues raised by San Bernardino Valley MWD, because these issues are not raised by the

Draft CDO. When the AHO issues its revised hearing notice for this matter, the revised notice will add appropriate clarifying language to hearing issue 1.

Any interested party, including any party to this proceeding, may file a complaint with the State Water Board's Division of Water Rights Enforcement Section that may raise any of these issues. The Enforcement Section may consider such a complaint and decide whether to take any enforcement actions based on it.

I also deny the request of the Prosecution Team and CDFW for an AHO order or proposed order directing BlueTriton to conduct studies and submit information regarding the effects of its operations on public trust resources. I am not aware of any statutory or other authority that would authorize the AHO to issue such an order now, and it would not be appropriate for the AHO to include such an order in the proposed order it will be preparing and transmitting to the Board when the AHO is not going to consider public trust issues during this hearing process.

I anticipate that the AHO will issue a revised hearing notice in this matter next week. It will have the same schedule and deadlines as those stated on page 5 of the AHO's August 16, 2021 Pre-Hearing Conference Order, except that there may be revisions of the site-visit and rebuttal-hearing dates to address the requests in Mr. Petruzzelli's October 12, 2021 e-mail. (2021-10-12 PT e-mail to AHO.)

### **CONCLUSIONS**

1. BlueTriton's motion to dismiss Draft CDO is denied, without prejudice to the rights of BlueTriton and other parties to make the same or related arguments, and to offer the same documents as exhibits, during the AHO's hearing process in this matter.
2. The other parties' requests to add additional hearing issues to the hearing issues stated in the AHO's July 8, 2021 Notice of Pre-Hearing Conference and Public Hearing, and to require BlueTriton to conduct studies and submit information regarding the effects of its operations on public trust resources, are denied, without prejudice to these parties' rights to raise the same or similar issues in future complaints they may file with the Division of Water Rights, Enforcement Section.

November 4, 2021 \_\_\_\_\_

/s/ ALAN B. LILLY \_\_\_\_\_

Alan B. Lilly

Presiding Hearing Officer

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