
State Water Resources Control Board

February 19, 2021

Re: Kings River FAS Hearing

TO ALL PARTIES:

On December 2, 2020, the Administrative Hearings Office (AHO) of the State Water Resources Control Board (State Water Board or Board) issued a Notice of Public Hearing and Pre-Hearing Conference (Notice of Public Hearing) on two pending petitions to revoke or revise the Declaration of Fully Appropriated Stream Systems (FAS Declaration) with respect to the Kings River System and related issues raised in a complaint (Semitropic Complaint) filed by Semitropic Improvement District of Semitropic Water Storage District (Semitropic) against Kings River Water Association (KRWA) and its member units. The Notice of Public Hearing identified procedural matters to be addressed during the pre-hearing conference set for January 26, 2021, including the hearing issues to be addressed in the proceeding, the hearing dates and associated deadlines, and whether the hearing should be conducted in phases.

KRWA, Alta Irrigation District, Consolidated Irrigation District, Fresno Irrigation District, and Tulare Lake Basin Water Storage District (collectively, Kings River Water Districts) sent a letter to the AHO dated December 23, 2020, raising procedural concerns and requesting changes to the timeline and structure of the hearing outlined in the Notice of Public Hearing. Semitropic sent a letter to the AHO dated December 31, 2020, opposing the requests by KRWA and the Kings River Water Districts.

On January 13, 2021, I sent a letter to Semitropic, KRWA, and the Kings River Water Districts proposing to structure the proceedings on the petitions and the Semitropic Complaint in phases. In my letter, I raised additional procedural issues about the proposed hearing phases that I asked the parties to address in their pre-hearing conference statements.

The AHO received a joint pre-hearing conference statement from Semitropic, KRWA, Alta Irrigation District, Consolidated Irrigation District, and Fresno Irrigation District, and individual pre-hearing conference statements from Tulare Lake Basin Water Storage District, Laguna Irrigation District, McMullin Area Groundwater Sustainability Agency, and California Department of Fish and Wildlife, prior to the pre-hearing conference. The AHO held the pre-hearing conference on January 26, 2021. Representatives of all of the parties that filed pre-hearing conference statements appeared at the pre-hearing conference.

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

1. Phases of the Hearing

None of the parties objected to conducting the hearing in phases as proposed in my letter of January 13, 2021. Therefore, the hearing in this matter will be held in the following phases. First, the AHO will conduct a Phase 1A hearing to address the threshold question of whether there is evidence tending to show that Licenses 11517 and 11521 should be revoked or a violation of a requirement described in Water Code section 1831, subdivision (d), is occurring or threatening to occur. The AHO will consider the evidence and determine whether the evidence supports giving notice pursuant to Water Code sections 1675.1 and 1834 with a statement of facts and information on which the Board's consideration of a proposed revocation of Licenses 11517 and 11521 and a proposed cease-and-desist order during Phase 1B would be based.

If the AHO determines after Phase 1A that Semitropic or other parties presented sufficient evidence, the AHO will give notice and provide "statement[s] of facts and information" pursuant to Water Code sections 1675.1 and 1834. The AHO will not present a proposed order to the State Water Board pursuant to Water Code section 1114, subdivision (c), after the close of Phase 1A. A preliminary determination by the AHO that there is sufficient evidence to issue notice for a Phase 1B hearing will not be a decision subject to reconsideration under Water Code section 1122 or a final action subject to judicial review under Water Code section 1126. Any findings of fact made by the AHO during Phase 1A of the hearing that support a decision to give notice and provide "statement[s] of facts and information" pursuant to Water Code sections 1675.1 and 1834 will not be binding on the AHO or the parties in Phase 1B. Although parties will not be permitted to present duplicative evidence during Phase 1B (if Phase 1B is held), the parties will have the opportunity to present new evidence relevant to the issues noticed for the Phase 1B hearing even if the evidence could have been presented during Phase 1A.

