

CHANGE SHEET #1 TO JULY 7, 2023 REVISED PROPOSED ORDER

Office of Chief Counsel’s recommended edits to July 7, 2023 revised proposed order prepared by Administrative Hearings Office (AHO) on the draft Cease and Desist Order (CDO) issued by the Assistant Deputy Director for the Division of Water Rights (Division) Permitting and Enforcement Branch to BlueTriton Brands, Inc. (BlueTriton) and on BlueTriton’s request to set aside proposed order and motion to stay further action. (References are to text page numbers.)

Throughout the document, change “Mr. Nichols” to “Mr. Nicholls”.

On page 1, first paragraph, edit the last sentence as follows:

Pursuant to Water Code section 1114, subdivision (c)(2)(C)(A), the Board adopts the AHO’s proposed order with the changes described in section 2.12.4 in its entirety.

On page 4, in the fourth-to-last line, change “Center of Biological Diversity” to “Center for Biological Diversity”.

On page 5, delete line 4, which reads “(list continues on next page)”.

On page 9, in the last paragraph, edit the third sentence as follows:

“During the AHO proceedings, a Prosecution Team witnesses testified that he believed that water deliveries...”

On page 20, in the second quoted paragraph, beginning with “Groundwater discharging...”, add a hyphen to the second-to-last line, for “north-northwest.”

On page 26, in the sixth paragraph, capitalize the “h” in “holes” in the text for “Bore holes No. 1, No. 1A, and No. 8 are hydraulically connected to Spring No. 4.”

On page 35, in the fourth paragraph, edit the first sentence by deleting the comma between “1” and “and” as follows:

“...Boreholes 1, and 8”

On page 36, in the first full paragraph, add a hyphen between “water” and “right permitting authority” as follows:

“...and that ‘presumptively subject to’ the Board’s water-right permitting authority”

On page 36, in the second full paragraph, in the second sentence, replace the word “at” with “as” as follows:

“...but that this amount could be at as low as...”

On page 42, lines 7 and 27, change “Exh. BTB-9” to “Exh. BTB-6”.

On page 46, edit the title of section 2.12.3.4 as follows (and make the corresponding edit in the table of contents):

2.12.3.4 Center for Biological Diversity Witness's Testimony

On page 46, in the middle of the first paragraph, edit the first sentence in the block quotation to add an ellipsis after "rock springs" and before "providing" and edit the second sentence in the block quotation as follows: "...were conducted on an altered hydraulic regime different from than was present during predevelopment condition."

On pages 47-48, edit the paragraphs starting at the bottom of page 47 and carrying over to page 48 as follows:

On July 7, 2023, the AHO transmitted to the Clerk of the Board and the parties to this proceeding "Change Sheet # 1," which contained the AHO's recommended edits to the AHO's May 26, 2023 proposed order. On July 10, 2023, BlueTriton's attorney filed a letter with the Board, which, among other things, asked for 30 days for interested parties to submit comments on the May 26 proposed order with the July 7 proposed changes.

On July 12, 2023, the AHO hearing officer and the Board's Chief Counsel sent a letter to BlueTriton's attorney. This letter stated that the AHO had decided to withdraw its transmittal of the May 26 proposed order to the Clerk of the Board, and to submit the May 26 proposed order with the changes in the July 7 Change Sheet # 1 as the "July 7, 2023 Revised Proposed Order." This letter stated that the Clerk of the Board would remove the item regarding the May 26 proposed order from the agenda for the Board's July 18 meeting, and that the deadline for submitting comments on the July 7, 2023 Revised Proposed Order was August 11, 2023.

The Office of Chief Counsel (OCC) and we have considered the comments submitted on or before the August 11 deadline and prepared and circulated Change Sheet # 1 to the July 7, 2023 Revised Proposed Order. This order contains the changes in that change sheet.

~~These changes correct typographical errors, correct some quotations and citations, and edit text addressing several points, including text regarding the relevant provisions of the judgment in the Del Rosa Mutual Water Company case discussed in section 2.6. These changes also add a new Appendix B to this order, which summarizes the filings described in the preceding paragraph and contains our responses.~~

~~Our order includes these changes. All of these changes were technical or other minor changes to the July 7, 2023 revised May 26, 2023 proposed order, and none of these changes materially changed any of the factual or legal bases of the proposed order. We were authorized by Water Code section 1114, subdivision (c)(2)(C) to make these changes to the proposed order before we adopted this order.~~

On page 48, after the first two paragraphs, add the following new section (and a corresponding entry for it in the table of contents):

2.13 August 11, 2023 BlueTriton Motion

On August 11, 2023, BlueTriton filed a motion to disregard and strike the July 7, 2023 amended proposed order. We have reviewed the arguments in that motion and have concluded that we should deny the motion.

