
State Water Resources Control Board

SUPPLEMENTAL NOTICE OF PUBLIC HEARING AND PRE-HEARING CONFERENCE ORDER

The State Water Resources Control Board
Administrative Hearings Office
will hold a Public Hearing to determine whether to adopt
a proposed cease-and-desist and administrative civil liability order to

Kevin Gonzalves

for alleged unauthorized diversions of water within the San Joaquin River Watershed
in Merced County

**The Public Hearing will begin on
July 17, 2020 at 1:00 p.m.
and will continue as necessary on
July 30, 2020 and July 31, 2020 from 9:30 am to 4:30 pm**

in the Sierra Hearing Room
Joe Serna, Jr. CalEPA Building
1001 I Street, Second Floor
Sacramento, California

BACKGROUND

March 12 Hearing Notice and Pre-Hearing Conference

On March 12, 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 regarding the draft cease-and-desist order (“Draft CDO”) the State Water Board’s Division of Water Rights (“Division”) Assistant Deputy Director had issued to the Respondent, Kevin Gonzalves, on November 12, 2019. The applicable statutes, Draft CDO, hearing issues, pre-hearing and hearing schedule and related provisions regarding pre-hearing and hearing procedures are described in detail in the March 12 notice and are not repeated here.

On April 10, 2020, the AHO issued a Notice of Updated Service List for this matter. On April 17, 2020, the AHO held the pre-hearing conference described in the March 12 notice.

May 5 Administrative Civil Liability Complaint

On May 5, 2020, the AHO received copies of a transmittal letter from the Division's Enforcement Section, an Administrative Civil Liability Complaint ("ACL") and several related documents. The ACL advises the Respondent that he may request a hearing on the ACL, and that any request for hearing must be received or postmarked within 20 days of the date on which Respondent received the ACL and related documents. The ACL is based on statements in the Division's May 22, 2018 Report of Investigation. The prior Draft CDL also is based on statements in this same Report of Investigation.

Because the ACL is a new legal action separate from the Draft CDO, Respondent must file a separate request for hearing on the ACL on or before the applicable deadline. (This hearing request will be separate from Respondent's November 22, 2019 request for hearing on the Draft CDO.)

Applicable Statutes

California Water Code section 1055 authorizes the State Water Board's Executive Director to issue an ACL to any person or entity on which administrative civil liability may be imposed pursuant to several listed statutes, including Water Code section 1052.¹ Subdivision (a) of section 1052 provides that the diversion or use of water subject to Division 2 (which begins with section 1000) of the Water Code other than as authorized by the division is a trespass. Subdivision (d)(2) of section 1052 provides that the Board may impose civil penalties for violations of section 1052 in accordance with section 1055.

Water Code section 1110 established the Administrative Hearings Office ("AHO") within the State Water Board. Water Code section 1112, subdivision (a)(1), provides that an AHO hearing officer shall preside over a hearing in a matter involving a complaint issued under Water Code section 1055. Water Code section 1114 provides that, after the hearing is held and the matter is submitted to the AHO, the AHO hearing officer shall prepare a proposed order and provide it to the Board for the Board's consideration.

PURPOSE OF HEARING AND HEARING ISSUES

The March 12 hearing notice stated that the purpose of this hearing is for the AHO to receive evidence relevant to the Draft CDO and any responses or defenses to it. After the hearing, the AHO will prepare a proposed order for submission to and consideration by the State Water Board. The AHO's proposed order will be based upon evidence in the administrative record developed before and during the hearing.

¹ The Executive Director has delegated this authority to the Board's Deputy Director for Water Rights, who in turn has delegated this authority to the Assistant Deputy Director for the Division's Permitting and Enforcement Branch. This Assistant Deputy Director issued the ACL in this matter.

The March 12 hearing notice listed the following three hearing issues:

- 1) Is Respondent violating, or threatening to violate, the prohibition in Water Code section 1052, subdivision (a) (which is referred to in Water Code section 1831, subdivision (d)(1)) against the unauthorized diversion or use of water subject to Division 2 (which begins with section 1000) of the Water Code?
- 2) If any such violations or threatened violations are occurring, then should the State Water Board issue a cease-and-desist order to Respondent under Water Code section 1831?
- 3) If the State Water Board decides to issue a cease-and-desist order to Respondent under Water Code section 1831, then what provisions should be in the order?

The AHO is assuming that Respondent will file a timely request for hearing on the ACL. Accordingly, the AHO is adding the following hearing issues:

- 4) Did Respondent divert or use water subject to Division 2 of the Water Code other than as authorized by Division 2?
- 5) If Respondent diverted or used water subject to Division 2 other than as authorized by Division 2, should the State Water Board's order include the imposition of administrative civil liability?
- 6) If the State Water Board's order includes the imposition of administrative civil liability, then what is the appropriate amount for such administrative civil liability? (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.)

CHANGES IN PRE-HEARING AND HEARING PROCEDURES

During the April 17 Pre-Hearing Conference, the Parties raised some issues and made some requests regarding the pre-hearing and hearing procedures. After considering the Parties' arguments and requests, the AHO makes the following changes to the procedures stated in the March 12 notice. Except as explicitly stated in the following paragraphs, all provisions of the March 12 notice, including all deadlines and hearing dates, remain in effect.

Filings of Exhibits and Exhibit Identification Indices

On May 5, the AHO issued its Notice of Availability of Administrative Hearings Office FTP Sites. A copy of this May 5 notice is attached. Instead of e-mailing exhibits and exhibit identification indices to the AHO and other parties, each party shall file its exhibit identification index and exhibits by uploading them to the FTP site with username AHO-FTP2. Each party may do this any time before the exhibit filing deadline. The parties do not need to serve exhibits or exhibit identification indices on other parties.