If held, the Phase 1B hearing will address whether the Board should revoke Licenses 11517 and 11521 and whether the Board should issue a cease-and-desist order. The AHO will determine at a later time whether to present a proposed order to the Board for its consideration pursuant to Water Code section 1114, subdivision (c)(1), after the close of Phase 1B but before Phase 2. If the AHO determines after Phase 1A that the evidence was insufficient to substantiate notice and "statement[s] of facts and information" pursuant to Water Code sections 1675.1 and 1834, the AHO will proceed directly to Phase 2. In Phase 2 of the hearing, the AHO will receive evidence relevant to the two petitions to revoke or revise the Board's FAS Declaration with respect to the Kings River. After Phase 2 of the hearing, the AHO will present a proposed order to the Board for its consideration pursuant to Water Code section 1114, subdivision (c)(1).

2. Phase 1A Hearing Schedule and Procedures

The deadlines in the chart below apply to Phase 1A of this hearing.

Deadlines / Schedule	Date and Time
Pre-Hearing Conference	March 23, 2021, 9:00 a.m.
Deadline for all parties who want to participate in Phase 1A to file amended NOIs, including proofs of service.	March 30, 2021, 4:00 p.m.
Deadline for all parties to file case-in-chief exhibits and exhibit identification indices.	May 3, 2021, 4:00 p.m.
Phase 1A hearing begins.	June 2, 2021, 9:00 a.m.
Additional Phase 1A hearing days (if necessary)	June 3 and June 4, 2021, 9:00 a.m., and additional dates as necessary.

As I described during the pre-hearing conference, the initial Notice of Intent to Appear (NOI) due on February 15, 2021, was only required to indicate the intent of the party or interested person to participate in one or more phases of the hearing and the contact information for the representative of the party or interested person. The amended NOI due on March 30, 2021, must identify, if applicable: (1) the name of each witness who will testify on the party’s behalf; (2) a brief description of each witness’s proposed testimony; and (3) an estimate of the time requested for the witness to present a brief oral summary of his or her written testimony. Parties who do not intend to present cases-in-chief but wish to cross-examine witnesses or present rebuttal should so indicate in their amended NOIs.

All parties who file an amended NOI for Phase 1A by the deadline identified above will be permitted to submit evidence relevant to the preliminary determination of whether there is evidence tending to show that Licenses 11517 and 11521 should be revoked or a violation of a requirement described in Water Code section 1831, subdivision (d), is occurring or threatening to occur. After submission by the parties of amended NOIs on March 30, 2021, the AHO will set time limits for the parties’ witnesses to orally summarize their written testimony. At this time, I am not setting time limits for cross-examination or presentation of rebuttal testimony. I will, however, set time limits for oral summaries of direct testimony and cross-examination and rebuttal testimony as necessary during the hearing to complete the preliminary Phase 1A hearing in a timely manner. I encourage parties who are similarly situated to coordinate their presentations of evidence and cross-examination to move through the witnesses’ testimony efficiently. I will also set a schedule and page limits for closing briefs and any dispositive motions at the close of the Phase 1A hearing.

3. Hearing Issues

Phase 1A of the hearing will address:

- (1) Whether there is evidence tending to show that Licenses 11517 and 11521 should be revoked or a violation of a requirement described in Water Code section 1831, subdivision (d), is occurring or threatening to occur; and
- (2) Whether the AHO should give notice and provide “statement[s] of facts and information” pursuant to Water Code sections 1675.1 and 1834, and conduct Phase 1B of the hearing.

The AHO will issue amended hearing notices for Phase 1B (if held) and Phase 2, at appropriate times after the close of the Phase 1A and Phase 1B hearings. Prior to issuing the amended hearing notices for these phases, the AHO will invite the parties to comment on proposed hearing issues for the relevant phase.

