
State Water Resources Control Board

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SUBJECT: Processes for Assignments of Water-Right Permitting Projects to
Administrative Hearings Office and Subsequent Proceedings

This memorandum describes the processes the Division of Water Rights (“Division”) and the Administrative Hearings Office (“AHO”), in consultation with the Office of Chief Counsel (“OCC”), have developed and normally will follow: (a) for making proposals to the Executive Director for assignments of water-right permitting projects to the AHO; and (b) for subsequent proceedings on projects the Executive Director has assigned to the AHO.

This memorandum applies to assignments of projects involving water-right applications and petitions and to projects involving potential amendments to existing water-right permits and licenses because of public trust, waste and unreasonable use, water quality control plan implementation, or other issues. These projects are collectively referred to in this memorandum as “water-right permitting projects” or “projects.” This memorandum does not discuss processes for matters involving administrative civil liability complaints, proposed cease and desist orders, or proposed revocations of water-right permits or licenses.

1. Applicable Statutes and Board Resolution

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

Water Code section 1112, subdivision (c), paragraph (2), authorizes the State Water Board to assign adjudicative hearings to the AHO, and paragraph (3) authorizes the State Water Board to request AHO hearing officers to perform additional work, including, but not limited to, non-adjudicative matters, mediations, and investigations. Through Resolution 2002-0104, the Board delegated authority to the Executive Director to conduct and supervise the activities of the State Water Board, with certain exceptions that do not apply here. The Executive Director may use that delegated authority and the Board's authorities under these statutes to assign water-right permitting projects to the AHO.

2. Division Proposals for Assignments of Projects to AHO

At appropriate times after review by the Division's Permitting Section or Petition, Licensing & Registration Section ("Petition Section"), and, as appropriate, in coordination with the Hearings and Special Projects Section ("Hearings Section"), the Deputy Director for Water Rights or the Assistant Deputy Director for the Division's Permitting and Enforcement Branch will consult with the AHO Presiding Hearing Officer regarding potential assignments of selected water-right permitting projects to AHO for further proceedings and hearings, considering staff workloads and other relevant factors. If they agree, then the Deputy Director or Assistant Deputy Director will recommend that the Executive Director make the assignment.

Depending on each project's specific facts and history, such assignments may occur relatively early in the process (e.g., soon after the deadline for filing protests has passed) or later in the process (after review and refinement of protest issues by Permitting or Petition Section staff, working with the interested parties, and potentially after preparation of CEQA documents or technical analyses).

Permitting and Petition Section staff will evaluate pending projects to determine which projects are appropriate for assignment to the AHO. Projects may be assigned to the AHO even though the CEQA documentation, water availability or other hydrologic analysis, or public trust analyses have not been completed.

The Division anticipates that projects that may be assigned to the AHO will be in the following three tiers:

Tier 1: Projects where there has been little or only minor past Division staff involvement to date, and projects in early development stages.

Tier 2: Projects with medium levels of previous Division staff involvement and background knowledge.

Tier 3: High complexity projects with long histories of Division staff involvement, during which Division staff developed substantial knowledge and expertise related to various elements of the projects.

The Division will decide the appropriate tier for each project and seek concurrence from the AHO on this decision during the consultation on potential assignment of the project to the AHO. It may be appropriate to assign some field investigations for minor protested applications or petitions, and some other discrete issues that require resolution, to the AHO. Depending on complexity and prior Division staff involvement, such projects may be in any of the preceding three tiers.

3. Process for Assignments of Projects to the AHO

To formally propose assignment of a project to the AHO:

- a. The Division will prepare a memorandum to the Executive Director, briefly describing the project and the selected tier and recommending assignment of the project to the AHO. This memorandum will be signed by either the Deputy Director for Water Rights or the Assistant Deputy Director for the Division's Permitting and Enforcement Branch, depending on whether there is potential need for separation of functions between the Assistant Deputy Director and Deputy Director (discussed in section 4 below).
- b. The Division also will prepare a draft memorandum that, if approved, will be from the Executive Director to the AHO Presiding Hearing Officer, formally assigning the project to the AHO. Normally these assignments will be "in whole," that is, for all pending issues associated with the project. For projects for which the Executive Director approves the assignment, copies of the assignment memorandum will be transmitted to the AHO and the Division, to be filed in the project's water-right file or files. The AHO also will send copies of the Division's and the Executive Director's memoranda to all interested parties, advise them of the assignment, and provide them a list of all interested parties' contact information and information about future proceedings. The AHO will post copies of the Division's and the Executive Director's memoranda on the appropriate AHO webpages.

