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## State Water Resources Control Board

April 6, 2021

**Re: Kings River FAS Hearing, Ruling on KRWA's and TLBWSD's Motions to Quash Subpoenas Duces Tecum and Submission of Rebuttal Exhibits in Phase 1A**

**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 AHO held a pre-hearing conference on January 26, 2021 and issued a procedural ruling on February 19, 2021. The procedural ruling stated that the hearing would be conducted in phases. Phase 1A of the hearing, which is to begin on June 2, 2021, will 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. Phase 1A is to be a preliminary or investigative hearing and will not result in the preparation of a proposed order by the AHO for the Board's consideration. In Phase 1A, the AHO will consider whether the AHO should give notice and provide statements of facts and information pursuant to Water Code sections 1675.1 and 1834. In Phase 1B, the AHO will consider, based on the statements of facts and information, whether the Board should revoke the licenses and whether the Board should issue a cease and desist order. The February 19, 2021 procedural ruling includes additional details about the phases of the hearing.

The AHO issued an Amended Notice of Public Hearing and Pre-Hearing Conference on March 19, 2021 and held a pre-hearing conference on March 23, 2021. The AHO will hold an additional pre-hearing conference on April 7, 2021, at 9:00 a.m.

## Motions to Quash

On March 1, 2021, Semitropic issued two subpoenas duces tecum in this matter. Semitropic issued the first subpoena to “Tulare Lake Basin Water Storage District” and the second to “Kings River Water Association.”<sup>1</sup> The subpoenas each attached an addendum with 22 requests for production of documents concerning certain topics. Some requests sought all documents on a certain topic from 1984 to the present, while others adopted a more recent timeframe. Each addendum included an affidavit in support of the subpoena. On March 12, Semitropic served deposition notices for Walter Bricker and Steven Haugen. On March 15 and 16, TLBWSD and KRWA, respectively, filed motions to quash Semitropic’s March 1 subpoenas. On March 19, Semitropic filed a joint opposition to the motions to quash.

On April 1, TLBWSD filed a motion to quash the subpoena and notice of deposition of Walter Bricker. This ruling does not directly address TLBWSD’s April 1 motion.

### A. Applicable Law

Both the Water Code and the Administrative Procedure Act (APA) authorize forms of pre-hearing discovery in matters pending before the State Water Board. (E.g., 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 attendance and giving of testimony by witnesses and for the production of evidence in any proceeding in any part of the State.” California Code of Regulations, title 23, section 649.6, further provides in subdivision (a) 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.) Water Code section 1100 authorizes the board or any party to a proceeding before it in any investigation or hearing “to cause the deposition of witnesses residing within or without the state to be taken in the manner prescribed by law for depositions in civil actions in the superior courts of this state under Title 4 (commencing with section 2016.010) of Part 4 of the Code of Civil Procedure.”

Government Code section 11450.05 authorizes an agency to use the subpoena procedure provided in Article 11 (commencing with section 11450.05) and article 12 (commencing with section 11455.10) of chapter 4.5 of part 1 of division 3 of title 2 of the Government Code in an adjudicative proceeding. An adjudicative proceeding is defined

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<sup>1</sup> Both subpoenas provided that the named parties should appear as witnesses on March 16, 2021, provided a time and place for appearance, and indicated no appearance was required if the appropriate records were produced. (See 2021-03-01 KRWA Subpoena Duces Tecum FINAL, 2.b.; 2021-03-01 TLBWSD Subpoena Duces Tecum FINAL, 2.b)

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 attendance at a hearing and 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 “Article 11 (commencing with section 11450.05) and article 12 (commencing with section 11455.10) of chapter 4.5 of part 1 of division 3 of title 2 of the Government Code shall apply to the issuance of a subpoena or subpoena duces tecum in an adjudicative proceeding [before the Board].” (*Id.* subd. (b).)