BlueTriton argues that the July 7, 2023 revised proposed order is unauthorized under the Water Code and the Administrative Procedure Act, and that the AHO's submission of the July 7, 2023 revised proposed order to the Board deprived BlueTriton of a fair and impartial consideration by the Board of its motions and comments on the May 26, 2023 proposed order. BlueTriton asks the Board to disregard the July 7, 2023 revised proposed order and strike it from the record in this proceeding. (BTB Motion to Disregard and Strike [BTB Motion], p. 6.)

BlueTriton asserts that the AHO hearing officer violated Water Code section 1114, subdivision (c), and provisions of the Administrative Procedure Act that require separation of functions by withdrawing the May 26, 2023 proposed order and submitting the July 7, 2023 revised proposed order to the Board. BlueTriton characterizes the AHO hearing officer's inclusion in the July 7, 2023 revised proposed order of responses to BlueTriton's comments on the May 26, 2023 proposed order as an "attempt[] to assume the role of legal advisor to the [Board]" and "advocate" for the Board to approve the proposed order. (BTB Motion, p. 8.) BlueTriton argues that the AHO hearing officer should not "offer[] responses to [BlueTriton's] comments and motions," which were "clearly directed to the [Board]." (*Id.*, pp. 8-9.)

Nothing in Water Code section 1114, subdivisions (c)(2) and (c)(4), or the Administrative Procedure Act prohibits an AHO hearing officer from withdrawing a proposed order and transmitting a revised proposed order to the Board. Furthermore, under general principles of administrative law, hearing officers have "wide latitude as to all phases of the conduct of the hearing, including the manner in which the hearing will proceed," and 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." (*Mileikowsky v. Tenet Health System* (2005) 128 Cal.App.4th 531, 560-561.)

It is appropriate and efficient, and it complies with principles of due process and fairness, for the AHO hearing officer to prepare responses to comments or motions the Board receives on a proposed order, particularly when those comments or motions are lengthy and complex. The Board then can consider those responses before it decides how to proceed. The Board often addresses significant comments received on a draft order in its final order so the Board's order will explain the Board's consideration of the comments received and the bases either for revisions to the order or for a decision not to change provisions of the order as a result of the comments.

A primary role of the AHO hearing officer is to prepare a proposed order in an adjudicative proceeding over which the hearing officer presides in a form that may be adopted as a final order by the Board. (Wat. Code, § 1114, subd. (c)(1).) The AHO hearing officer has the authority to prepare changes to a proposed order that was submitted to the Board for the Board's consideration as a result of comments received by the Board or motions by the parties. This authority is inherent in the hearing officer's function of preparing

proposed orders that may be adopted as final orders.

The AHO hearing officer may address comments or motions the Board receives by preparing revisions to a proposed order either through a change sheet that the Board may consider with the proposed order, for technical or minor changes, or by withdrawing the proposed order and submitting a revised proposed order that includes responses to the comments or motions. When the AHO hearing officer decides to withdraw a proposed order and submits a revised proposed order to the Board, interested parties have an additional thirty days to comment on that revised proposed order and to request particular actions by the Board under Water Code section 1114, subdivision (c)(4).

It was appropriate for the AHO hearing officer in this proceeding to prepare Appendix B, which addresses the 41 pages of comments submitted by BlueTriton on the May 26 proposed order, and other parties' comments, and then to withdraw the May 26 proposed order and transmit the July 7 revised proposed order, which incorporates Appendix B, to the Board for the Board's consideration. By preparing and submitting a revised proposed order, the AHO hearing officer was not exercising prosecutorial or advocacy functions. Rather, he was taking actions similar to those that trial court judges take under California Rules of Court, Rule 3.1590, in response to arguments on the judges' tentative decisions and proposed statements of decision. (See Cal. Rules of Court, rule 3.1590 (a) [tentative decision not binding]; (g) [any party may object to proposed statement of decision].) This process allowed the AHO hearing officer to use his familiarity with the extensive administrative record to provide responses to BlueTriton's detailed arguments, and it allowed the Board members to consider these responses before the Board decided how to proceed. Interested parties had a fair opportunity to comment on the July 7 revised proposed order in writing by the August 11 deadline, and the Board considered those comments before adopting this final order.

