
State Water Resources Control Board

June 28, 2022

Public Hearing on Prosecution Team’s Draft Cease-and-Desist Order to BlueTriton Brands, Inc.: Hearing Officer’s Ruling on Prosecution Team’s December 2, 2021 Motion to Quash

Introduction

This document contains my ruling on the Prosecution Team’s December 2, 2021 motion to quash the November 30, 2021 subpoena duces tecum served by BlueTriton Brands, Inc. (“BlueTriton”) on the State Water Board’s custodian of records. For the reasons discussed in this ruling, I grant the Prosecution Team’s motion to quash.

Background

On November 30, 2021, BlueTriton served a subpoena duces tecum on the State Water Board’s custodian of records. The addendum to this subpoena stated that BlueTriton requested the production of two documents: (a) the document referred to and cited in the Division of Water Rights Sacramento Valley Enforcement Unit’s December 20, 2017 Report of Investigation (“2017 Report of Investigation”) as “OE, 2016,” which is a November 17, 2016 “Memorandum to Division staff”; and (b) a document referred to and cited in the 2017 Report of Investigation as “OE, 2017a,” which is a May 1, 2017 “Memorandum to Division staff.” (2021-11-30 BlueTriton Subpoena Duces Tecum, pdf p 4; 2017-12-20 Report of Investigation (Nestle), p. 36.)

In the “affidavit” (titled an affidavit, but actually a declaration) attached to BlueTriton’s Subpoena Duces Tecum, one of BlueTriton’s attorneys argues that good cause exists for the production of these documents because the 2017 Report of Investigation cited OE, 2016 twelve times, cited OE, 2017A five times, and listed both documents in the list of references, without any claim of confidentiality. (2021-11-30 BlueTriton Subpoena Duces Tecum, pdf p. 6, ¶¶ 4-5.) BlueTriton argues that these documents are material to the issues involved in this proceeding because OE, 2016 addresses the State Water Board’s permitting authority over springs and pumping wells, and OE, 2017a addresses the effect of the Del Rosa judgment, “among other things.” (*Id.*, pdf p. 6, ¶¶ 6-7.)¹ This declaration states that BlueTriton previously sought production of these documents under the Public Records Act, and the State Water Board declined to produce them, “claiming attorney client privilege.” (*Id.*, pdf pp. 6-7, ¶¶ 8-9.)

¹ The Del Rosa judgment is discussed in section 4.3.3 on pages 24-26 of the 2017 Report of Investigation.

On December 3, 2021, the Prosecution Team filed a motion to quash BlueTriton's November 30, 2021 subpoena duces tecum. (2021-12-03 PT Mtn. to Quash.) In the declaration filed with this motion, the Prosecution Team's attorney states that he prepared these two memoranda "to assist Division Enforcement staff with understanding and responding to complex legal issues and defenses raised by Respondent's counsel" and "at the request of staff and intended as internal work product and attorney-client communications," and that "[t]hey included legal analysis and advice and provided my thoughts and impressions on the proposed case strategy." ((2021-12-03 Decl. of K. Petruzzelli ISO mtn. to quash, p. 1, ¶¶ 3-4.)

In its motion, the Prosecution Team states that the 2021 Report of Investigation cites a third memorandum, "OE, 2017b," and that this memorandum lacked any privileged information and "should have been the only cited memorandum in the 2017 ROI." (2021-12-03 PT Mtn. to Quash, p. 2.) The Prosecution Team states that, after receiving "significant amounts of new information in response to the 2017 ROI," the Division issued a revised report of investigation in 2021 (the "2021 Report of Investigation"). The Prosecution notes that the draft cease-and-desist order that is the subject of this proceeding contains numerous references to the 2021 Report of Investigation and does not substantively refer to the 2017 report's findings or analysis. (2021-12-03 PT Mtn. to Quash, p. 2.)