## B. Analysis

TLBWSD and KRWA’s motions to quash Semitropic’s subpoenas duces tecum assert that the applicable statutes do not create “a right to pre-trial discovery between interested parties” (KRWA Mot., p. 4; TLBWSD Mot., p. 4); the subpoenas are defective on their face (KRWA Mot., p. 6; TLBWSD Mot., p. 6); and Semitropic failed to engage in good-faith meet-and-confer efforts (KRWA Mot., p. 10; TLBWSD Mot., p. 9.) Semitropic opposes the motion, arguing that the “State Water Board’s regulations expressly authorize parties to conduct pre-hearing discovery” (Opp. p. 10); Water Code sections 1080 and 1100 do not serve as a barrier to pre-hearing discovery (Opp. p. 11); and the moving parties’ technical objections are improper (Opp. p. 14.)

As described above, the Water Code, applicable provisions of the APA, and State Water Board regulations authorize pre-hearing discovery by parties to proceedings before the Board, including parties to adjudicative hearings conducted by the AHO. Such discovery is not, however, a matter of right without limitation. The State Water Board has significant discretion to conduct its proceedings in a manner deemed most suitable to the particular case in an effort to secure relevant information expeditiously without unnecessary delay and without unnecessary expense to the parties. Hearing officers conducting administrative hearings have “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.) The APA explicitly authorizes a hearing officer to issue protective orders to shield a person served with a subpoena or subpoena duces tecum from unreasonable or oppressive demands (Gov. Code, § 11450.30), and the Board has similar discretion to quash or limit the scope of discovery sought pursuant to other sources of authority under the Water Code.

Water-rights hearings before the State Water Board differ from civil litigation in important respects that typically render pre-hearing discovery more burdensome than beneficial. First, the State Water Board’s files often contain substantial information about the water rights at issue, which information is readily available to all parties. In this proceeding, the AHO has made efforts to ensure that the Board’s files are available to the parties in advance of the exhibit submittal deadlines and will continue to coordinate with the parties and the Division of Water Rights, as necessary, to include relevant public records in the administrative record. Second, parties are required to

exchange written testimony and exhibits prior to the hearing, eliminating the element of surprise in most instances. Finally, cross-examination of parties' witnesses is not limited to the scope of direct testimony so each party has the opportunity to cross-examine opposing witnesses on any matter relevant to the issues. (Cal. Code Regs., tit. 23, § 648.5.1; Gov. Code, § 11513, subd. (b).) In Phase 1A of this proceeding, all of these factors support a decision to limit or prohibit pre-hearing discovery at this time.

It is the nature of Phase 1A of this proceeding as a preliminary or investigative hearing, however, that most strongly weighs against allowing pre-hearing discovery by the parties at this phase. The purpose of Phase 1A is for the AHO to consider the evidence submitted by the parties and determine whether the evidence supports giving notice with a statement of facts and information for Phase 1B. The outcome of the proceeding will not be a proposed order for consideration by the Board or any final action. Rather, the AHO will either give notice of Phase 1B, to address the merits of whether the Board should revoke Licenses 11517 and 11521 or issue a cease and desist order, or proceed directly to Phase 2.

In this phase, the Board is considering whether to issue the notice that is the statutorily required precursor to a hearing on the merits, essentially, the initial pleading in the matter. Because the Board has not yet issued notice of a potential revocation or violation, no right to a hearing by any of the parties has yet been triggered.<sup>2</sup> To allow discovery by third parties prior to issuance of the statement of facts and information and notice of a right to a hearing would essentially vest a third party with investigative authority normally reserved to the Board as the government agency with oversight responsibility. Setting aside the question of whether such an exercise of authority by a third party is lawful, I find it to be inappropriate here.