Contrary to BlueTriton's argument in its motion, any communications by the AHO hearing officer with the Board, Office of Chief Counsel, or non-enforcement staff of the Division of Water Rights did not violate the prohibitions against ex parte communications in Government Code sections 11425.10, subdivision (a)(8), and section 11430.10. Government Code section 11430.30 allows communications to the presiding officer from an employee or representative of an agency that is a party if the communication is for the purpose of assistance and advice and is from a person who has not served as investigator, prosecutor, or advocate in the proceeding. No staff of the AHO, Office of Chief Counsel, or the Division of Water Rights outside of the enforcement branch have served in an investigative, advocacy, or prosecutorial role in this proceeding. Therefore, no communications among the AHO hearing officer, the Board, Office of Chief Counsel, and non-enforcement staff of the Division of Water Rights violated these provisions of the Administrative Procedure Act.

BlueTriton also argues that the July 7 proposed order was untimely because the AHO hearing officer did not prepare a hearing management plan under Water Code section 1114, subdivision (d)(3). (BTBMotion, p. 12.) At the time the AHO hearing officer determined that the matter was complex, the hearings in the proceeding had already concluded and the matter had been deemed submitted to the hearing officer for preparation of a proposed order. A hearing management plan was unnecessary because

there were no additional submittals by the parties that required deadlines. BlueTriton does not include any explanation in its motion about what information or deadlines it asserts should have been included in a hearing management plan established by the hearing officer.

Finally, BlueTriton argues that the Board should have considered its June 2 Motion to Stay and Request to Set Aside the AHO's May 26 Proposed Order in a separate order, before acting on the May 26 proposed order or the July 7 revised proposed order, to address the question of the Board's authority to take enforcement actions against the diversions of water by BlueTriton. (BTB Motion, p. 14.)

None of the reported court decisions BlueTriton cited for its argument would require the Board to act on BlueTriton's motion in a separate order that would address the Board's water-right permitting and enforcement authorities before the Board acted on the entire proposed order the AHO hearing officer prepared. The Board has the discretion to consider all the relevant evidence and arguments in this proceeding at one time, and to address BlueTriton's jurisdictional arguments as part of its consideration of the July 7 revised proposed order in its entirety. This order addresses BlueTriton's jurisdiction arguments in sections 3.1 through 3.6.

For these reasons, we conclude that we should deny BlueTriton's August 11 motion to disregard and strike the July 7, 2023 revised proposed order.

On page 49, at the end of the first paragraph, remove the underline beneath "The California Law of Water Rights".

On page 50, first paragraph under the heading "Summary", third line, add an "a" between "through" and "known" to edit the sentence as follows:

"...stream flowing through a known and definite channel..."

On page 55, after the first full paragraph, add the following new footnote 39, and re-number all subsequent footnotes:

³⁹ In several decisions, the State Water Board and some of its predecessors denied applications for permits to appropriate groundwater that was not associated with any springs and that would be pumped by wells, based on conclusions that the water to be pumped was percolating groundwater. (See Decision 724 (State Engineer 1951); Decision 968 (State Water Rights Board 1960); Decision 1327 (State Water Board 1969); Decision 1337 (State Water Board 1969).)

On page 65, capitalize "Water-Right Enforcement Authority" in the title of section 3.6.2 (and make the corresponding change in the table of contents).

On page 69, edit the last paragraph of footnote 43 and footnote 44 as follows:

Because ~~all~~ All of BlueTriton's tunnels and boreholes in Strawberry Canyon are associated with former springs. ~~We are not deciding in this proceeding the issue of the extent to which~~ whether the Board's water-right permitting and enforcement

authorities could extend ~~apply~~ to water diverted by tunnels not associated with springs.

⁴⁴ Our conclusion that the water-right rules that apply to springs also apply to diversions of water associated with springs through underground tunnels, boreholes or pipes is based on all the relevant factors described in this order, including evidence that water discharging from Springs 1, 2, 3, 7, and 8 historically discharged into natural channels. This conclusion is not based solely on the fact that BlueTriton's diversions impact surface-water flows, and this conclusion does not address surface waters that are not associated with springs that historically flowed into natural channels, or other diffused surface waters. (Cf. *North Gualala Water Co. v. State Water Resources Control Bd.*, *supra*, 139 Cal.App.4th, p. 1606 ["impact" test alone is not appropriate test for determining legal classifications of groundwater].)

On page 73, in the second sentence of the third paragraph, add a period after the references to "Arrowhead Springs Corp." as follows:

"...amounts that were surplus to Arrowhead Springs Corp.'s needs of water from these sources..."

On page 79, in the second full paragraph, after the second sentence, add the following text:

(See *Conservatorship of Whitley* (2007) 155 Cal.App.4th 1447, 1462; *Newcomb v. City of Newport Beach* (1936) 7 Cal.2d 393, 404.)

