

## **State Water Resources Control Board, Administrative Hearings Office: Preparing for Your Hearing**

### **Overview**

If this is your first time participating in a hearing before the State Water Resources Control Board's Administrative Hearings Office, this guide will give you some idea of what to expect. This document is intended for people who do not have attorneys and are appearing in enforcement matters. You may also wish to read the AHO's FAQs document, available on the AHO's webpage under the heading "AHO Procedures & FAQs". If you have received a Notice of Public Hearing (Hearing Notice), that document also will contain helpful information.

### **What Is an Administrative Hearing?**

An administrative hearing is like a court hearing because parties have opportunities to present relevant evidence and testimony. A Hearing Officer, instead of a judge, conducts the hearing. An administrative hearing is different from a court hearing because of the subject matter of the hearing. An administrative hearing involves disputes on issues under the control of an administrative or regulatory governmental agency, such as the State Water Resources Control Board (Board).

In some cases, these disputes involve alleged violations and enforcement of state water-rights requirements. These types of proceedings are considered "enforcement actions." Other cases may involve petitions to change water-right permits or licenses, petitions to change fully appropriated stream petitions, or water-right complaints by one party against another party or parties.

### **Who Is Involved in an Administrative Hearing?**

Administrative hearings for enforcement actions usually involve two parties, the Water Board's Prosecution Team and the Respondent, while other matters may involve multiple parties. Administrative hearings normally include two decisionmakers, the Hearing Officer and the Board itself.

Normally, the Board's Division of Water Rights, Enforcement Section (Enforcement Section) leads enforcement actions. In these cases, the Enforcement Section is responsible for investigating a potential water-rights violation and deciding whether to bring a formal enforcement action to direct a party to take certain actions, or to prohibit a party from taking certain actions, by asking the Board to adopt a "cease and desist order," or to impose a penalty, known as "administrative civil liability". Attorneys from the Board's Office of Enforcement and staff from the Division of Water Rights, Enforcement Section together are the Prosecution Team that presents the enforcement case during the hearing.

The Respondent is the person or entity accused of the violation. The Respondent may hire an attorney or may appear without an attorney. He or she may dispute evidence presented by the Prosecution Team and may present his or her own evidence.

The Hearing Officer is an attorney in the Board's Administrative Hearings Office (AHO). For an administrative hearing, the Hearing Officer will set the schedule, make procedural rulings, and conduct the hearing. The Hearing Officer is not a judge and does not act as a jury as you might find in a court hearing or trial, because the Hearing Officer does not make a final decision. However, like a judge, the Hearing Officer will hear testimony from witnesses, and receive evidence such as reports, e-mails, photographs, and other documents. After both parties have presented their evidence and arguments, the Hearing Officer will close the hearing and prepare a Proposed Order. The Proposed Order is a recommended order based on the evidence presented during the hearing. The Hearing Officer then will submit this Proposed Order to the Board for it to review and consider adopting.

The Board consists of five full-time Members appointed by the Governor and confirmed by the State Senate. After most AHO hearings, the Board will review and consider adopting the Hearing Officer's Proposed Order. More information about Board meetings is provided at the end of this document under the heading, "After the Hearing".

### **Independence and Separation of the AHO**

The AHO is an independent organizational unit within the Board. The AHO maintains protocols to prevent any "ex parte" communication that would compromise its impartiality. An ex parte communication is a communication between a Hearing Officer or other AHO staff member and one party or one party's representative, when all of the other parties or their representatives have not been notified of the communication or have not been given opportunities to participate in the communication.

The AHO normally prohibits all ex parte communications involving AHO Hearing Officers or AHO staff. This means that once the AHO sends a Notice of Public Hearing (Hearing Notice), parties to a hearing may not communicate, off the record, with AHO Hearing Officers or AHO staff, about the substance of the hearing or major hearing procedures unless the AHO has notified all other parties of the proposed communication and given all other parties opportunities to participate in the communication or discussion.

For enforcement matters, members of the AHO are separated and independent from members of the Prosecution Team, which includes staff in the Division of Water Rights Enforcement Section and attorneys in the Board's Office of Enforcement. Like all other parties, the members of the Prosecution Team are prohibited from having any ex parte communications with members of the AHO.