The Prosecution Team argues that the affidavit accompanying a subpoena duces tecum "must allege specific facts justifying discovery," citing *Johnson v. Superior Court* (1968) 258 Cal.App.2d 829, 836. (2021-12-03 PT Mtn. to Quash, pp. 3-4.) Citing *Elmore v. Superior Court* (1967) 255 Cal.App.2d 635, 638, the Prosecution Team argues that "[t]he affidavit must demonstrate that the material sought is: (1) relevant to the subject matter; (2) material to the issues; and (3) needed for effective preparation for trial." (2021-12-03 PT Mtn. to Quash, p. 4.) The Prosecution Team argues that BlueTriton's subpoena duces tecum does not meet any of the elements of this three-part test. (*Id.*, pdf pp. 4-5.)

The Prosecution Team also argues that I should grant its motion to quash because the subpoena seeks the production of documents protected from disclosure by the attorney-client privilege and the attorney work product doctrine. (*Id.*, pp. 5-6.)

On December 3, 2021, I sent an e-mail to the Prosecution Team's attorney, with copies to everyone else on the e-mail service list for this proceeding. That e-mail acknowledged that the Administrative Hearings Office ("AHO") had received the Prosecution Team's motion to quash and stated that the Prosecution Team's obligation to respond to BlueTriton's subpoena duces tecum was stayed until I ruled on the Prosecution Team's motion to quash. I stated in that e-mail that I planned to order a relatively short briefing schedule and then to promptly issue a ruling on the motion.²

² As discussed in the following paragraphs, the parties subsequently filed briefs, so I did not need to set a briefing schedule. Because of the burdens created by subsequent

On December 13, 2021, BlueTriton filed its opposition to the Prosecution Team's motion to quash. (2021-12-13 BlueTriton Opp. to Mtn. to Quash.) In this opposition, BlueTriton argues that good cause exists to require the Prosecution Team to produce the two documents because the 2017 Report of Investigation "relied extensively on the Subject Documents to support its allegations regarding the nature of BTB's water rights and the State Water Board's jurisdiction over the water at issue." (*Id.*, p. 7.) BlueTriton argues that, even though the Division of Water Rights subsequently issued its 2021 Report of Investigation, the 2017 Report of Investigation is "potential impeachment evidence," and BlueTriton "should not be denied the opportunity to address how the State Water Board's legal theory in this matter changed over the course of the investigatory process and the basis for any change in its position." (*Ibid.*)

BlueTriton argues that the "State Water Board" waived any protection under the attorney-client privilege or the attorney work product doctrine when the Division of Water Rights issued the 2017 Report of Investigation, which cites OE, 2016 and OE, 2017a multiple times. (*Id.*, pp. 2-6.)

On December 20, 2021, the Prosecution Team filed a reply to BlueTriton's opposition. In this reply, the Prosecution Team argues that OE, 2016 and OE, 2017a "were merely referenced inadvertently" in the 2017 Report of Investigation and were "not disclosed." (2021-12-20 PT Reply in Support of Motion to Quash and Vasquez Decl., p. 1.) The Prosecution Team included a Declaration of Victor Vasquez, a Senior Water Resource Control Engineer in the Division of Water Rights and supervisor of the Division's Sacramento Valley Enforcement Unit, with its reply. (*Id.*, pdf p. 8, ¶ 1.) In this declaration, Mr. Vasquez states that his understanding was that Mr. Petruzzelli said the Division could cite OE, 2016 and OE, 2017a in the 2017 Report of Investigation, but, in hindsight, "it is highly possible that there was a miscommunication and confusion between Division Enforcement staff, myself, and Mr. Petruzzelli about which memoranda we were asking to cite, which resulted in staff inadvertently citing OE 2016 and OE 2017a." (*Id.*, pdf p. 9, ¶¶ 3-4.) Nevertheless, "[i]t was not [his] intent to waive the privilege for the OE 2016 and OE 2017a memoranda, and [he] specifically excluded these documents from the attachments to the 2017 ROI while he included the OE 2017b memorandum." (*Id.*, ¶ 4.)

