
State Water Resources Control Board

SUPPLEMENTAL NOTICE OF HEARING AND PRE-HEARING CONFERENCE ORDER

The State Water Resources Control Board
Administrative Hearings Office
will hold a Public Hearing on the pending petitions of

the County of Sacramento and the Sacramento County Water Agency

to change water-right Licenses 1062 and 4060 (Applications A001061 and A014494),
which authorize diversions of water from the Sacramento River
in Sacramento County,
and related issues regarding whether these licenses should be revoked.

**The Public Hearing will begin on
August 3, 2020 at 9:00 am
and will continue as necessary on August 13, 2020 and
August 31, 2020 from 9:00 to 4:30 pm
in the Byron Sher Auditorium (on August 3 and 13)
and in the Sierra Hearing Room (on August 31)**

Joe Serna, Jr. CalEPA Building
1001 I Street, Second Floor
Sacramento, California.

BACKGROUND

On March 17, 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 petitions filed by the County of Sacramento and the Sacramento County Water Agency (jointly referred to in this notice as “Sacramento County”) to change water-right Licenses 1062 and 4060 (Applications A001061 and A014494). As stated in that notice, this hearing also will consider whether the State Water Board should revoke these licenses. The applicable statutes, hearing issues and pre-hearing and hearing schedules are described in detail in the March 17 notice and are not repeated here.

On April 7, 2020, the AHO issued a Notice of Updated Service List for this matter. On April 22, the AHO held the pre-hearing conference described in the March 17 notice.

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

NOTICE OF CHANGE OF THIRD HEARING DAY

The previously noticed third hearing day (if necessary) is changed from August 17, 2020 to August 31, 2020.

NOTICE OF POTENTIAL REVOCATION OF LICENSES

The March 17 notice describes some of the relevant background facts and the statutes that may be applicable to the potential revocation of Sacramento County's water-right Licenses 1062 and 4060. The March 17 notice also notified interested parties that the hearing officer would discuss during the pre-hearing conference the process for considering issues associated with these potential license revocations.

Following the March 17 notice and the discussion during the April 22 pre-hearing conference, the hearing officer issues the following rulings and supplemental notice regarding these license-revocation issues:

Pursuant to Water Code sections 1675 and 1675.1 and California Code of Regulations, title 23, sections 850 and 851, the AHO, acting on behalf of the State Water Board, notifies Sacramento County that the AHO will consider during the hearing the issue of whether water-right Licenses 1062 and 4060 should be revoked. The relevant facts the AHO will consider include the apparent lack of any diversions or beneficial uses of water under these licenses since 2006 or earlier, the amounts and characters of the historical diversions and uses that occurred under these licenses during any year since the years in which these licenses were issued, and any related facts regarding the licensees' intents to divert and use water under these licenses at any time. Information regarding many of these facts is in the documents in the files that the AHO has posted on the AHO's FTP site (discussed below). The parties may introduce evidence regarding additional relevant facts during the hearing process.

To the extent these relevant facts raise issues concerning these potential license revocations that extend beyond the issues raised by the protests of the Department of Water Resources ("DWR") and the Bureau of Reclamation ("Reclamation"), the AHO is raising these additional issues on its own motion. The AHO is not making any pre-determinations regarding any of these issues, and the AHO will not take any position on any of these issues during the hearing. The AHO's intent in raising these additional issues is to give all parties opportunities to offer during the hearing any evidence they believe may be relevant to any issues associated with potential revocations of these licenses. The AHO will rely on the parties to present evidence, and to make arguments, on these issues during the hearing process.

The AHO is treating the NOI of Intent ("NOI") filed by Sacramento County in this proceeding on April 6, 2020 as a request for hearing on these license-revocation issues that satisfies the requirements for a licensee's request for hearing under Water Code section 1675.1.