In its pre-hearing conference statement and during the pre-hearing conference, Tulare Lake Water Storage District requested clarification that the hearing issues addressing potential revocation of Licenses 11517 and 11521 and a potential cease-and-desist order, would only address Kings River water as a source and would not address other sources of water that may be tributary to Tulare Lake. During the pre-hearing conference, Kevin O’Brien indicated on behalf of Semitropic, that Semitropic may be willing to stipulate to such a clarification. Any party who objects to limiting the scope of all phases of these hearings to Kings River water as a source, and excluding other sources of water that may be tributary to Tulare Lake, shall file a statement of objection with the AHO by **February 26, 2021**. Parties may also file statements of support by this deadline. After considering any submittals by the parties, the AHO will issue an amended Notice of Public Hearing for Phase 1A of the hearing, which will clarify the scope of the Phase 1A hearing.

4. Hearing Team and Separation of Functions

As stated in the Notice of Public Hearing in this matter issued by the AHO on December 3, 2020, I am the hearing officer who will preside during pre-hearing conferences and the several phases of this hearing. Other AHO staff members may be present and may assist me during the pre-hearing conferences and the hearings. I may also consult with other AHO hearing officers and staff members when deliberating on matters relevant to this proceeding. In addition, I and other AHO staff members may consult with staff of the Division of Water Rights (excluding staff in the Division’s Enforcement Section), staff of the Board’s Office of Chief Counsel, members of the executive management of the State Water Board, and State Water Board members, to discuss or deliberate on matters relevant to this proceeding.

Although the Board's Office of Enforcement and the Division's Enforcement Section are not, at this time, parties to the proceeding, the AHO and other participants on the hearing team identified above will maintain separation of functions from staff in the Office of Enforcement and the Enforcement Section, including the Assistant Deputy Director for the Permitting & Enforcement Branch. No *ex parte* communications involving substantive or controversial procedural matters in this proceeding may occur between AHO staff or other individuals with whom AHO staff may consult identified above, and staff of the Office of Enforcement and the Enforcement Section. Because of this separation of functions, parties may communicate individually with staff of the Division's Enforcement Section or the Office of Enforcement to discuss issues regarding this proceeding.

Parties may communicate with the Division of Water Rights Records Unit as necessary to obtain copies of records administered by the Records Unit that may be relevant to this proceeding. Parties may also communicate with staff of the Division of Water Rights about matters that are not directly within the scope of this proceeding as needed to conduct ordinary business with the Division, including, for example, KRWA's pending Petition for Change for License 11521 and inquiries related to annual water use reporting. As this proceeding continues, I will monitor whether separations between the hearing team members (including the Board staff members listed above as potential hearing team members and State Water Board members) and other Division staff is necessary or appropriate to prevent *ex parte* communications about substantive or controversial procedural matters that are directly at issue in this proceeding.

More information about the separation of functions between the AHO and certain members of the Division of Water Rights staff is provided in the July 10, 2020 memorandum from the Presiding Hearing Officer of the AHO and the Deputy Director of Water Rights to the Executive Director, titled "Processes for Assignment of Water-Right Permitting Projects to Administrative Hearings Office and Subsequent Proceedings." This memorandum is available on the AHO webpage at: https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2020-07-10_aho-dwr_processes_memo.pdf. This matter is a Tier 3 project for which separation of functions for certain staff within the Division of Water Rights applies.

5. Pre-Hearing Conference

The AHO will hold a pre-hearing conference in this matter on **March 23, 2021, at 9:00 a.m.** The pre-hearing conference will be held by Zoom teleconference. The AHO will circulate the Zoom teleconference information to each person or entity that has filed an initial NOI. The parties may, but are not required to, file new pre-hearing conference statements prior to the pre-hearing conference.

Sincerely,

SIGNATURE ON FILE

Nicole L. Kuenzi
Hearing Officer
Administrative Hearings Office

SERVICE LIST

Updated February 16, 2021

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