On December 23, 2021, BlueTriton filed a motion for leave to file a sur-reply or, in the alternative, to strike the "new evidence" in the Prosecution Team's December 20, 2021 reply. (2021-12-23 BlueTriton Mtn. to File Sur-Reply ISO Mtn. to Quash.) BlueTriton attached its sur-reply to its motion. I grant BlueTriton's motion to file this sur-reply.

In its sur-reply, BlueTriton argues that the "State Water Board" knowingly waived any privilege. (*Id.*, pdf pp. 4-5.)

motions and hearing days in this proceeding, and because of my workloads in other proceedings, I have not been able to rule on this motion until now. However, in light of my ruling, no party is prejudiced by this delay.

Discussion

Government Code section 11450.30, subdivision (a), provides that a person served with a subpoena or subpoena duces tecum “may object to its terms by a motion for a protective order, including a motion to quash.” Subdivision (b) of this section provides that the presiding officer shall resolve the objection “on terms and conditions the presiding officer declares. The presiding officer may make another order that is appropriate to protect the parties or the witness from unreasonable or oppressive demands, including violations of the right to privacy.”

1. Good Cause and Materiality

“When the agency’s subpoena power is invoked to secure discovery, the good cause and materiality requirements of Code of Civil Procedure section 1985 must be governed by discovery standards.” (*Johnson v. Superior Court, supra*, 258 Cal.App.2d, at p. 836.) Under these discovery standards, “the test is whether 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.” (*Elmore v. Superior Court, supra*, 255 Cal.App.2d, at p. 638.)

I agree with the Prosecution Team that, because these memoranda were cited only in the 2017 Report of Investigation, which was superseded by the 2021 Report of Investigation before the Division of Water Rights Permitting and Enforcement Branch issued its draft cease and desist order, these memoranda are not relevant or material to this proceeding.

Also, although I have not seen OE, 2016 or OE, 2017a, based on their titles and author it appears to me that they contain only analyses by the Prosecution Team’s attorney of some of the legal issues in this proceeding, and that they do not contain any evidence regarding factual issues. Because these memoranda apparently do not contain any information that would tend to prove or disprove any factual issues, they do not appear to be relevant or material.

Although BlueTriton argues that it should have the opportunity to address how the “State Water Board’s legal theory in this matter changed during the course of the investigatory process and the basis for any change in its legal position” (2021-12-13 BlueTriton Opp. to Mtn. to Quash, p. 7), any such changes would not be relevant or material to any factual issues or the independent legal analyses that I will be including in the AHO’s proposed order in this proceeding.

I also conclude that production of these memoranda to BlueTriton was not necessary for BlueTriton’s effective hearing preparation. In its motion in limine regarding some of Story of Stuff Project’s sur-rebuttal testimony, BlueTriton argued that a declaration of an attorney that Story of Stuff Project planned to call as a witness was “entirely legal argument, which does not constitute evidence and should not be admitted into the record as such.” (2022-04-22 BTB Mtn. In Limine to exclude Sur-Rebuttal Testimony

and Exhibits, p.5.) I granted that motion. I now conclude that, for similar reasons, PT, 2016 and PT, 2017a would not be admissible in this proceeding. (See *Sheldon Appel Co. v. Albert & Olike* (1989) 47 Cal.3d 863, 884 (“[I]t is thoroughly established that experts may not give opinions on matters which are essentially within the province of the court to decide” (citations omitted).) Because these memoranda would not be admissible, BlueTriton did not need them to prepare for the hearings in this proceeding.

2. Attorney-Client Privilege

I also grant the Prosecution Team’s motion to quash for the separate and independent reason that OE, 2016 and OE, 2017a are protected from disclosure by the attorney-client privilege. Mr. Petruzzelli, an attorney in the Board’s Office of Enforcement, prepared these two memoranda as confidential communications between him and members of the Division’s Permitting and Enforcement Branch, which should be considered to be his “client” under Evidence Code section 951. These memoranda were “confidential communication[s] between client and lawyer,” as that term is used in Evidence Code section 952.