4. Coordination of AHO and Division Staff; separation of functions; prohibition on *ex parte* communications

After the Executive Director assigns a project to the AHO, interested parties may have communications with AHO and Division staff, or Board members, to discuss the application or petition, following the processes described in this section 4.

Except as discussed below for communications between Permitting and Petition Section staff and interested parties for some projects, all communications about a project between interested parties and AHO, Division staff, and Board members after the Executive Director has assigned the project to the AHO, even communications regarding routine procedural matters, normally will be through meetings for which all interested parties will receive notice or through correspondence for which all interested parties will receive copies.

The AHO Presiding Hearing Officer will consult with the Deputy Director for Water Rights regarding participation of selected Bay Delta and Hearings Branch (“Hearings Branch”) staff in proceedings and hearings assigned to the AHO, considering staff workloads and other relevant factors. Hearings Branch staff may participate as members of the AHO project’s team in agreed-upon capacities.

The following procedures will apply to coordination of AHO and Division staff, and where appropriate, separations of functions between Permitting and Petition Section staff and AHO and Hearings Branch staff and prohibitions on *ex parte* communications:

- a. Tier 1 (Projects where there has been little or only minor past Division staff involvement to date, and projects in early development stages):
 - i. To avoid adversely impacting the workloads of Permitting and Petitions Section staff, AHO and Hearings Branch staff will become the technical specialists who will work with the AHO hearing officers on these projects. For the hearings, AHO and Hearings Branch staff will work together, with input from OCC as needed and appropriate, to address policy questions and considerations, to formulate strategy, and to discuss the project with Board members in closed sessions.
 - ii. No separation of functions between Permitting and Petition Sections staff and AHO and Hearings Branch staff normally will be needed for these projects. All relevant information that the Board has received normally will be in the water-right files for these projects and additional input from Permitting and Petition Section staff normally will not be needed for these projects after the Executive Director has assigned them to the AHO. Permitting and Petition Section staff normally will not have any contacts with any interested parties regarding a project after the project has been assigned to the AHO besides contacts through the processes described in the introduction to this Section 4, above.
 - iii. For some Tier 1 projects, it may be necessary or appropriate for members of Permitting or Petition Section staff to present information during the AHO’s hearing on the project or to work with the applicant or petitioner on the development of a CEQA document. For such projects, the Deputy Director or the Assistant Deputy Director for the Permitting and Enforcement Branch may assign members of Permitting or Petition Section staff to present information during the AHO hearing or to work with the applicant or petitioner on the development of a CEQA document. When such assignments are made, the assigned members of the Permitting or Petition Section staff will not have any further internal communications about the project with AHO or Hearings Branch staff or any Board members.
 - iv. AHO and Hearings Branch staff will work together, with input from the OCC as needed and appropriate, to address policy questions and

considerations, and to discuss the project with Board members in closed sessions.

- b. Tier 2 (Projects with medium levels of previous Division staff involvement and background knowledge):
 - i. To avoid adversely impacting the workloads of Permitting and Petitions Section staff, AHO and Hearings Branch staff will become the technical specialists who will work with the AHO hearing officers on these projects. Permitting and Petition Section staff will work internally with the AHO and Hearings Branch staff as needed to provide background information.
 - ii. If needed, AHO or Hearings Branch technical staff will prepare a “technical background memorandum”, working with OCC attorneys, as necessary. The preparation of this memorandum will be informed by Petitions or Application Section staff as necessary, and the AHO will file the memorandum in the formal hearing record as background information and send copies of it to interested parties. The purpose of the technical background memorandum will be to provide information about the State Water Board proceedings regarding the project that already have occurred and, to the extent possible, to identify the pending issues and anticipated future proceedings. The technical background memorandum will be based on documents in the administrative record, but the hearing officer will not treat statements in it as evidence for the hearing or findings for the AHO’s proposed order.
 - iii. No separation of functions between Permitting and Petition Sections staff and AHO and Hearings Branch staff normally will be needed for these projects. Permitting and Petition Section staff normally will not have any contacts with any interested parties regarding a project after the Executive Director has assigned the project the AHO besides contacts through the processes described in the introduction to this Section 4, above.
 - iv. For some Tier 2 projects, it may be necessary or appropriate for members of Permitting or Petition Section staff to present information during the AHO’s hearing on the project or to work with the applicant or petitioner on the development of a CEQA document. For such projects, the Deputy Director or the Assistant Deputy Director for the Permitting and Enforcement Branch may assign members of Permitting or Petition Section staff to present information during the AHO hearing or to work with the applicant or petitioner on the development of a CEQA document. When such assignments are made, the assigned members of the Permitting or Petition Section will not have any further internal communications about the project with AHO or Hearings Branch staff or any Board members.