Parties to a hearing may communicate with each other, such as during settlement negotiations or to coordinate presentation of shared exhibits, at any time. As long as no AHO Hearing Officer or other AHO staff member is involved, these are not

improper ex parte communications. Please refer to the Hearing Notice and the FAQs on the AHO webpage for more information. A detailed explanation of ex parte communications can be found at:

[https://www.waterboards.ca.gov/laws\\_regulations/docs/exparte.pdf](https://www.waterboards.ca.gov/laws_regulations/docs/exparte.pdf)

### **Before the Hearing**

If you request a hearing after receiving an Administrative Civil Liability Complaint, you will receive a Hearing Notice.

The Hearing Notice is an important document that discusses the issues that will be considered during the hearing, procedural rules, and contact information. You may submit exhibits before your hearing, but this is not required. Please review the Hearing Notice for more information about how to file exhibits with the AHO.

The AHO normally will begin preparing the “administrative record” before the hearing and will post it at the time it sends the Hearing Notice. The AHO may add additional documents to the administrative record before, during or after the hearing. The administrative record contains the evidence the Hearing Officer uses to prepare the proposed order. Documents from the Water Board’s files, all exhibits offered or admitted into evidence, and all recordings of the proceedings, are parts of the administrative record for each case.

For in-person hearings, the Hearing Notice will state the hearing start time and location. If the hearing will be held electronically, the Hearing Notice will state the start time and instructions for participating using video conference software.

The Hearing Notice also may direct you to the AHO’s webpage, which has information about each pending matter, a link to the AHO’s YouTube channel, and a link to Frequently Asked Questions. The AHO’s webpage can be accessed at [https://www.waterboards.ca.gov/water\\_issues/programs/administrative\\_hearings\\_office/](https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/) To help prepare for your hearing, you may want to watch recordings of past AHO hearings, which are posted to the AHO’s YouTube channel.

While you do not need an attorney to represent you before the AHO, if the hearing will involve complex legal issues, you should consider hiring an attorney. Some attorneys provide legal services free of charge, called “pro bono representation.” The AHO maintains a list of attorneys that offer pro bono representation to parties without an attorney in water rights cases before the AHO. This list is available on the AHO’s webpage, available at [https://www.waterboards.ca.gov/water\\_issues/programs/administrative\\_hearings\\_office/docs/2021/pro\\_bono\\_aho.pdf](https://www.waterboards.ca.gov/water_issues/programs/administrative_hearings_office/docs/2021/pro_bono_aho.pdf).

All hearings before the AHO are public hearings, meaning that anyone can watch the hearing and the administrative record is publicly available on the AHO-FTP website. More information about watching the hearing and the AHO-FTP website is available on the AHO’s webpage.

## **During the Hearing**

The Hearing Officer will begin the hearing by sharing introductory comments with the parties, taking a “roll call” of the parties, and asking if any non-parties want to offer statements. After roll call, the Prosecution Team’s attorney may make an oral opening statement and then present its case-in-chief by calling its witnesses to testify. The Hearing Officer will have each witness take an oath. This oath requires each witness to tell the truth, just as if the witness was testifying in court, and subject to the same legal penalties for not telling the truth. AHO staff will operate hearing room equipment or video conference software to display any slides the Prosecution Team has submitted with its exhibits, and to ask its witnesses to discuss the Prosecution Team’s exhibits. The AHO does not provide a court reporter for its hearings, but any party may hire a court reporter at the party’s expense.

A member of the Prosecution Team will ask the Prosecution Team’s witnesses to summarize their written testimony. This oral testimony is called “direct testimony.” If the Prosecution Team submits exhibits, the Hearing Officer will expect the Prosecution Team’s witnesses to verify that all the Prosecution Team’s exhibits are accurate (to “authenticate” the exhibits). The Prosecution Team’s witnesses also may summarize their written testimony.

After the Prosecution Team completes its questioning of its witnesses, the Respondent may cross-examine these witnesses.

After cross-examination, the Prosecution Team will have an opportunity to ask its witnesses questions about new issues that were raised during cross-examination. This is called “re-direct.” Following re-direct, the Respondent may ask cross-examination questions regarding any new issues that arose during re-direct. This is called “re-cross.”

The Hearing Officer may ask the witnesses questions at any time and may allow the Prosecution Team and the Respondent to ask follow-up questions about new issues raised by the Hearing Officer’s questions.