Evidence Code section 912 provides that a holder of a privilege, including the attorney-client privilege, may waive the privilege if the holder, “without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone.”

BlueTriton argues that, by citing OE, 2016 and OE, 2017a “a total of *eighteen* times” in the 2017 Report of Investigation, the “State Water Board” “knowingly and repeatedly identified and disclosed the substance of” these memoranda, and thereby waived any claim of attorney-client privilege regarding these documents. (2021-12-13 BlueTriton Opp. to Mtn. to Quash, p. 4, italics in original.)³

I disagree. While the 2017 Report of Investigation cites these two memoranda numerous times, it does not contain any quotations from them. BlueTriton does not provide any authority, and I am not aware of any authority, for the proposition that citations to privileged documents, without any disclosures of any of the actual communications in them, cause a waiver of the applicable privilege. To the contrary, such citations without quotations appear at most to be disclosures that certain privileged communications occurred. And the California Supreme Court has held that such disclosures alone do not waive the privilege:

A disclosure that a communication did occur that does not disclose the specific content of the communication may not waive the privilege.
[Citations.] . . . the acknowledgment that a communication on the topic occurred did not have the depth and specificity necessary to constitute

³ BlueTriton’s subpoena duces tecum states that the 2017 Report of Investigation cited OE, 2016 twelve times and OE, 2017a five times. (2021-11-30 BlueTriton Subpoena Duces Tecum, pdf p 6, ¶¶ 4-5.) BlueTriton does not explain the discrepancy between these two numbers, which total 17, and the statement in its motion that the 2017 Report of Investigation cited these documents a total of 18 times.

disclosure of a significant part of the communication and thus did not waive the attorney-client privilege. [Citation.]

(*People v. Hayes* (1999) 21 Cal.4th 1211, 1265 fn. 14.)

3. Attorney Work Product Doctrine

I also grant the Prosecution Team's motion to quash for the separate and independent reason that OE, 2016 and OE, 2017a are protected from disclosure by the attorney work product doctrine.

Code of Civil Procedure section 2018.030, subdivision (a), provides:

(a) A writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories is not discoverable under any circumstances.

Although I have not seen OE, 2016 or OE, 2017a, based on their titles and their author it appears to me that they contain impressions, conclusions, opinions and legal research and theories of the Prosecution Team's attorney, and thus are protected from disclosure by this statute.

In *City of Petaluma v. Superior Court* (2016) 248 Cal.App.4th 1023, 1033, the court held:

The protections of the attorney-client privilege and the work product doctrine may be waived by disclosure of privileged communications or work product to a party outside the attorney-client relationship if the disclosure is inconsistent with the goals of maintaining confidentiality or safeguarding the attorney's work product.

For the reasons discussed in the previous section of this ruling, I conclude that the Division's Permitting and Enforcement Branch did not disclose the privileged communications that may be in OE, 2016 and OE, 2017a. I therefore reject BlueTriton's argument that either the Division or the Office of Enforcement waived the protections of the attorney work doctrine that apply to these documents.

In summary, for each of these independent reasons, I grant the Prosecution Team's motion to quash BlueTriton's November 30, 2021 subpoena duces tecum.

