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## State Water Resources Control Board

May 10, 2022

### **Re: Administrative Civil Liability Complaint against Griset Farms – Ruling on Prosecution Team’s Motion to Quash**

#### **TO ALL PARTIES:**

On April 8, 2022, the State Water Resources Control Board’s (State Water Board or Board) Administrative Hearings Office (AHO) issued a Notice of Public Hearing (Notice of Hearing) on the February 18, 2022 Administrative Civil Liability Complaint issued by the Assistant Deputy Director for the Division of Water Right Griset Farms (Water Right IDs SG005923 and SG005924).

On April 22, 2022, the Division of Water Rights Prosecution Team (“PT”) filed a Motion to Quash the April 14, 2022 Request for Documents that the attorney for Griset Farms, on behalf of the “Griset Respondents,” had sent to the PT. On April 27, 2022, the Griset Respondents filed a Request for Extension of Submission Deadline.

On April 28, 2022, I informed the parties that the deadline for Griset Farms’ response to the PT’s April 22 Motion to Quash was May 3, 2022. I stated that the PT’s obligations to respond to the Griset Respondents’ Request for Documents were stayed until the AHO ruled on the PT’s Motion to Quash. I denied the Griset Respondents’ Request for Extension of Submission Deadline and stated that I would, if necessary, specify a subsequent deadline for submission of additional exhibits.

The Griset Respondents filed their Opposition to Motion to Quash Discovery Request and an accompanying Declaration of Paul Minasian on May 3, 2022.

For the following reasons, I grant the PT’s Motion to Quash Request for Documents Dated April 14, 2022.

#### **Legal Background**

AHO hearing officers conduct AHO hearings in accordance with the State Water Board regulations applicable to adjudicative proceedings. (Cal. Code Regs., tit. 23, § 648, subd. (a).) The regulations governing the admission of evidence in adjudicative proceedings before the Board (and the AHO) are in California Code of Regulations, title 23, sections 648-649.5; chapter 4.5 of the Administrative Procedure Act (APA) (Government Code section 11400-11475.70); sections 801 to 805 of the Evidence Code; and section 11513 of the Government Code. (*Ibid.*)

In general, a hearing officer conducting an administrative hearing has “wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed.” (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 560, disapproved on other grounds in *Mileikowsky v. West Hills Hospital and Medical Center* (2009) 45 Cal.4th 1259, 1273.)

## **Procedural Background**

The April 8, 2022 Notice of Public Hearing describes the background facts and the purpose of the hearing. (2022-04-08 Notice of Public Hearing, pp. 1-3.) The Notice of Public Hearing lists the following five hearing issues:

- 1) Did the Deputy Director of the Division of Water Rights issue a curtailment order to Respondent under California Code of Regulations, title 23, division 3, chapter 2, article 23.5 (sections 875-875.9)?
- 2) Did the Respondent submit, under penalty of perjury, within seven calendar days of the date of the curtailment order, a certification as described in California Code of Regulations, title 23, section 875.6?
- 3) Did Respondent violate a State Water Board regulation or order that requires the Respondent to file a certification as stated under California Code of Regulations, title 23, section 875.6?
- 4) If Respondent violated a State Water Board regulation or order, should the AHO hearing officer impose administrative civil liability on Respondent?
- 5) If the State Water Board decides to impose administrative civil liability on Respondent, what is the appropriate amount of such administrative civil liability?<sup>1</sup>

## **Applicable Law**

The Water Code, the APA and State Water Board regulations authorize forms of pre-hearing discovery in matters pending before the State Water Board. (Wat. Code, §§ 1080 & 1100; Cal. Code Regs., tit. 23, §§ 648 & 649.6; Gov. Code, §§ 11450.10 & 11450.20.)

Water Code section 1080 provides that the Board may “issue subpoenas ... for the production of evidence in any proceeding in any part of the State.” California Code of

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<sup>1</sup> Water Code section 1055.3 provides that, in determining the amount of civil liability, the Board shall take into consideration all relevant circumstances, including, but not limited to: (a) the extent of harm caused by the alleged violation; (b) the nature and persistence of the alleged violation; (c) the length of time over which the alleged violation occurred; and (d) the corrective actions, if any, taken by the violator.