After all the Prosecution Team’s witnesses have completed their testimony, the Prosecution Team’s attorney will ask the Hearing Officer to admit the Prosecution Team’s exhibits and testimony into evidence. When the Hearing Officer is preparing the proposed order, the Hearing Officer will consider only testimony given during the hearing and exhibits that have been admitted into evidence. The Respondent will have an opportunity to object to the Prosecution Team’s exhibits and testimony. The Respondent may simply disagree with testimony or think it hurts his or her case, but normally these are not valid reasons to object. Rather, the Hearing Officer will sustain objections only if the objections are based on some applicable rule of law.

Next, the Respondent may make an oral opening statement and then may call witnesses, including himself or herself. The Hearing Officer will require each witness to

take the oath. The Respondent then may ask the witnesses questions and may provide direct testimony as a witness. A member of the Prosecution Team may cross-examine the Respondent's witnesses, including the Respondent if he or she testified.

There then will be opportunities for re-direct and re-cross questions of Respondent's witnesses, and the Hearing Officer may ask these witnesses questions. The Respondent then will ask the Hearing Officer to admit Respondent's exhibits and testimony into evidence.

In some hearings, the parties may ask to submit additional, "rebuttal" evidence. Rebuttal evidence is new evidence used to respond to (rebut) evidence another party has presented in its case-in-chief. The Hearing Officer will determine how the Parties will present rebuttal evidence.

At the end of the hearing, the Hearing Officer may allow the parties to make oral closing statements, or the Hearing Officer may direct the parties to prepare and file written closing statements.

### **After the Hearing**

The AHO will post a hearing room or video conference recording of the hearing on the AHO-FTP website. The AHO may also make available an informal transcript of the hearing.

After the parties have made their oral closing statements or filed their written closing statements (depending on which the Hearing Officer directs the parties to do), the Hearing Officer has 90 days to prepare a Proposed Order and transmit it to the Board. The Hearing Officer normally considers only hearing testimony and evidence that the Hearing Officer has admitted into evidence when the Hearing Officer prepares the Proposed Order. However, the Hearing Officer also may consider other publicly available information. If the Hearing Officer does this, then the Proposed Order will discuss this information. The Hearing Officer may also consult with AHO technical staff and other Board staff while preparing the Proposed Order, except that the Hearing Officer will not consult with staff of any other Board section that has participated in the hearing as a party or a party's representative.

When the AHO sends the Proposed Order to the Board, the AHO will send copies of the Proposed Order to the parties. The Board will provide notice for the Board meeting where it will discuss, and consider adopting, the Proposed Order. This normally will occur within 90 days from the date the AHO transmits the Proposed Order to the Board.

Before the Board meeting, parties may submit comments on the Proposed Order for the Board's consideration. During the Board meeting, the Board Members may discuss the Proposed Order and ask the Hearing Officer and the parties questions. Parties may address the Board during the open session portion of the meeting. Information about how to participate in Board meetings may be accessed at

[https://www.waterboards.ca.gov/board\\_info/calendar/](https://www.waterboards.ca.gov/board_info/calendar/). The Board also may discuss this

matter in the closed session portion of the meeting. Members of the public are not permitted to attend closed sessions. The Hearing Officer and other members of Board staff who are not on the staffs of parties to the proceeding may participate in these closed sessions.

Water Code section 1114 specifies five types of actions the Board may take on an AHO Proposed Order: (1) adopt the proposed order; (2) reduce or otherwise change the proposed administrative civil liability and adopt the rest of the Proposed Order; (3) make technical or minor changes to the Proposed Order and adopt it as the Board's order; (4) reject the Proposed Order and return the matter to the AHO for further proceedings; or (5) reject the Proposed Order and decide the case on the administrative record and its own hearing or on an agreed statement of the parties. The Board must make its final decision on the Proposed Order in the open session portion of the Board's meeting.

A party that disagrees with the Board's adopted order may ask the Board to "reconsider" the order within 30 days of the date the Board adopted the Order. The Board may reconsider its order based on evidence in the administrative record and the parties' arguments, or the Board may direct the AHO to hold a hearing to receive additional evidence. If the Board decides not to reconsider its order, then any party may challenge the Order in court.