- v. AHO and Hearings Branch staff will work together, with input from OCC as needed and appropriate, to address policy questions and considerations, and to discuss the project with Board members in closed sessions.
- c. Tier 3 (high complexity projects, with a long history of Division staff involvement, during which Division staff developed substantial knowledge and expertise related to various elements of the project):
- i. When the Executive Director assigns a Tier 3 project to the AHO, the AHO Presiding Hearing Officer and the Deputy Director for Water Rights will meet (with OCC input, if necessary) to determine the appropriate role for the Permitting or Petition Section staff. Separation of functions between the Permitting or Petition Section staff and the AHO and Hearings Branch staff may be necessary or appropriate and will be determined on a case-by-case basis. To decide this issue, and for projects for which a separation of functions is deemed to be appropriate, to decide when the separation should occur, the AHO Presiding Hearing Officer and the Deputy Director for Water Rights will consider the details of the Permitting or Petition Section staff's prior work on the project, the need or desirability for them to prepare technical documents regarding the project in the future, and whether or not they are likely to be asked to testify during the hearing for the project.
 - ii. If there is no separation of functions, then Permitting or Petition Section staff will work with AHO and Hearings Branch staff, and Permitting and Petition Section staff will not have any contacts with any interested parties after the project has been assigned to the AHO besides contacts through the processes described in the introduction to this Section 4, above.
 - iii. If there is a separation of functions, then, when the separation is to occur, the Permitting or Petition Section staff will prepare a technical memorandum that describes the pending issues, any staff concerns, and any other input that they want to convey to the AHO and Hearings Branch. The Permitting or Petition Section staff will work with an assigned OCC attorney to prepare this technical memorandum. They will provide copies of this technical memorandum to all interested parties and it will become part of the administrative record for the project. The technical memorandum will be based on documents in the administrative record but the AHO will not treat statements in it as evidence for the hearing or findings for the AHO's proposed order.
- (1) For projects where there is a separation of functions, there normally will be no limitations on communications between interested parties and Permitting or Petition Section staff. Such communications may address topics like preparation of CEQA documents or technical analyses.

- (2) After a separation of functions occurs, Permitting or Petition Section staff will not have any further internal communications about the project with AHO or Hearings Branch staff or any Board members, except as provided in paragraph (5) below. All communications between Petition Section or Permitting Section staff and AHO or Hearings Branch Staff or Board members will be through meetings to which all interested parties receive notice or through correspondence for which copies are sent to all interested parties.
- (3) For these types of projects, Permitting or Petition Section staff may be a party to the hearing, although such a role is anticipated to be infrequent.
- (4) For these types of projects, the Deputy Director for Water Rights will decide, at the time of the separation of functions, which side of the “firewall” to be on. The Assistant Deputy Director for the Permitting & Enforcement Branch will be on the Permitting or Petition Section side of the firewall.
- (5) For some projects, the Division of Water Rights may, on request of the AHO, assign Permitting or Petition Section staff members who have not previously worked on a project to work with AHO and Hearings Branch staff and Board members on the project. For purposes of the separation of functions and rules against *ex parte* contacts, such Permitting, or Petition Section staff members will be on the AHO side of the “firewall.”

5. Process for Refinement of Protest Issues and Preparation of Technical Documents

After assignment of a project to AHO, an AHO hearing officer, with associated AHO and Division technical staff, normally will hold a status conference with all interested parties for the purposes of:

- a. reviewing protest and other pending issues and narrowing or refining them if possible and appropriate; and
- b. developing a plan and schedule for the parties, and possibly AHO or Division staff, to complete any necessary CEQA document, water availability or hydrologic analysis, or public trust analysis. As necessary, AHO hearing officer will use Board’s statutory authorities under Water Code sections 1275-1276, 1332, 1334-1335, 1701.3-1701.4, 1703.5-1703.6 to order the parties to complete these documents.