Regulations, title 23, section 649.6, subdivision (a), provides that “upon its own motion or upon request of any person, the Board may issue subpoenas ... for attendance at a proceeding and for production of documents at any reasonable time and place or at a hearing.” A proceeding is “any inquiry, investigation, hearing, ascertainment, or other proceeding ordered or undertaken by the board....” (Wat. Code, § 1075.)

Government Code section 11450.05, subdivision (b), authorizes an agency to use the subpoena procedure specified in Article 11 (Government Code sections 11450.05-11450.50) of chapter 4.5 in an adjudicative proceeding. An adjudicative proceeding is defined as “an evidentiary hearing for determination of facts pursuant to which an agency formulates and issues a decision.” (Gov. Code, § 11405.20.) Government Code section 11450.10 provides that “subpoenas and subpoenas duces tecum may be issued for ... production of documents at any reasonable time and place or at a hearing.” California Code of Regulations, title 23, section 649.6, provides in subdivision (b) that “[a]rticle 11 (commencing with Government Code section 11450.05) and article 12 (commencing with section 11455.10) of chapter 4.5 shall apply to the issuance of a subpoena or subpoena duces tecum in an adjudicative proceeding [before the Board].”

A person served with a subpoena or subpoena duces tecum may file a motion for a protective order, and the hearing officer may issue a protective order to shield a person served with a subpoena or subpoena duces tecum from unreasonable or oppressive demands. (Gov. Code, § 11450.30.)

### **Respondent’s April 14, 2022 Request for Documents**

On April 14, 2022, the attorney for “[t]he Respondents in the matter, George S. Griset, Stephen D. Griset, Griset Farms, Inc., and the George S. Griset Revocable Trust”<sup>2</sup> requested within 10 days and pursuant to Government Code section 11507.6, “[a]ll emails, letters, notes, memorandums, lists, computer materials or compilations, or other forms of compilations of numbers, maps or diagrams prepared by, in the possession of, or available to the State Water Resources Control Board employees, consultants, attorneys, or agents” that identify or refer to 11 listed topics. (2022-04-22 PT Motion to Quash, Attachment A, p. 2.)

These topics include: (1) “wells located upon lands owned by Griset or to the operation or use of water from those wells for any purpose”; (2) inclusion of these wells in any notices or attempts to curtail pumping; (3) alternatives for designating the wells; (4) purposes and likely or possible effects of providing for a written notice and threat of

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<sup>2</sup> The Division of Water Rights’ Administrative Civil Liability Complaint identifies Griset Farms as the sole party subject to the enforcement action. Stephen Griset has requested a hearing. We are treating the April 14, 2022 request for documents as a request from Respondent Griset Farms and not from other “Respondents” named in the April 14, 2022 Request for Production of Documents. This ruling treats Griset Farms as the sole respondent in this action, and, unless the context indicates otherwise, “Respondent” in this ruling refers to Respondent Griset Farms.

finer or penalties; (5) “the possibility or likelihood of well owners challenging the Notice of Curtailment or the authority of the SWRCB to issue because of the costs and risk of penalties they would incur if they challenged the legal effect and jurisdiction of the SWRCB to issue curtailment orders relating to groundwater use”; (6) “the source of water being pumped from or used from the Griset wells”; (7) “the phrasing or alternative language or placement of language within a Notice of Curtailment”; (8) communications with other parties prior to the identification and inclusion of the Griset wells within any notice of curtailment; (9) communications with Deputy Director Erik Ekdahl regarding his statements to the Siskiyou County Board of Supervisors; (10) references to communications or communications involving specified federal court proceedings; and (11) the costs, expenses and burden of a notice of curtailment on persons of Hmong origin occupying lands within the Shasta Vista Subdivision. (2022-04-22 PT Motion to Quash, Attachment A, pp. 2-4.) (These are just summaries of the 11 topics. The April 14, 2022 Request for Documents describes these topics in much more detail.)

### **PT’s Motion to Quash Respondent’s Request for Documents**

The PT’s April 22, 2022 Motion to Quash asserts that the Griset Respondents: (a) relied on an inapplicable statute, Government Code section 11507.6, for their document request; (b) failed to meet the requirements under California Code of Regulations title 23, section 649.6, subdivision (a) for subpoenas; (c) assert a request on behalf of George Griset, who is not listed as a party to the hearing; and (d) requested documents in categories that are overly broad and extend beyond the scope of the five hearing issues. (2022-04-22 PT Motion to Quash, pp. 4-6.)