On page 80, edit the first sentence as follows, add the following text, and start a new paragraph before the second sentence:

As discussed in section 3.6.2, we conclude that BlueTriton's diversions through Tunnels 2 and 3 and Boreholes 1, 1A, 7, 7A, 7B, 7C and 8 for beneficial uses are within the State Water Board's water-right permitting and enforcement authorities because the diversions are of water closely associated with historical springs. Our conclusion that BlueTriton's tunnels and boreholes in Strawberry Canyon divert water closely associated with historical springs is based on: (1) the physical proximity of the tunnels and boreholes to the locations of these historical springs (see section 2.9 [The entrances to Tunnels 2, 3, and 7 are in the same locations where Springs 2, 3, and 7 historically discharged. Boreholes 1, 1A, and 8 are located approximately 60 feet from the location where Spring 4 historically discharged and Boreholes 7, 7A, 7B, and 7C are located approximately 40 feet from the location where Spring 7 historically discharged]); (2) evidence that the tunnels and boreholes intercept water that would have discharged from the springs (see section 2.9), including the characterizations in the 1999 Dames & Moore report of the diversions through the tunnels and boreholes as diversions from springs or from sources of the springs (Exh. PT-23); (3) identification by BlueTriton's predecessors and consultants of the springs as the sources of the water diverted through the tunnels and boreholes in engineering reports (see section 2.9), groundwater extraction notices (see section 2.10.1), and reports prepared for compliance with FDA regulations governing "spring water" (see sections 2.10.2, 2.10.3, and 2.10.4); and (4) BlueTriton's representations to consumers that the bottled water is "spring water" (see section 2.10).

On page 82, in the first full paragraph, edit the end of the first sentence as follows:

“...BlueTriton delivers to the San Manuel Band on ~~during~~ the same day.”

On page 85, after numbered paragraph 6, add the following new paragraph:

7. We should deny BlueTriton’s August 11, 2023 motion to disregard and strike the July 7, 2023 amended proposed order.

On page 87, after lettered paragraph e, add the following new paragraph:

- f. We deny BlueTriton’s August 11, 2023 motion to disregard and strike the July 7, 2023 amended proposed order.

On page B1 through B26, remove the header “**07/18/2023 Board Meeting- ITEM #9 CHANGE SHEET #1 (CIRCULATED 07/07/2023)**”.

On page B1, under the underlined heading for “Comments,” in the stand-alone sentence that begins “These comments all urged...”, add “the” between “urged” and “Board.”

On page B12, in the fifth paragraph, change “we have deleted this sentence from this order” to “the AHO deleted this sentence from the May 26, 2023 proposed order.”

On page B12, in footnote B5, third sentence, change “we have edited the first paragraph” to “the AHO edited the first paragraph”.

On page B13, third paragraph, add “to” to the first sentence, as follows: “...as opposed to being ‘spread over the surface of the ground...”

On page B14, Argument 10, add a comma in the first sentence between “consultants” and “that” as follows: “...its predecessors and its consultants, that the water BlueTriton extracts...”

On page B15, in the third paragraph in the response to Argument 12, change “We have edited” to “The AHO edited.”

On page B15, under Argument 13, in the sixth line of the block quotation, reverse the quotation marks after the ellipsis ending with “its lands... - ” and make the same edit in the first sentence below this, as follows: “The first text that is omitted from this quotation “at ...” Also in this block quotation, delete the closed quotation marks after “...the Los Angeles area” and correct the spelling of “medial” to “medical”.

On page B22, line 3, delete the “-ly” after “judicially notice” in the following sentence: “...therefore was subject to judicially notice under Evidence Code section 452, subdivision (h)...”

On page B22, in line 6, change “we have edited” to “the AHO edited”.

On page B24, in the first paragraph responding to Argument 20, edit “they” as follows: “...even though ~~they~~ Mr. Serrano and the Center for Biological Diversity did not submit statements demonstrating why the AHO hearing officer should allow them to do so.”

On page B26, edit the paragraph before the last paragraph as follows:

These arguments are incorrect. As discussed in footnote 39 at the end of section 3.4, several decisions of the State Water Board and some of its predecessors denied applications for permits to appropriate water that was not associated with any springs and that would be pumped by wells, based on conclusions that the water to be pumped was percolating groundwater. The Board will consider the precedents in those decisions during future proceedings involving pumping and use of percolating groundwater that is not associated with springs. Such proceedings, and proceedings regarding water associated with springs that did not historically flow into natural channels, or other diffused surface waters will involve different issues from those addressed in this order, and any Board order in such a proceeding will involve different legal analyses.