HEARING ISSUES

Based on the pre-hearing conference statements filed by the parties' representatives and their statements during the pre-hearing conference, the hearing officer revises the hearing issues stated in the March 17 notice to be the following issues:

- 1) Should Licenses 1062 and 4060 be revoked under Water Code sections 1241 and 1675?
 - a) Were the water rights described in these licenses abandoned?
 - b) Have the licensees ceased to put the water authorized to be diverted and used under the appropriate water rights described in these licenses to useful or beneficial purposes?
 - c) Have the licensees failed to observe any of the terms and conditions of the licenses?
 - d) What were the amounts of historical diversions and use under each of these licenses during any relevant period?
 - e) During the period when no water was diverted or used under these licenses, was there any competing or conflicting claim to the water that could have been diverted and used under these licenses?
- 2) If Licenses 1062 and 4060 are not revoked, then should Sacramento County's change petitions be granted?
 - a) Would the State Water Board's approval of these petitions result in injury to any other legal user of water?
 - b) Would the State Water Board's approval of these petitions unreasonably affect any fish, wildlife or any other instream beneficial use?
 - c) Would the State Water Board's approval of these petitions be in the public interest?
 - d) Would the State Water Board's approval of these petitions cause the initiation of a new water right?
 - e) What is the status of Sacramento County's actions to comply with the California Environmental Quality Act ("CEQA") for these petitions? May the State Water Board proceed as a CEQA responsible agency to act on these petitions?
- 3) If these change petitions should be granted, then what new terms or conditions, if any, should be added to Licenses 1062 and 4060 when the petitions are granted?

ADMINISTRATIVE RECORD DOCUMENTS AND PARTIES' EXHIBITS

Availability of Administrative Record Documents

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. The files the AHO has posted on the AHO-FTP site may be accessed

at: <https://ftp.waterboards.ca.gov/#/Sacramento%20County%20-%20Petitions%20to%20Change%20WaterRight%20Licenses%201062%20and%204060%20%28Applications%20A001061%20and%20A014494%29/>

In the "Administrative Records" folder posted at this FTP site, the AHO has posted files with copies of various documents in the State Water Board's public files for Licenses 1062 and 4060, including the licensee reports for these licenses beginning in 1975 (for diversions during 1972-1974) that the AHO has located in these files. Because these documents already are in the initial Administrative Record, parties do not need to submit copies of them as exhibits. During the hearing, the hearing officer will ask the parties if they have any objections to any of these documents being admitted into evidence. The parties then may include citations to admitted documents in their closing briefs.

Submission of Parties' Exhibits

If any party wants to offer copies of any other documents in the State Water Board's public files as exhibits during the hearing, then, for those documents, the party should follow the procedures for filing exhibits specified in the March 17 hearing notice.

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 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.

Except as explicitly stated in this notice and order, all provisions of the March 17 notice, including all pre-hearing and hearing procedures, deadlines and hearing dates, remain in effect.

OTHER HEARING ISSUES

Burden of Proof

In its prehearing conference statement, Sacramento County argues that DWR and Reclamation have the burden of proving that Sacramento County abandoned or forfeited Licenses 1062 and 4060. The hearing officer is not going to rule on burden-of-proof issues now. The hearing officer will issue rulings on these issues as necessary after the parties have offered their evidence and made their legal arguments. The hearing officer notes that, as discussed in the State Water Board's Order WR 2011-0016, these issues are nuanced, involving issues associated with the initial burden of

establishing a prima facie case, shifting the burden to produce evidence, and rebuttal of evidence submitted by the other party. (See Order WR 2011-0016, pp. 35-36.)

Order of Proceeding and Potential Motions

Both Sacramento County and Reclamation have requested that the hearing be conducted in two parts, with the first part concerning the license-revocation issues and the second part concerning the change-petition issues. The hearing officer will address this issue and related issues regarding the order in which the parties will present their evidence and the time limits for summaries of direct testimony after the parties have filed their exhibits and exhibit identification indices.

Historical Diversions and Use

In their pre-hearing conference statements and during the pre-hearing conference, some of the parties' attorneys made arguments about which periods of historical diversions and use are relevant in this proceeding. In response to these arguments, the hearing officer has removed "recent" from the issue regarding historical diversions and use and has re-stated this issue to read: "What were the amounts of historical diversions and use under each of these licenses during any relevant period?"

With this more-general statement of this issue and the preceding Notice of Potential Revocation of Licenses, each party may offer evidence regarding historical diversions and use during any period the party believes is relevant in this proceeding, and may make appropriate arguments regarding the evidence. The hearing officer will not make any rulings regarding which periods are relevant to this issue until after the parties have submitted their evidence and made their arguments.

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 Byron Sher Auditorium and Sierra Hearing Room are 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 AHO 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.

Date: May 20, 2020

SIGNATURE ON FILE
Alan B. Lilly, Presiding Hearing Officer

Enclosures:

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

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State Water Resources Control Board

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

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