




State Water Resources Control Board

TO: Administrative Hearings Office Employees

FROM: Nicole L. Kuenzi
Presiding Hearing Officer 
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DATE: May 31, 2024

SUBJECT: Administrative Hearings Office Procedures to Maintain Separation of Functions and to Avoid Conflicts of Interest or the Appearance of Bias Arising from Prior Employment

The State Water Resources Control Board's (State Water Board) Administrative Hearings Office (AHO) is an "independent organizational unit" that serves as a "neutral, fair and efficient forum for adjudications." (Wat. Code, § 1110, subd. (a).) This memorandum establishes screening procedures to prevent a conflict of interest or appearance of bias of AHO hearing officers and other employees of the AHO who participate in the decision-making process for any adjudicative proceeding conducted in whole or in part by the AHO.

Applicable Law

When an administrative agency conducts adjudicative proceedings, constitutional due process and the Administrative Procedures Act afford parties the right to a fair tribunal in which the decisionmaker is free of bias for or against a party. (*Morongo Band of Mission Indians v. State Water Resources Control Bd.*, (2009) 45 Cal.4th 731, 737; Gov. Code, § 11425.20.) "When due process requires a hearing, the adjudicator must be impartial." (*Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025.)

Government Code section 11425.30(a) states that a person may not serve as a presiding officer in an adjudicative proceeding if the person has served as an investigator, prosecutor, or advocate in the proceeding or its pre-adjudicative stage, or is subject to the authority, direction, or discretion of a person who had served in one of those roles. Agency staff who fall within this prohibition must be screened from playing an advisory role to an adjudicative decisionmaker in the same matter. (*Sweeney v. California Regional Water Quality Bd.* (2021) 61 Cal.App.5th 1093, 1144; see also Gov. Code § 11425.10(a)(4).) Presiding officers in such proceedings are also subject to disqualification for bias, prejudice, or interest in the proceeding. (Gov. Code § 11425.40(a).)

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Under Water Code section 1113 and Government Code sections 11475.20 and 11475.40, AHO hearing officers are subject to Canon 3E(1) of the California Code of Judicial Ethics. Under Canon 3E(1), an AHO hearing officer “shall disqualify himself or herself in any proceeding in which disqualification is required by law.” Code of Civil Procedure section 170.1 addresses judicial disqualification in a variety of situations, including disqualification based on prior employment. Under Code of Civil Procedure section 170.1(a)(2)(A), judges are automatically disqualified if they “served as a lawyer in the proceeding, or in any other proceeding involving the same issues he or she served as a lawyer for a party in the present proceeding or gave advice to a party in the present proceeding upon a matter involved in the action or proceeding.” Judges are deemed to have served as a lawyer in the proceeding if within the past two years: (i) a party to the proceeding, or an officer, director, or trustee of a party, was a client of the judge when the judge was in the private practice of law or a client of a lawyer with whom the judge was associated in the private practice of law; or (ii) a lawyer in the proceeding was associated in the private practice of law with the judge.

In addition, as licensed attorneys in the State of California, AHO hearing officers are subject to Rule 1.11, subdivision (d)(2)(i) of the California Rules of Professional Conduct, which provides: “Except as law may otherwise expressly permit, a lawyer currently serving as a public official or employee...shall not participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed written consent.” The State Water Board’s Conflict-of-Interest Code also disqualifies certain AHO employees from participating in decisions in which the employee has a disqualifying financial interest under title 2, section 18730(b)(9). Conflict-of-Interest Code for the State Water Resources Control Board (2023), at pp. 1, 7.)

Procedures for Separation

Although the legal provisions discussed in this memorandum directly apply only to AHO hearing officers, these procedures shall apply to any AHO employee involved in the decision-making process of any proceeding before the AHO.

Permanent Ban to Maintain Separation of Functions

The California Administrative Procedures Act requires that the adjudicative function in an administrative adjudication be separated from the investigative, prosecutorial, and advocacy functions. (Gov. Code § 11425.10(a)(4).) Functions are appropriately separated when staff performing a prosecutorial, investigative, or advocacy role are distinct from adjudicative staff in the same matter and the staff are screened from each other. (*Sweeney, supra*, 61 Cal.App.5th 1093, 1144.) Thus, AHO employees who previously participated in a prosecutorial, investigative, or advocacy role in a proceeding assigned to the AHO shall be permanently banned from participating in the AHO

proceeding and shall be screened from any deliberative communications by the adjudicative staff about the proceeding.

Permanent Ban Based on Prior Representations Involving the Same or Similar Proceedings

An AHO employee is permanently banned from participating in any proceeding in which the employee previously appeared as an attorney, consultant, representative, advocate, or witness in connection with prior employment. (See Code of Civil Procedure section 170.1(a)(2)(A).) For example, if an attorney joins the AHO as a hearing officer, the hearing officer is permanently banned from participating in any proceeding in which the hearing officer represented a former client before the AHO. Similarly, if an employee previously employed by a private consulting firm joins the AHO, the employee is permanently banned from participating in any proceeding in which the employee served as a consultant for a former client before the AHO.

Two-Year Ban on Participating in Matters in Which Employee's Former Employer or Client Appears Before AHO

For two years after the first day of employment with the State Water Board, an AHO employee shall not participate in any proceeding in which the employee's prior employer or client has appeared or appears in a new proceeding before the AHO. For example, if an attorney joins the AHO as a hearing officer, for two years after the first day of employment with the State Water Board, the hearing officer may not participate in any proceeding in which the hearing officer's former law firm or client appears before the AHO. With respect to hearing officers' former clients, this two-year ban applies regardless of the nature or extent of the representation. Similarly, if an employee previously employed by a private consulting firm joins the AHO, for two years after the first day of employment with the State Water Board, the employee may not participate in any proceeding in which the engineer's former consulting firm or client appears before the AHO.