The PT’s motion requests, in a footnote, that I take official notice of State Water Board Order WR 2022-0143-EXEC. (2022-04-22 PT’s Motion to Quash, pp. 2-3, fn. 4.) AHO staff have added copies of this order, State Water Board Resolution No. 2021-0029, Order WR 2021-0082-DWR, and Addendum No. 9, dated March 15, 2022, to this order as separate files in the initial administrative record for this proceeding. I am authorized to take official notice of these documents. (Cal. Code Regs., tit. 23, § 648.2.)

### **Respondent’s Opposition to PT’s Motion to Quash**

The Respondent’s May 3, 2022 opposition argues that: (a) whether the Respondent’s request was labeled a discovery request or a subpoena, they are “entitled to discovery prior to a hearing” and may do so with or without a subpoena; and (b) they have submitted a declaration regarding the relevance of these document requests and that they are “entitled to all documents and materials which might explain the SWRCB’s ambiguous notice and its attempt to exercise power over groundwater use upon overlying lands without an adjudication of the groundwater rights and basin uses.” (2022-05-03 Resp. Griset Farms’ Oppo to Mtn to Quash, pp. 1-4.)

The May 3, 2022 Declaration of Paul Minasian describes the Griset Farms lands and wells and the Grisets’ historical practice of using water pumped by these wells to irrigate alfalfa and other crops on the Griset lands and to supply water to owners of lots in the

Shasta Vista Subdivision. (2022-05-03, Decl. of P. Minasian, pp. 1-2, ¶¶ 3-8.) The declaration describes various actions the Siskiyou County Board of Supervisors, Sheriff and District Attorney have taken. (*Id.* at pp. 2-3, ¶¶ 9-10.) The declaration asserts that the requested documents “would likely explain who made the decision that well water from the Griset wells should be ordered as subject to a curtailment.” (*Id.* at p. 3, ¶ 12.) The declaration discusses the September 10, 2021 form letter the Deputy Director for the State Water Board’s Division of Water Rights sent to owners of properties in the Shasta River watershed and the March 15, 2022 Division of Water Rights Addendum No. 9 to Orders WR 2021-0082-DWR and WR 2021-0085-DWR and makes various legal arguments regarding that letter and that addendum. (*Id.* at pp. 4-6, ¶¶ 13-14.)

The declaration states that “Respondents are entitled to examine all documents and materials which may show the relationship between the SWRCB’s claim that curtailment notices and authority applies to Respondents and the effect or intended effect of the SWRCB implementing a plan of discrimination being conducted by the County of Siskiyou against the Hmong population.” (*Id.* at p. 6, ¶ 16.) The declaration argues that, without these materials, Respondent will not be able: (a) to determine which State Water Board officials authored the September 10, 2021 letter and March 15, 2022 addendum and why they did this; or (b) to determine if State Water Board actions are violating the September 3, 2021 order issued by the United States District Court for the Eastern District of California against Siskiyou County and various Siskiyou County officials in *Dilevon Lo v. County of Siskiyou*, No. 2:21-cv-00999-KJM-DMC. (*Id.* at pp. 6-7, ¶ 16.)<sup>3</sup>

## Legal Analysis

The PT first argues that the Griset Respondents seek documents under Government Code section 11507.6, which is part of chapter 5 of the Administrative Procedure Act, and that chapter 5 does not apply to Board water-right hearings. (2022-04-22 PT’s Motion to Quash, p. 4.)

California Code of Regulations, title 23, section 648, subdivision (c) provides that, “[e]xcept as provided in subdivision (b) of this section, chapter 5 of the Administrative Procedure Act (Govt. Code §§ 11500-11529) does not apply to hearings before the State Board.” The exception in subdivision (b) of section 648 refers to Government Code section 11513, but not to any other parts of chapter 5. I therefore agree with the PT that Government Code section 11507.6 does not apply to this proceeding.