June 28, 2022

/s/ ALAN B. LILLY

Alan B. Lilly
Presiding Hearing Officer
Administrative Hearings Office

Enclosure: Service List (copies sent by e-mail only)

SERVICE LIST

Representatives of participating parties:

Kenneth Petruzzelli
John Prager
Office of Enforcement, State Water
Resources Control Board
801 K St., 23rd Floor
Sacramento, CA 95814
Kenneth.Petruzzelli@Waterboards.ca.gov
John.Prager@Waterboards.ca.gov
*Attorneys for Division of Water Rights
Prosecution Team*

Robert E. Donlan
Christopher M. Sanders
Shawnda M. Grady
Hih Song Kim
Patty Slomski
Ellison Schneider Harris & Donlan L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
red@eslawfirm.com
cms@eslawfirm.com
sgrady@eslawfirm.com
ps@eslawfirm.com
HihSong.Kim@waters.nestle.com
Attorneys for Blue Triton Brands

Rita P. Maguire
P.O. Box 60702
Phoenix, Arizona 85082
rmaguire@azwaterlaw.com
Attorney for Blue Triton Brands

Nancee Murray
Kathleen Miller
P.O. Box 944209
Sacramento, CA 94244-2090
nancee.murray@wildlife.ca.gov
kathleen.miller@wildlife.ca.gov
*Attorneys for California Department of
Fish and Wildlife*

Steve Loe
33832 Nebraska St.
Yucaipa, CA 92399
steveloe01@gmail.com

Meredith E. Nikkel
Samuel E. Bivins
Holly E. Tokar
Downey Brand LLP
621 Capitol Mall, 18th Fl.
Sacramento, CA 95814
mnikkel@downeybrand.com
sbivins@downeybrand.com
htokar@downeybrand.com
*Attorneys for San Bernardino Valley
Municipal Water District*

Rachel Doughty
Christian Bucey
Michael O'Heaney
Erica Plasencia
Paul Kibel
Story of Stuff Project
Greenfire Law, PC
P.O. Box 8055
Berkeley, CA 94704
rdoughty@greenfirelaw.com
cbucey@greenfirelaw.com
michael@storyofstuff.org
eplasencia@greenfirelaw.com

Laurens H. Silver, Esq.
PO Box 667
Mill Valley, CA 94942
larrysilver@earthlink.net
Attorney for Sierra Club

Lisa Belenky
1212 Broadway, Suite 800
Oakland, CA 94612
lbelenky@biologicaldiversity.org
*Attorney for Center for Biological
Diversity*

Amanda Frye
12714 Hilltop Drive
Redlands, CA 92373
amandafrye6@gmail.com

Hugh A. Bialecki, DMD
Save Our Forest Association, Inc.
PO Box 2907
Blue Jay, CA 92317
habialeckidmd@gmail.com

People submitting only policy statements:

Kristopher Anderson, Esq.
Association of California Water
Agencies
980 9th St. Suite 1000
Sacramento, CA 95814
krisa@acwa.com

Jody Isenberg
League of Women Voters of the San
Bernardino Area
P.O. Box 3925
San Bernardino, CA 92413
betsy.starbuck@gmail.com
jodyleei@aol.com
watermarx55@hotmail.com

Jennifer Capitolo
California Water Association
601 Van Ness, Suite 2047
San Francisco, CA 94102
jcapitolo@calwaterassn.com

Mary Ann Dickinson
P.O. Box 5404
Blue Jay, CA 92317
maryann@a4we.org

David J. Guy
Northern California Water Association
(NCWA)
455 Capitol Mall, Suite 703
Sacramento, CA 95814
dguy@norcalwater.org

Steve Loe
Southern California Native Freshwater
Fauna Working Group
33832 Nebraska St.
Yucaipa, CA 92399
steveloe01@gmail.com

Henry A. Frye
387 Flanders Road
Coventry, CT 06238
henryfrye6@gmail.com

Anthony Serrano
7517 Mt. McDuffs Way
Highland, CA 92346
anthonyaserrano@gmail.com

People who have asked to be on service list:

Joshua S. Rider
Staff Attorney
Office of the General Counsel, USDA
joshua.rider@usda.gov

Joe Rechsteiner
District Ranger-Front Country Ranger District
San Bernardino National Forest
joseph.rechsteiner@usda.gov

Robert Taylor
Forest Hydrologist
San Bernardino National Forest
robert.taylor2@usda.gov