After the exhibit filing deadline, the AHO will move all filed exhibits and exhibit identification indices to the FTP site with username AHO-FTP and advise the parties that these documents are available to download from that site. Each party also shall mail or hand-deliver two paper copies of its exhibits and exhibit identification index to the AHO at the mailing or hand-delivery address listed in the March 12 notice. The mailing or hand delivery shall occur on or before one day after the date of the exhibit filing deadline.

Permissible Formats for Electronic Exhibit Files

Unless the AHO authorizes a different format, all electronic files of exhibits shall be in pdf format, and all electronic files of exhibit identification indices shall be in Word or Excel format. If a party wants to file an exhibit in some other format, then the party shall make a written request by e-mail to the AHO (with cc's to all other parties) describing the desired format, the computer software needed to view the exhibit in that format and the reason why the party seeks to file the exhibit in that format. Any party making such a request shall make the request at least two weeks before the deadline for filing exhibits. The AHO will attempt to rule on the request within one week after the request is filed. Unless the AHO grants the request, all exhibits shall be filed in pdf format.

Deadline for Filing Slides Summarizing Written Testimony

During the pre-hearing conference, both parties asked for a later deadline for filing slides summarizing their witnesses' written testimony. (These slides are described in the second paragraph of part 6 of the INFORMATION CONCERNING WATER-RIGHT HEARINGS that was enclosed with the March 12 hearing notice.) The AHO extends the deadline for filing these slides to June 29, 2020, which is 14 days after the deadline for filing exhibits. This June 29 deadline applies only to the sets of slides (one set for each witness) that summarize the testimony of the parties' witnesses. All other exhibits (besides rebuttal exhibits, which are described in part 8.c. of the INFORMATION CONCERNING WATER-RIGHT HEARINGS) must be filed by the June 15 deadline.

POTENTIAL CHANGE OF HEARING FROM IN-PERSON HEARING TO TELECONFERENCE FORMAT

The AHO intends to proceed with this hearing as scheduled, as an in-person hearing. The Sierra Hearing Room is sufficiently large that all people attending the hearing should be able to maintain the recommended six-foot social distancing protocols.

However, if, because of the COVID-19 pandemic, the State Water Board is not able or authorized to hold in-person hearings on the scheduled hearing date, then the AHO will convert this hearing to a hearing to be held by teleconference, with video and audio participation by all interested parties. If this change is necessary, the AHO will issue a written notice describing the revised hearing procedures.

SETTLEMENT

As stated in the March 12 notice, if the Prosecution Team and the Respondent enter into a written settlement agreement signed by representatives of both Parties, then they should notify the AHO of this agreement, using the procedures for submitting documents described in the March 12 notice as soon as possible. Unless the AHO receives notice that both parties have signed a written settlement agreement settling all issues stated above for this hearing before the first day of hearing, the AHO will proceed with the hearing as scheduled. The AHO will not postpone or otherwise delay the hearing because the parties are engaging in settlement discussions or are "close" to a settlement.

May 15, 2020 _____

/s/ ALAN B. LILLY
Alan B. Lilly
Presiding Hearing Officer

Enclosures:

- May 5, 2020 Notice of Availability of Administrative Hearings Office FTP Sites
- Service List

S:\AHO\Water-Right Enforcement - Other\Kevin Gonzalves\Internal docs\2020-05-15 supplemental notice of hearing in Gonzalves matter.docx

NOTICE OF AVAILABILITY OF ADMINISTRATIVE HEARINGS OFFICE FTP SITES

The Administrative Hearings Office (AHO) has created two File Transfer Protocol (FTP) sites for the purposes of making AHO Administrative Record files available to the public and allowing parties to transmit files to the AHO.

The two FTP sites can be accessed at <https://ftp.waterboards.ca.gov/> and are described here:

(1) Username: AHO-FTP

Anyone may download from this FTP site the Administrative Record documents that the AHO has uploaded for the pending proceedings listed on the AHO website. Only AHO personnel may upload files to this FTP site. The AHO's normal practice will be to post on this FTP site all Administrative Record documents for each pending proceeding. These documents will include documents AHO personnel have copied from the Division of Water Rights Records Unit's public files and exhibits and exhibit indices filed by parties to pending proceedings. The AHO will post these latter types of documents promptly after each filing deadline for such documents.

(2) Username: AHO-FTP2

Any party to a proceeding pending before the AHO may upload documents for the proceeding (primarily exhibits and exhibit identification lists) to this FTP site. No one besides AHO personnel may download or delete any files from this FTP site. The AHO will send supplemental hearing notices to parties to proceedings pending before the AHO, advising them of the new protocols for uploading exhibits and exhibit identification lists to this FTP site instead of serving them on the other parties.

To obtain authorization to access either of these FTP sites, please submit an email request to the AHO at EXEC-AdminHrgOffice@Waterboards.ca.gov with "Request for AHO ftp password" in the subject line. After receiving your e-mail request, the AHO will provide you with a password to access these FTP sites. It is not necessary to include other parties in the cc line for these e-mail requests.

Date: May 5, 2020

SIGNATURE ON FILE

Alan B. Lilly, Presiding Hearing Officer

SERVICE LIST

Kevin Gonzalves and Jennifer Gonzalves
9888 N. Buhach Rd
Winton, CA 95388
kgonzalves@live.com

Kenneth Petruzzelli, John Prager
Division of Water Rights,
Prosecution Team
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