However, as discussed above, California Code of Regulations, title 23, section 649.6, authorizes parties to ask the Board to issue subpoenas “for production of documents at any reasonable time and place or at a hearing.” Although the Respondent’s document request did not follow this procedure for subpoenas, I will treat their document request

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<sup>3</sup> Respondent attached a copy of this preliminary injunction order as Attachment 2 to its opposition.

as a subpoena for production of documents under California Code of Regulations, title 23, section 649.6.<sup>4</sup>

The PT next argues that the Griset Respondents' request for documents should "fail against any applicable discovery pathway," because, even if the request is treated as a subpoena for documents, the Griset Respondents did not submit an affidavit "showing good cause for the production of the matters and things described in the subpoena." (2022-04-22 PT's Motion to Quash, p. 4.)

Government Code section 11450.05 provides that an agency may use the subpoena procedure described in Article 11 of Chapter 4.5 (Govt. Code, §§ 11450.05-11450.50). Government Code Section 11450.20, subdivision (a), provides that "[s]ubpoenas and subpoenas duces tecum shall be issued by the agency or presiding officer at the request of a party, or by the attorney of record for a party, in accordance with Sections 1985 to 1985.4, inclusive, of the Code of Civil Procedure." Code of Civil Procedure section 1985, subdivision (b), states that a "copy of an affidavit shall be served with a subpoena duces tecum issued before trial, showing good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control." (Code of Civil Procedure section 2015.5 authorizes the use of a declaration instead of an affidavit.)

Although Respondent did not include the required affidavit or declaration with their April 14, 2022 Request for Documents, I treat the May 3, 2022 Declaration of Paul Minasian as a declaration accompanying this request.

Code of Civil Procedure section 1985, subdivision (b), provides that the affidavit accompanying a subpoena duces tecum must "show[] good cause for the production of the matters and things described in the subpoena, specifying the exact matters or things desired to be produced, setting forth in full detail the materiality thereof to the issues involved in the case, and stating that the witness has the desired matters or things in his or her possession or under his or her control." In *Elmore v. Superior Court* (1967) 255 Cal.App.2d 635, 638-639, the court held that the affidavit must demonstrate that the documents sought to be discovered are: (1) relevant to the subject matter; (2) material to the issues; and (3) needed for effective preparation for trial.

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<sup>4</sup> Respondent asserts that they may submit a "discovery request," like the one they have sent to the PT, because Government Code section 11450.10 provides that a person is subject to a contempt sanction for "failure or refusal, without substantial justification, to comply with a ... discovery request." (2022-05-03 Resp. Griset Farms' Oppo to Mtn to Quash, p. 2.) I assume the Respondent intended to cite to Government Code section 11455.10 for this argument. This passing reference to a "discovery request" in this statute, which addresses "enforcement of orders and sanctions," does not authorize any new discovery procedure outside of the subpoena framework described in Water Code section 1080 and California Code of Regulations, title 23, section 649.6.

As discussed above, the May 3, 2022 Declaration of Paul Minasian generally asserts that the requested documents may be relevant to the issues of: (a) which State Water Board staff members decided to impose water-right curtailments and reporting requirements on the Griset Respondents, and why they decided to do this; and (b) whether any SWRCB actions are violating the September 3, 2021 order of the United States District Court for Eastern District of California.

Neither of these issues is involved in the present hearing. Issue (1) for the present hearing just concerns whether or not the Deputy Director of the Division of Water Rights issued a curtailment order to Respondent, not why. Issues (2) and (3) concern actions, or lack of actions, by Respondent, not actions by the State Water Board. Issue (4) is whether, considering Respondent's actions or lack of actions, the State Water Board should impose administrative civil liability on Respondent. Issue (5) concerns the amount of any such administrative civil liability. Water Code section 1055.3 specifies the factors the Board is to consider in determining the amount of any such administrative civil liability. None of the four listed factors concerns the issues to which the Declaration of Paul Minasian states that the requested documents may be relevant. Section 1055.3 also refers to "all relevant circumstances," but there is no indication that the issues discussed in this declaration concern any circumstances that are relevant to the present hearing issues.

For these reasons, I conclude that Respondent's request for documents does not meet the three-factor test stated in *Elmore v. Superior Court, supra*, and are "unreasonable or oppressive demands" under Government Code section 11450.30, subdivision (b). I therefore grant the PT's Motion to Quash.

Sincerely,

/s/ MEGAN S. KNIZE

Megan S. Knize  
Hearing Officer  
Administrative Hearings Office

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