The sequencing of the phases of this proceeding also favors waiting to conduct any pre-hearing discovery until after Phase 1A is complete. If the AHO determines that the evidence supports noticing Phase 1B of the hearing and defines the scope of the issues to be addressed in Phase 1B, the parties will be in a better position to engage in focused discovery to seek specific information. The reservation of discovery until a later portion of a proceeding is consistent with past Board practice in other matters and promotes the efficiency of the phased hearing process. (See, e.g., California Water Fix Hearing Ruling Notice, Mar. 16, 2018 at p. 1 [documents requested in subpoena were not relevant to current stage of hearing but could be relevant to a potential third part of the hearing], available at

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<sup>2</sup> The Notice of Public Hearing issued on December 2, 2020, provided notice of a proposed cease and desist order and potential revocation of Licenses 11517 and 11521, and incorporated the Semitropic Complaint by reference as the statement of facts and information upon which the Board's consideration of a proposed cease and desist order and the potential revocation of the licenses would be based. I have since decided to hold Phase 1A of the hearing, at the request of KRWA, TLBWSD, and other parties, to consider whether the AHO should give notice and provide statements of facts and information pursuant to Water Code sections 1675.1 and 1834. (2021-02-19 Letter from AHO, Kings River FAS Pre-Hearing Conference Ruling.)

[https://www.waterboards.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/california\\_waterfix/ruling\\_notices/docs/20180316\\_cwf\\_ruling.pdf](https://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/california_waterfix/ruling_notices/docs/20180316_cwf_ruling.pdf).)

For these reasons, I conclude that pre-hearing discovery is premature at this phase. Therefore, this ruling does not further address the parties' other arguments, including alleged facial defects in the subpoenas.

### C. Conclusion

While, in general, parties may seek pre-hearing discovery in adjudicative hearings before the Board, including hearings conducted by the AHO, I grant the motions to quash because I conclude that discovery is inappropriate at this initial phase. This ruling does not prevent Semitropic or any other party from serving the same or similar discovery requests at a later phase. In anticipation that some pre-hearing discovery is likely to occur either before Phase 1B (if a Phase 1B is held) or Phase 2 of this hearing, I encourage the parties to discuss an appropriate discovery plan well in advance of the hearing dates for those phases. I also encourage the parties to tailor discovery requests to limit the burdens imposed, particularly if the information can be obtained by other means. If disputes arise, I direct the parties to meet and confer in good faith to attempt to resolve these disputes without involving the hearing officer.

The subpoenas duces tecum issued by Semitropic dated March 1, 2021, to Tulare Basin Water Storage District and Kings River Water Association are vacated. This ruling does not directly address TLBWSD's pending motion to quash the notice of deposition of Walter Bricker. I suggest that Semitropic consider the substance of this ruling before deciding whether to file an opposition to TLBWSD's motion to quash or take other action with respect to the notices of deposition of Walter Bricker and Steven Haugen.

### Submission of Rebuttal Exhibits

In the pre-hearing conference statements and at the pre-hearing conference held on March 23, 2021, the parties indicated that the hearing officer should allow rebuttal evidence and require submission of rebuttal exhibits in advance of Phase 1A of the hearing. Therefore, I am setting a deadline of May 26, 2021, at 4:00 p.m. for all parties to file any rebuttal exhibits, including written rebuttal testimony, and rebuttal exhibit identification indices for Phase 1A. The table below provides an updated schedule of the pre-hearing and hearing schedule for Phase 1A.

Rebuttal evidence will be limited to evidence that is responsive to evidence presented with another party's case-in-chief. To demonstrate compliance with this requirement, each party shall list, in each part of the party's rebuttal testimony, the evidence presented in another party's case-in-chief to which that part of the rebuttal testimony is responsive.

<b>Deadlines / Schedule</b>	<b>Date and Time</b>
Pre-hearing conference.	<b>April 7, 2021, 9:00 a.m.</b>
Deadline for all parties to file case-in-chief exhibits and exhibit identification indices.	<b>May 3, 2021, 4:00 p.m.</b>
Deadline for all parties to file rebuttal exhibits and exhibit identification indices.	<b>May 26, 2021, 4:00 p.m.</b>
Phase 1A of the hearing begins.	<b>June 2, 2021, 9:00 a.m.</b>
Additional Phase 1A hearing days (as necessary)	<b>June 3 and June 4, 2021, 9:00 a.m., and additional dates as necessary.</b>

Sincerely,

SIGNATURE ON FILE

Nicole L. Kuenzi  
Hearing Officer  
Administrative Hearings Office