Ban Based on Disqualifying Financial Interest

Under the State Water Board's Conflict-of-Interest Code, designated State Water Board employees are disqualified from participating in "governmental decisions that the employee knows or has reason to know will have a reasonably foreseeable material financial effect, distinguishable from its effect on the public generally, on the official or a member of the official's immediate family or on" interests in businesses, real property, or other sources of income that meet designated thresholds. (Conflict-of-Interest at p. 1; Cal. Code Regs., tit. 2, § 18730(b)(9).) The AHO's Presiding Hearing Officer, attorneys, environmental scientists, and Water Resources Control Engineers are designated employees for purposes of disqualification based on their financial interests. (Conflict-of-Interest Code at p. 7.) These designated employees will be screened from participating in AHO proceedings in accordance with title 2, section 18730(b)(9) of the California Code of Regulations.

Screening Procedures

1. Access to Internal Documents:

When an employee joins the AHO, the AHO and the State Water Board's Division of Information Technology limit access to internal electronic and paper files for any proceeding in which the employee is banned from participating in accordance with this memorandum.

Employees subject to any ban on participation in any AHO proceeding are not granted electronic access, through the use of electronic permissions, to the subfolders for those proceedings in the AHO's internal folder or in any similar root folder for a pending proceeding maintained on the State Water Board's drive. When a two-year ban on an employee's participation expires, the employee may be granted electronic permission to access these previously restricted folders. Employees subject to any ban on participation in any AHO proceeding are not prevented from accessing the subfolders for those proceedings on the AHO's publicly accessible external drive, also known as the AHO's FTP folder, or any similar publicly accessible subfolder on the State Water Board's FTP site.

The AHO also utilizes Sharepoint for sharing internal documents and files. Employees subject to any ban on participation in any AHO proceeding are not granted electronic access, through the use of electronic permissions, to the subfolders for those proceedings on the AHO's Sharepoint platform or any subfolders for the proceeding located elsewhere on the State Water Board's Sharepoint platform. When a two-year ban on an employee's participation expires, the employee may be granted electronic permission to access these previously restricted folders.

The AHO maintains limited paper records for certain of its proceedings. Most of these paper records are copies of documents that are also maintained in publicly accessible folders on the State Water Board's FTP site. To the extent that the AHO maintains internal notes or other documents that are not publicly available, these documents are kept in the private office of the Presiding Hearing Officer or the office of the hearing officer assigned to the matter. To the extent that other employees maintain personal notes about pending proceedings, these employees are instructed to prevent access to these personal notes by any employee who is banned from participating in the proceeding.

2. Other Communications:

An employee who is banned from participating in a proceeding will not participate in any meeting or phone conversation, or be included on any e-mail or other form of communication, addressing any substantive or controversial procedural issue related to that proceeding. AHO staff and other members of the respective hearing teams will not

discuss any substantive or controversial procedural issue with any employee who is banned from participating in the proceeding.

Any employee who shares an office or cubicle with another employee who is banned from participating in any proceeding shall maintain the privacy of any discussion about any substantive or controversial procedural issue related to that proceeding.

The AHO recognizes potential conflicts of interest arising from prior employment activities for the following employees listed in Table A. The AHO has applied, and will continue to apply, the screening procedures described in this memorandum and Table A to these employees.

Table A – April 1, 2025

AHO Employee	Start Date	Two-Year Disqualification from Participation in the Following Proceedings	Permanent Disqualification in the Following Proceedings	Restrictions on Access
Sam Bivins	4/16/2024	<p>Any proceeding in which Downey Brand LLP has appeared before the AHO on behalf of a party but where Mr. Bivins was not the representative for the client:</p> <p>Delta Conveyance Project (Screen ends April 17, 2026)</p>	<p>BlueTriton Brands, Inc. (Nestle)</p> <p>City of Solvang (A022423)</p> <p>Kern River Applications</p> <p>Nevada ID - South Sutter WD (Bear River)</p> <p>Kings River FAS Declaration</p>	<p>Office not shared with other AHO employees.</p> <p>Access to internal drives restricted.</p> <p>Access to Sharepoint folders restricted.</p> <p>No other communications about substantive or controversial procedural issues.</p>
Cody Phillips	3/18/2025	<p>Any proceeding in which a member of California Coastkeeper Alliance¹ has participated as a party and any future proceeding in which California</p>	<p>Not applicable. California Coastkeeper Alliance was not a party to any AHO proceeding during Mr. Phillips' employment.</p>	<p>Office not shared with other AHO employees.</p> <p>Access to internal drives restricted.</p>

¹ The member entities of California Coastkeeper Alliance are: Humboldt Waterkeeper, Inland Empire Waterkeeper, Los Angeles Waterkeeper, Monterey Waterkeeper, Orange County Coastkeeper, Russian Riverkeeper, San Diego Coastkeeper, Shasta Waterkeeper, and Yuba River Waterkeeper (South Yuba River Citizens League).

		<p>Coastkeeper Alliance or any of its members participate as a party:</p> <p>Delta Conveyance Project</p> <p>Nevada Irrigation District – South Sutter Water District (Bear River)</p> <p>Yuba County Water Agency</p> <p>(Screen ends March 19, 2027)</p>		<p>Access to Sharepoint folders restricted.</p> <p>No other communications about substantive or controversial procedural issues.</p>
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