After a status conference, an AHO hearing officer normally will issue an order refining the protest or other pending issues and directing the parties to prepare necessary documents by specified deadlines, if appropriate. It may be appropriate for some projects for Division or AHO staff to supervise the preparation of the necessary

CEQA documents, using the money in the State Water Board's budget for CEQA compliance on a revolving-fund basis.

An AHO hearing officer will conduct additional status conferences from time to time to review the parties' progress and their compliance with the deadlines in the AHO hearing officer's initial order. If necessary, the AHO hearing officer will issue additional orders. If protests are resolved outside of the hearing process, the AHO Presiding Hearing Officer and the Deputy Director for Water Rights will meet to determine the appropriate means for subsequent actions on the project.

6. AHO Hearings

If an AHO hearing is necessary for any project, then the interested parties will be the primary parties in the hearing. Interested parties will include the applicant or petitioner, protestants, and other parties to whom the AHO hearing officer grants party status.

An AHO hearing officer will preside over each hearing and may ask the parties' witnesses questions during the hearing. Members of the AHO and Hearings Branch staff assigned to the project will provide a pre-hearing briefing to the hearing officer, with recommended questions. They may provide additional briefings or recommended questions to the hearing officer during the hearing, and they will work with the hearing officer to prepare the proposed order.

For some projects, Permitting or Petition Section staff may present documents they have prepared. These documents may be water-availability or other hydrological analyses, public-trust analyses, CEQA documents, analyses of protest issues, or other technical documents. If Permitting or Petition Section staff presents documents during the hearing, then the Permitting or the Petition Section will participate in the hearing as a party, their staff members will participate as witnesses, their documents will be marked as exhibits, and they will be subject to cross-examination. Permitting or Petition Section staff presentations normally will focus on presenting information, and not on taking any positions on any hearing issues.

For some projects, the AHO and Hearings Branch staff may prepare analyses of protest issues or other technical documents that they will circulate to interested parties and add to the administrative record. These staff members will not participate in the hearings as witnesses. The technical memorandum with these analyses will be based on documents in the administrative record but the hearing officer will not treat statements in it as evidence for the hearing or findings for the AHO's proposed order.

7. State Water Board Proceedings on AHO Proposed Orders

After the AHO completes its proposed order for a project and transmits it to the State Board, the State Board will hold a meeting to receive comments from interested parties. The Board also may hold a closed session to discuss the proposed order or individual Board members may request briefings regarding the proposed order. Members of the

AHO and Hearings Branch staff (and appropriate OCC attorneys, discussed below) may participate in these meetings, closed sessions, and briefings as appropriate.

8. Post-Order Proceedings

After the State Board adopts a final order in a proceeding, it may be necessary for Permitting or Petition Section staff to prepare a new or amended water-right permit, permits, license, or licenses that are consistent with the final order. Permitting or Petition Section staff normally will work with applicant or petitioner and other interested parties on new or amended permit, permits, license, or licenses. If disputes arise during this process, then they will be referred to AHO for resolution.

9. OCC Attorney Roles

Where necessary, OCC attorneys will be assigned to work with Permitting and Petition Section staff on specific projects to points where they are ready for assignment to AHO. OCC attorneys also will advise Permitting and Petition Section staff who present documents and testimony during hearings on these projects, and they will represent the Permitting or Petition Section during the hearing. Different OCC attorneys will be assigned to work with AHO and Hearings Branch staff on specific projects, as necessary.

10. AHO Mediations

The AHO may determine that some projects are appropriate for mediation. In such meditations, an AHO hearing officer, with assistance from AHO and Hearings Branch staff as appropriate, will work with the parties to try to facilitate settlement agreements that would resolve some or all the pending issues.

If mediation does not resolve all pending substantive issues for a project, then the AHO will hold a hearing and prepare a proposed order. If mediation does resolve all the pending substantive issues for a project, then the AHO Presiding Hearing Officer and the Deputy Director for Water Rights will meet to determine the appropriate final actions for the project. These actions may include the post-order proceedings described in section 8 above.

Normally, one AHO hearing officer will supervise a mediation and, if the mediation is not successful, another AHO hearing officer will preside over the hearing in the same project, and the two hearing officers will not discuss the project with each other. AHO and Hearings Section staff that participated in the mediation normally will not participate in the hearing process.